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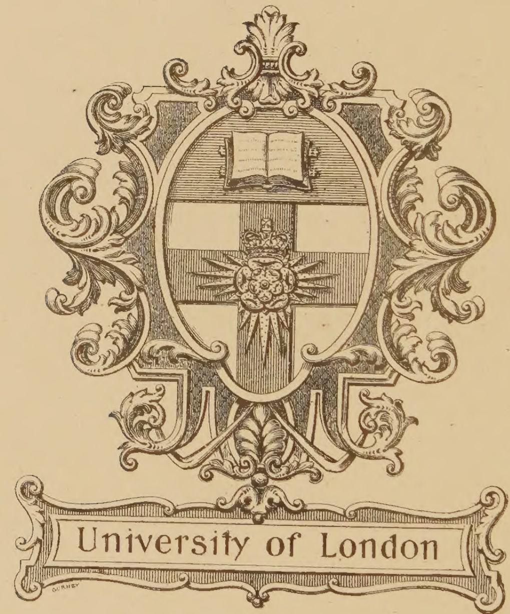

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ANNOTATED

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AND
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CORRIGENDA.

[1943] 2 All E.R. 783. *Re* FARQUHAR. At l. B.5 read as follows: "The word is "practicable" and I cannot construe that otherwise than as meaning . . . payment of a modified amount is the limit of what in the circumstances of the case is possible."

P. 209. JOBLING *v.* SUNDERLAND ASSESSMENT COMMITTEE. In the 4th line add "if" after the word "Even" to read "Even if the storage is not within . . ."

P. 281. *Re* PASCOE. At end of headnote replace "under the Bankruptcy Act, 1914, s. 47" by "without any intervention on the part of the trustee."

P. 456. AUSTIN *v.* GREENGRASS. Counsel for the respondent was *A. A. Pereira*

P. 520. SUTCH *v.* BURNS. The assumption that the policy complied with the Act of 1936 was made at the request of the parties and it must not be taken as decided that a policy in the form in question is or is not in compliance with the Act.

P. 579. TRANSVAAL & DELAGOA BAY INVESTMENT CO., LTD. *v.* ATKINSON. Counsel for the second defendant were *Michael Marcus* and *J. Sarch* and not *H. Malone.*

P. 639. HOLMAN *v.* GEORGE ELLIOT AND CO. By inadvertence this report does not state that there was a change of solicitors in the course of these proceedings and that *John Whittle, Robinson & Bailey*, who acted in this appeal, were not acting for the plaintiff at the time when there was a failure to serve the writ prior to its expiration.

P. 650. ABSALOM *v.* TALBOT. At E in the last line of the quotation from KONSTAM, Law of Income Tax, delete the words "and bad debts debited."

P. 652. ABSALOM *v.* TALBOT. In the third para. from the end of this case delete from the words: "In other words" to the words "should be appropriately reduced."

THE
ALL ENGLAND
LAW REPORTS
ANNOTATED

Distinguished. ILLSTON & ROBSON, LTD. *v.* SMITH. [1948] 1 All E.R. 834.

JONES *v.* AMALGAMATED ANTHRACITE COLLIERIES, LTD.

[HOUSE OF LORDS (Viscount Simon, L.C., Lord Thankerton, Lord Russell of Killowen, Lord Macmillan and Lord Wright), **November 1, 2, 3, 4, December 7, 1943.**]

Workmen's Compensation—Partial incapacity—Workman called up for military service—Pay and allowance in army less than pre-accident wages—Whether entitled to compensation—"Earning or is able to earn"—Workmen's Compensation Act, 1925 (c. 84), *s.* 9 (3) (i).

Before June 15, 1932, the workman was employed by the respondents as a collier. On that date he met with an accident and was paid compensation as for total incapacity until 1935. From then until Nov. 15, 1937, he was employed above ground, and was paid compensation for partial incapacity. In Nov., 1937, through a rise in wages, his compensation for partial incapacity ceased. By September, 1940, his average earnings were £3 15*s.* 4*d.* per week, and he was regularly employed. On Sept. 30, 1940, he was called up for military service and his pay and allowances amounted to £2 0*s.* 9*d.* per week. In May, 1942, the workman applied for compensation for partial incapacity. His claim was based upon the fact that before the accident he was earning £2 10*s.* per week and that he now received £2 0*s.* 9*d.* per week, and that he was entitled to half the difference between those amounts by reason of the provisions of the Workmen's Compensation Act, 1925, s. 9 (3) (i):—

HELD [LORD WRIGHT *dissenting*]: the workman's pay and allowances in the army were "earnings" in employment or business within the meaning of the Workmen's Compensation Act, 1925, s. 9. His inability to earn his pre-accident wages was not due to the injury and he was not entitled to compensation.

Decision of the Court of Appeal ([1942] 2 All E.R. 600) *affirmed.*

[**EDITORIAL NOTE.** It is fundamental that the loss of earning power for which compensation can be paid must be due to the injury by accident which the workman has suffered. The loss of earning power here was due to the fact of the workman's conscription and, since it did not arise out of the injury, this was not a case in which an award could be made. It is to be noted, however, that by a long-standing decision of the House of Lords in *Owners S.S. Raphael* v. *Brandy* (3) pay for military service has to be taken into account in calculating the man's earnings.

AS TO EARNINGS DURING INCAPACITY, see HALSBURY, Hailsham Edn., Vol. 34, pp. 914, 915, paras. 1258, 1259; and FOR CASES, see DIGEST, Vol. 34, pp. 416-420, Nos. 3378-3411.]

Cases referred to:

(1) *McCann* v. *Scottish Co-operative Laundry Assocn., Ltd.*, [1936] 1 All E.R. 475; Digest Supp.; 105 L.J.P.C. 58; 154 L.T. 503; 29 B.W.C.C. 1.

*(2) *Pedley* v. *Davison & Son, Ltd.* (1937), 30 B.W.C.C. 323; Digest Supp.

*(3) *Raphael (Owners)* v. *Brandy*, [1911] A.C. 413; 34 Digest 244, *2078*; 80 L.J.K.B. 217; 103 L.T. 746; 4 B.W.C.C. 6.

(4) *Heathcote* v. *Haunchwood Collieries, Ltd.*, [1918] A.C. 52; 34 Digest 395, *3230*; 87 L.J.K.B. 226; 117 L.T. 677; 10 B.W.C.C. 647.

(5) *Blakemore* v. *Delta Mill* (1919), *Ltd.* (1935), 28 B.W.C.C. 193 ; Digest Supp.
(6) *Steele* v. *Robert George & Co., Ltd.*, [1942] A.C. 497 ; [1942] 1 All E.R. 447.
(7) *Warncken* v. *Moreland (R.) & Son, Ltd.*, [1909] 1 K.B. 184 ; 34 Digest 350, *2817* ; 78 L.J.K.B. 332 ; 100 L.T. 12 ; 2 B.W.C.C. 350.
(8) *Fife Coal Co., Ltd.* v. *Cant* (1920), 90 L.J.P.C. 69 ; 34 Digest 349, *2811* : 124 L.T. 545 ; 13 B.W.C.C. 449.
(9) *Fyfe* v. *Fife Coal Co.* (1927), 138 L.T. 65 ; Digest Supp. ; 20 B.W.C.C. 548.
(10) *Ball* v. *Hunt (William) & Son, Ltd.*, [1912] A.C. 496 ; 34 Digest 238, *2039* ; 81 L.J.K.B. 782 ; 106 L.T. 911 ; 5 B.W.C.C. 459.
(11) *Portland Colliery Co.* v. *Murray*, [1923] A.C. 566 ; 34 Digest 456, *3737* ; 92 L.J.P.C. 177 ; 129 L.T. 746 ; 16 B.W.C.C. 116.
(12) *Harwood* v. *Wyken Colliery Co.*, [1913] 2 K.B. 158 ; 34 Digest 348, *2803* ; 82 L.J.K.B. 414 ; 108 L.T. 283 ; 6 B.W.C.C. 225.
(13) *Norman & Burt* v. *Walder*, [1904] 2 K.B. 27 ; 34 Digest 416, *3380* ; 73 L.J.K.B. 461 ; 90 L.T. 531 ; 6 B.W.C.C. 124.
(14) *Bevan* v. *Nixons Navigation Co.*, [1929] A.C. 44 ; Digest Supp. ; 139 L.T. 647 ; 21 B.W.C.C. 237.
(15) *Cardiff Corpn.* v. *Hall*, [1911] 1 K.B. 1009 ; 34 Digest 402, *3284* ; 80 L.J.K.B. 644 ; 104 L.T. 467 ; 4 B.W.C.C. 159.
*(16) *Port of London Authority* v. *Gray*, [1919] 1 K.B. 65 ; 34 Digest 417, *3384* ; 88 L.J.K.B. 107 ; 120 L.T. 11 ; 11 B.W.C.C. 206.
(17) *Doncaster Amalgamated Collieries* v. *Leech*, [1941] 1 K.B. 649 ; [1941] 2 All E.R. 7 ; 110 L.J.K.B. 676 ; 165 L.T. 338 ; 34 B.W.C.C. 88.
(18) *Evans* v. *Oakdale Navigation Collieries, Ltd.*, [1940] 1 K.B. 702 ; [1940] 2 All E.R. 201 ; Digest Supp. ; 109 L.J.K.B. 493 ; 33 B.W.C.C. 122.
(19) *Thompson* v. *L.N.E. Ry. Co.*, [1935] 2 K.B. 90 ; Digest Supp. ; 104 L.J.K.B. 515 ; 152 L.T. 571 ; 28 B.W.C.C. 95.

Appeal by the workman from a decision of the Court of Appeal (MacKinnon, Goddard and du Parcq, L.JJ.) given on Nov. 13, 1942, and reported [1942] 2 All E.R. 600. The facts are fully stated in the opinion of Viscount Simon, L.C.

Gilbert J. Paull, K.C., and *G. P. Thomas* for the appellant.

F. A. Sellers, K.C., and *Carey Evans* for the respondents.

Viscount Simon, L.C. : My Lords, this is the workman's appeal in a workmen's compensation case where the Court of Appeal (MacKinnon, Goddard, and du Parcq., L.JJ.) reversed a decision given in the workman's favour by His Honour Judge Temple Morris.

The appellant was a collier employed by the respondents, and in June, 1932, he met with a serious accident in the mine where he was working which broke his pelvis and crushed his back. His average pre-accident wage was £2 10*s.* 8*d.* He was paid compensation as for total incapacity until 1935. In that year he began work above ground at the screens and thenceforward, until Nov. 15, 1937, received compensation as for partial incapacity. After Nov. 15, 1937, owing to increase in wage-rates, his wages at the screens equalled or exceeded his pre-accident wage and consequently compensation ceased. He remained partially incapacitated by the accident, but, in view of the size of his post-accident wages, the weekly payment was nil.

On Sept. 30, 1940, when the appellant was earning a wage of £3 15*s.* 4*d.* at the screens, he was compulsory called up for service in the Army under the National Service (Armed Forces) Act, 1939, and became a gunner in the Royal Artillery. While serving he draws the usual pay and allowance of a bachelor gunner, and these, together with rations and other advantages, are agreed to amount to £2 0*s.* 9*d.* per week. He now claims from his previous employer half the difference between this and his pre-accident wage.

The county court judge has found as facts that the appellant is still partially incapacitated for work as a result of his accident ; that he is not physically fit for his pre-accident work as a collier, but is fit for lighter work such as work at the screens ; that at such work he would still be able to earn £3 15*s.* 4*d.* per week ; and that the cause of his inability to earn that sum is not any physical incapacity, but solely his conscription under the 1939 Act.

The appellant attempted to argue that conscription would probably not have been applied to him if he had not been injured in 1932, but this is a speculation into which it is impossible to enter with confidence, and we must take it that the application of conscription to the appellant was a supervening event which further limited his income but which is not proved to be causally connected with the original accident. The question, therefore, is whether a supervening event of this kind operates to increase the respondents' liability to the appellant.

If I understand the argument of counsel for the appellant rightly, he did not dispute that, if a partially incapacitated workman meets with a second accident say, a traffic accident or an illness, with which the employers have nothing to do, and thereby is further reduced in earning capacity (or even totally incapacitated), this supervening event does not increase the liability of his employers. At any rate, that is plainly so; the employer in such a case may continue to be liable for the partial incapacity due to the original accident, but the supervening event is not connected with the original accident at all: see the decision of this House in *McCann* v. *Scottish Co-operative Laundry Assocn.* (1), and compare *Pedley* v. *Davison* (2). The same principle applies here. Compensation, under sect. 9 of the Act of 1925, is compensation when total or partial incapacity for work "results from the injury" and is measured by the use of a comparison of average weekly earnings before the accident with "the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident." Even assuming that a soldier's pay is for some purposes "earnings," (as under sect. 10 of the Act: see *Owners of S.S. Raphael* v. *Brandy* (3)) a reduction in an injured workman's income owing to conscription cannot be laid to the charge of his former employer, for it is unconnected with the injury for which the employer is responsible.

I agree with the observation of DU PARCQ, L.J., that the words "which he is earning" in sect. 9 (3) (i) of the Act refer only to earnings which are, at least in some degree affected by the workman's incapacity. He said at p. 604:

> . . . it follows that, as a general rule, a man whose earnings are reduced because he has been called up for service in His Majesty's Army, cannot properly claim that his soldier's pay and allowances shall be treated as his earnings for the purposes of the subsection. They represent a figure which is wholly irrelevant to the calculation thereby prescribed. The reduction in his income is due, not to his incapacity, but to the fact that the legislature has made him (in common with other young men) liable for military duty

I move that this appeal be dismissed with costs.

LORD THANKERTON: My Lords, the facts in this appeal have been stated by my noble and learned friend. It is clear that, on June 15, 1932, in the employment of the respondents, personal injury by accident arising out of and in course of the employment was caused to the appellant, and that the respondents are liable to pay compensation to the appellant provided that he can justify a claim for a weekly payment calculated in accordance with the rules in sects. 9 and 10. It is also clear that, immediately prior to his conscription on Sept. 30, 1940, he was still suffering from partial incapacity resulting from the injury, but as the wage he was earning at the screens exceeded his pre-accident wage of £2 10*s*. 8*d*. as a coal miner, there was no room for compensation. Then came the conscription, on Sept. 30, 1940, and a reduction in earnings to the amount of £2 0*s*. 9*d*. instead of the average weekly wage of £3 15*s*. 4*d*. which he was then earning at the screens. Hence arises the appellant's present application for an increase in the rate of his weekly compensation as from the date of the conscription.

The arbitrator states:

> I find that the applicant is still partially incapacitated for work as the result of the accident. He is now not physically fit for his pre-accident work as a collier, but he is fit for any light labouring work, and in particular for work at the colliery screens. If he could undertake light labouring work he would now be earning an average weekly wage of £3 15*s*. 4*d*. The cause of his inability to earn £3 15*s*. 4*d* is due not to any physical incapacity but solely to his conscription under the 1939 Act.

In face of these definite findings, it seems to me impossible for the appellant's counsel to maintain, as he sought to do, that other passages in the judgment suggest some connection between the physical incapacity due to the accident and the amount of the army pay and allowances which he is earning.

My Lords, it is important to remember that sect. 9 throughout provides for ascertainment of the amount of compensation in respect of total or partial incapacity for work which results from the injury defined in sect. 1, which is caused in a particular employment, rendering the employers in that employment liable to pay compensation. Subsect. (3), if fully expressed, prescribes rules for calculating the weekly payment in the case of partial incapacity resulting from the injury, and these words govern the whole of the subsection.

Secondly, under sect. 9, the amount of the weekly payment is ascertained on a wage-earning basis. In subsect. 2, the weekly payment in the case of total incapacity is based on the workman's pre-accident earnings. In subsect. (3), the weekly payment in the case of partial incapacity is based on the difference between two figures, viz., his pre-accident earnings and the earning ability which remains to the partially incapacitated workman. If he is in fact earning an average weekly wage, that figure is to be taken unless, through the workman's slackness in seeking employment appropriate to his partially injured state which would afford higher earnings, or some similar cause, his actual earnings do not provide a valid test. In that case, or where he is not in fact earning, recourse is to be had to what he is able to earn. This was dealt with in *Heathcote* v. *Haunchwood Collieries, Ltd.* (4), and *Blakemore* v. *Delta Mill* (1919), *Ltd.* (5), but, in my opinion, they do not affect the present question, for I have no doubt that the appellant's army pay and allowances are earnings within the meaning of sect. 9 (3) (i), and there can be no question that they represent a genuine test of his present earning capacity. The decision of this House in *Owners of S.S. Raphael* v. *Brandy* (3), appears to me to cover the former point.

It follows that there exists, as the arbitrator has found, a reduction from the pre-accident figure of £2 10*s.* 8*d.* to £2 0*s.* 9*d.*, which is his present wage-earning capacity, the difference amounting to 9*s.* 11*d.* But it is clear that this reduction does not result from the injury, for the arbitrator has so found, and I am unable to see that it is relevant against the particular employer, whose liability is limited to the results of the injury caused in his employment. As MacKinnon, L.J., says at p. 603:

> His claim is not based on any continuing result of the injury, or upon incapacity resulting therefrom . . .

Or, as du Parcq, L.J., puts it at p. 604:

> The reduction in his income is due, not to his incapacity, but to the fact that the legislature has made him (in common with all other young men) liable for military duty.

I am unable to distinguish this case from, for instance, the case of the workman sustaining injury from two successive accidents, the first of which leaves him subject to partial incapacity for work, and the second of which increases the partial incapacity. The wage which he may be in fact earning after the second accident would be accepted as the amount of his earnings, but there would necessarily remain an inquiry with a view to allocating the parts of the total reduction which resulted respectively from the injury caused in each accident, so as to ascertain the compensation due by the particular employer against whom the claim was made. Similarly, if the second accident rendered the workman totally incapacitated the first employer would only be liable as for partial incapacity and not as for total incapacity. The same conclusion appears to me to follow if the cause of the second reduction is not a second injury by accident within the Workmen's Compensation Act, but a cause entirely unconnected with the first injury by accident. The case of a workman who unreasonably refuses to undergo an operation or medical treatment may also be said to be analogous. In *Steele* v. *Robert George & Co.* (1937), *Ltd.* (6) Viscount Simon, L.C., said at p. 499:

> As Fletcher Moulton, L.J., put it in *Warncken* v. *R. Morland & Son, Ltd.* (7), "a workman must behave reasonably, and if the incapacity, or the continuance of the incapacity after a certain time, is due to the fact that he has not behaved reasonably, then the continuing incapacity is not a consequence of the accident, but a consequence of his own unreasonableness." This view of the matter has been recognised by this House in *Fife Coal Co.* v. *Cant* (8), and in *Fyfe* v. *Fife Coal Co., Ltd.* (9), as well as in many cases in the Court of Appeal and in the Court of Session in Scotland.

I agree with the motion proposed by Viscount Simon, L.C.

Lord Russell of Killowen: My Lords, the basis of the judgments of MacKinnon and Goddard, L.JJ., must be taken as unsound, in view of the decision of this House in the case of *Owners of S.S. Raphael* v. *Brandy* (3). That authority (which was not cited in the Court of Appeal) disposes, in my opinion, of the somewhat startling contention that a man in the employ of the Crown does not "earn" his pay.

There remain for consideration the reasons for the judgment of du Parcq, L.J., and the construction which he placed on the first rule in sect. 9 (3) of the

Act. He held that upon the true construction of that rule, before " the average weekly amount which he is earning " (which I will hereafter refer to as the reduced earnings) can be taken as the factor which is to be deducted from "the amount of the average weekly earnings of the workman before the accident," some link or *nexus* must be shown to connect the reduction in earnings with the accident, otherwise the workman would be receiving compensation for something which did not result from the injury. In other words, if the reduction has been brought about by some cause which is unconnected with the workman's injury, it is irrelevant to the purpose of the section, which is to provide a method of calculating an amount of compensation for incapacity for work resulting from the injury. In such circumstances the second branch of the first rule and not the first must come into play.

My Lords, I agree with this view. The object of the Act (in cases of non-fatal accidents) is to compensate the workman for his loss of earning power. Sect. 9 gives the rules for calculating the amount of that compensation where the loss is only partial, but the only compensation which has to be calculated under those rules is compensation for incapacity for work which results from " the injury ", i.e., the injury which, under sect. 1, has rendered the employer liable to pay compensation.

In my opinion, if the calculation is to accord in its result with the object of the Act, it must be permissible in applying the first rule, when a workman who is actually earning a wage applies for a review, to inquire into all the circumstances in order to ascertain whether the reduced earnings constitute a factor which is proper to be taken into account for the purpose of making the calculation which the rule prescribes. If on inquiry it turns out that the reduction is not caused by an increase of incapacity for work resulting from the injury, then the reduced earnings cannot be a factor proper to take into account.

In the present case the difference between the appellant's army pay and what he was earning at the time of his conscription, is in no way due to any decrease of earning power on his part or connected with the injury for which the employers are liable to pay compensation. The second branch of the first rule accordingly applies, and since his pre-conscription average weekly earnings exceeded his pre-accident average weekly earnings, his application for a review and increase must fail.

For the reasons which I have indicated I agree with the order of the Court of Appeal, and would dismiss this appeal.

LORD MACMILLAN : My Lords, your Lordships have before you an application by the appellant for review of the compensation payable to him under the Workmen's Compensation Act, 1925. The facts of the case have been narrated by VISCOUNT SIMON, L.C. It is enough for my purpose to emphasise the cardinal points (i) that the appellant, who is still partially incapacitated for work as the result of his accident, was, when called up for military service, in receipt of average weekly earnings in excess of his pre-accident wages and was consequently not receiving any weekly compensation, and (ii) that the pay which the appellant is receiving in the army is less than his pre-accident wages. He claims to be entitled to half the difference between his army pay of £2 0*s.* 9*d.*, and his pre-accident wages of £2 10*s.* 8*d.*, viz., 4*s.* 11½*d.*, and this the arbitrator awarded him, but the Court of Appeal has set aside the award.

In my opinion the judgment of the Court of Appeal is right. To justify an application by a workman for review of his compensation he must establish that there has been some change of circumstances. But not every change of circumstances to his detriment will justify review. The change must be relevant to his capacity or ability to earn wages, to his earning power, as affected by his accident and its consequences. Here the arbitrator finds in fact that the present inability of the appellant to earn more than his pre-accident wages is " due not to any physical incapacity but solely to his conscription " and that the appellant is still able to earn more than his pre-accident wages.

For the purpose of calculating the compensation payable in cases of partial incapacity sect. 9 (3) of the Act directs a comparison to be made between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning after the accident. The appellant submits that, if the latter figure is arithmetically less than the former figure, compensation automatically becomes due unless the latter figure can be challenged as not *bona fide*. I cannot accept this reading. The partial incapacity which justifies an award of compensation must, in the words of sect. 9 (1), be partial incapacity for work resulting from the injury. So far as the appellant's partial incapacity for work resulting from his injury is concerned there has been no change of circumstances since his compensation was suspended in consequence of his earning more than his pre-accident wages. The conscription of the appellant has in no way affected his wage-earning capacity. It is a circumstance wholly extrinsic to his injury for which neither he nor the respondents have any responsibility. If a second accident entirely unconnected with his employment had befallen the appellant and resulted in a diminution of his weekly earnings below his wages before his first accident, it is plain that the respondents would be under no liability to compensate him for the difference between his wages before his first accident and his wages after his second accident. It is the same with the appellant's conscription. It would certainly be a remarkable result of the Act if it required an employer to compensate his workman for the consequences, not of something resulting from an injury sustained in the employment, but of the workman being called up for military service. The Act gives compensation for personal injury by accident. Conscription is not a personal injury by accident.

I am accordingly for affirming the judgment of the Court of Appeal.

LORD WRIGHT: My Lords, this case raises no question as to the appellant's right to compensation under the Workmen's Compensation Act, 1925, s. 1. The only question is as to the scale of compensation. These are different questions as explained by LORD MACNAGHTEN in *Ball* v. *Hunt* (10), and LORD DUNEDIN in *Portland Colliery Co.* v. *Murray* (11), at p. 575.

The issue depends on whether the appellant's pay and allowances as a soldier called up for service in the army under the National Service (Armed Forces) Act, 1939, are earnings which are to be taken into account for computing the weekly payments of compensation. He claims that they are and that he falls within the precise terms of the Workmen's Compensation Act, 1925. Personal injury has been caused to him by the accident arising out of and in the course of his employment, which has caused him partial incapacity for work. That still continues. He is entitled to compensation in accordance with the provisions of the Act contained in sect. 9 which provides that, where partial incapacity for work results from the injury, the compensation shall be a weekly payment during the incapacity which is to be one half the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount he is earning after the accident. I disregard the words "or is able to earn in some suitable employment or business," because as this House has held in *Blakemore* v. *Delta Mills* (1919), *Ltd.* (5), these words state a second alternative which is only to come into consideration in the absence of actual earnings. His partial incapacity to earn which reduced his earning capacity from that of a collier to that of a worker only capable of light jobs was produced once for all by the injury. That fixed his right. It still continues and the only problem is to ascertain the measure of the compensation. His average pre-accident weekly earnings have been fixed once for all. The amount of the compensation (if any) must vary from time to time according as his weekly post-accident earnings are equal to or greater or less than his pre-accident earnings. If equal, no compensation will be claimable because there is no difference at all, if greater there will also be no compensation because there is no difference to the detriment of the workman, if less, then the minus difference will give the measure of the weekly payment. The Act fixes an arbitrary arithmetical measure, depending on actual fact and varying with the facts. Where the weekly payment ceases to be exigible because the workman is earning as much as or more than his pre-accident earnings, the liability which continues as long as the incapacity, is kept alive by a declaration of liability to cover the period when no compensation is actually due. The Act of 1925 changed the law in the respect that under the Act of 1906 there was no hard or fast formula like the difference between pre-accident and post-accident earnings. The arbitrator under the 1906 Act had a discretion. Under Sched. I (3) the weekly payment:

> . . . shall bear such relation to the amount of that difference [between pre-accident and post-accident earnings] as under the circumstances of the case may appear proper.

This change in the law, which restored on that point the rule embodied in the 1897 Act, must be remembered in considering some of the decisions under the 1906 Act. The result may sometimes seem arbitrary and not affording any true equation between the loss and the compensation. But it must be remembered that the remedies under the Workmen's Compensation Act are dissimilar from what the common law would give in an action for damages. This is explained by Buckley and Hamilton, L.JJ., in *Harwood* v. *Wyken Colliery Co.* (12).

Actual earnings may be affected (increased or reduced) by causes other than the continuing partial incapacity. The injured man, though incapacitated to do his former work, may exercise a gainful activity outside the sphere of the employment in which he was injured. The collier may earn money as a shop assistant, a clerk, a bookmaker, a commercial traveller, or in a myriad other possible ways in which he is not incapacitated by his injury, however permanent its effects may be. His earnings for better or worse may be affected by all sorts of contingencies peculiar to the particular activity which the man was at the time pursuing. These contingencies may have no relation to the man's original employment or to the direct consequences of the accident. Their only materiality is their effect on the post-accident earnings. An early illustration of this principle is to be found in *Norman and Burt* v. *Walder* (13), where the workman had been partially incapacitated by injury arising out of and in the course of his employment by a firm of builders and contractors. After the accident he started a small bakery business with the help of his wife and son and daughter. The Court of Appeal held, reversing the county court judge, that "earnings" under the Act could not be limited to money earned in the employment of a master, though such earnings are not the same as the profits of the business. So far as I know that decision has never been questioned. Such earnings do not affect the right, but merely go to reduce the amount of compensation to which the man is entitled. For that reason it has been held that the amount of the man's compensation is reducible on the ground that he has not availed himself of reasonable opportunities or has disabled himself by conduct which has prevented or diminished his post-accident earnings, as where he unjustifiably refuses to work. The second alternative, "ability to earn," it is now clear, only refers to physical capacity. So the House of Lords held in *Bevan* v. *Nixons Navigation Co.* (14), following the decision of the Court of Appeal to the same effect in *Cardiff Corporation* v. *Hall* (15). The Lords were divided. Lord Dunedin who had in effect the casting vote confessed that, if in 1912 or 1913 he had to sit on appeal against the *Cardiff* case (15), he would find it hard to say what his opinion would have been. But he was influenced by the fact that the *Cardiff* case (15) had ruled the practice ever since, also by the fact that the legislature had passed a measure in 1923, repeated in the Act of 1925 and now in force in an amended form in an Act of 1931. The measure provided the conditions under which a partially incapacitated workman could be treated as totally incapacitated. But as the question raised in this appeal relates to the first alternative and the test is the test of actual earnings, not estimated ability to earn, I merely refer to these authorities for purposes of distinction. It certainly seems anomalous that the test of physical capacity to earn should have been accepted in the second alternative under sect. 9 (3), when it did not apply in the first alternative. In the first alternative the physical condition of the partially incapacitated man is at least for the time a constant factor; whereas his actual earnings may vary by reason of other factors, such for example as changes in rates of wages, chances of gainful employment or activity, badness or goodness of trade, which may change from time to time: *Portland Colliery Co.* v. *Murray* (11).

The first alternative depends on the man having actual earnings in what I may describe as the substituted pursuit or occupation, which is a sort of salvage, for the benefit of the employer, so long as the man is "earning" at all. Can, then, it must be asked, the appellant's army pay and allowances be regarded as earnings for the purpose of the Act? That they may be so regarded has been in my opinion decided by this House in *Owners of S.S. Raphael* v. *Brandy* (3).

This ruling was applied by the Court of Appeal in *Port of London Authority* v. *Gray* (16), where it was held that a partially incapacitated workman, who during the last war had been called up on military service, he having previously voluntarily attested under Lord Derby's scheme, must bring into account, for the benefit of the employers and in reduction of the weekly payment, his army pay and allowances. They were earnings within the meaning of the Act. This decision has not been, so far as I know, doubted, and has been followed in the course of the present war by the Court of Appeal in *Doncaster Collieries* v. *Leech* (17). A

These last authorities do not bind this House, but in principle, as I think, are right and cover the present case, unless they can be distinguished on the ground that they were cases of voluntary enlistment, whereas the present case is one of compulsory service under the Act of 1939. But whatever differences may be involved in that distinction, I cannot see how it can affect the question whether or not the army gains are earnings for the purposes of the Act. It is true that in B *Gray* (16) the case of a man compulsorily serving was expressly reserved by DUKE, L.J., but the Lord Justice does not consider whether it could make any practical difference in a question like the present. SWINFEN EADY, M.R., does not mention the point. But he quotes the language of the county court judge that the man by enlisting had made it impossible for the employers to assess the extent to which the man was disabled in respect of the industrial disease from earning full wages at his work. The Court of Appeal reversed the decision of the county C court judge. So far as it goes, the case of a man compulsorily serving would be a stronger case in favour of the man, in that the element of choice by the man would be absent.

The instance of a second physical disability by a second accident or industrial disease supervening on a former injury which has caused partial incapacity has been discussed in several cases; that, however, is in my opinion a class of D cases which throw no light on the present case, where there is no second accident giving new right to compensation, where the original physical disability remains unaltered, and the only question is whether there are any earnings and, if so, what earnings to be brought into account in reduction of the weekly payments. As to the case of two actual physical accidents, the rule which has been applied by the Court of Appeal is stated by SLESSER, L.J., in *Evans* v. *Oakdale Navigation Collieries* (18), at p. 707, to be that where a claim is made as regards a second E accident while incapacity still exists from a former one, the compensation for the later accident can only be that proportion of incapacity on which the second accident can operate. He cited *Harwood* v. *Wyken Colliery Co.* (12), *Thompson* v. *London & North Eastern Ry. Co.* (19). But there is here no second accident. Conscription cannot be regarded, in my opinion, as a second accident. It merely affects the actual earnings which give the basis of computation of the weekly payments in respect of the right already existing. The amount involved F here may seem very trifling, but it does not follow that it is so very trifling to the workman. And, as counsel for the respondents observed, the decision given in this case will have wide repercussions.

In my opinion, the appellant is earning in his army employment £2 0*s*. 9*d*. a week, which, if set against his pre-accident weekly earnings of £2 10*s*. 8*d*., would give a difference of 9*s*. 11*d*., 50 per cent of which is 4*s*. 11½*d*. This is what, G as I read the Act, he is entitled in all the facts to have. It is true that, if he had not been compulsorily serving, he would have been getting, partially incapacitated as he was, average weekly earnings of £3 15*s*. 4*d*. He cannot earn that now, but he should, in my opinion, get a weekly payment based upon the gainful use he can make of his actual earning capacity. He may as a patriot be content with the comparatively small earnings of a soldier, but it would, in my opinion, be hard if in addition he lost the exiguous weekly payments which he is entitled H to under the Act. For myself I would allow the appeal and restore the award of the county court judge.

Appeal dismissed with costs.

Solicitors: *John T. Lewis & Woods*, agents for *Randell Saunders & Randell*, Swansea, (for the appellant); *Botterell & Roche*, agents for *Llewellyn & Hann*, Cardiff (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

WAY & WALLER, LTD. *v.* RYDE.

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and Goddard, L.JJ.), **December 2, 1943.**]

Agency—Remuneration—Commission—Sale of shares in hotel company—Hotel mortgaged by company—Whether commission payable on full value of hotel.

The appellants were estate agents and they claimed from the respondent commission on £25,000, the value of an hotel, on the ground that they had been instrumental in finding a purchaser of it. They also claimed commission on the value of the stock. The hotel was in fact owned by a company, the issued capital of which was £10,000, and the respondent owned all the shares in the company except one. The hotel was mortgaged by the company for £15,000 and the respondent had given no personal guarantee in respect of the mortgage. The appellants contended that the bargain was for the sale of an hotel and the stock therein. The respondent contended that it was a sale of shares in the hotel company. By a letter dated Oct. 10, 1941, the appellants had sent to the respondent a scale of their remuneration. The respondent made no objection to the scale but allowed the appellants to continue the negotiations :—

HELD : (i) the contract was for the sale of shares in the company which owned the hotel.

(ii) as the respondent had not objected to the scale contained in the letter of Oct. 10, 1941, he must be taken to have accepted it by conduct, but commission was payable only on the price received for the shares and sum paid for the stock. It was not right to add the mortgage debt to the price of the shares.

[**EDITORIAL NOTE.** On the sale of an equity of redemption, the agent is generally entitled to add the amount of the mortgage debt taken over, to the purchase price paid when calculating his commission. Where, however, the transaction is carried through by the purchase of shares in the company owning the property, the mortgage debt cannot be included in that way.

AS TO AGENT'S REMUNERATION, see HALSBURY, Hailsham Edn., Vol. 1, pp. 257-259, paras. 432, 433 ; and FOR CASES, see DIGEST, Vol. 1, pp. 488-493, Nos. 1664-1692.]

APPEAL by the plaintiffs from a judgment of CROOM-JOHNSON, J., dated June 25, 1943. The facts are fully set out in the judgment of LORD GREENE, M.R.

J. D. Casswell, K.C., and *M. Turner-Samuels* for the appellants.

G. O. Slade, K.C., and *A. L. Gordon* for the respondent.

LORD GREENE, M.R. : In the action out of which this appeal arises the plaintiffs were claiming commission from the defendant on the sale of a freehold hotel. That was the way in which the case was put forward in the first instance, namely, that they procured a purchaser for a hotel at a purchase price of £25,000 ; and they claimed commission on that basis.

What happened in fact can be quite shortly stated. The client did not own the hotel, the hotel belonged to a limited company in which he held all the shares but one. The issued capital was £10,000. The hotel, in the hands of the company, was subject to a mortgage of £15,000. The actual transaction between the client and the purchaser was a purchase of his shares, and nothing more. The purchase price paid by the purchaser was £10,000 plus an additional sum equal to the value of the stock. That was the way in which the price of the shares was fixed.

That the plaintiffs were instrumental in procuring that transaction to be carried through is not in question, and, indeed, could not be questioned ; but their claim is to be remunerated on the footing that the transaction was a totally different one from what it was in fact. They claimed to be remunerated as though they had brought about a contract of sale by the purchase of property belonging to the defendant subject in his hands to a mortgage. In such a case, of course, in a normal case, the agent is entitled to his commission not merely on the price paid for the equity of redemption, but on the amount of the mortgage as well. In such a transaction the services rendered by the agent are to find a person who will take over the equity of redemption with the burden of the mortgage and indemnify the client against that mortgage. Nothing of the kind happened here. No such services were performed. No purchaser was found who took over the mortgage, for the very simple reason that the vendor was not the mortgagor. The vendor was the owner of shares and nothing but shares. The purchaser bought those shares and bought nothing else; and I cannot see any ground, either on the facts as found, or in fairness, how the plaintiffs could expect to be paid for something they never effected at all, namely, a sale of the hotel subject to the mortgage. The only work they did was to A procure a purchaser for shares, and in respect of that they are entitled to be remunerated. Much reliance was placed on the fact that most people concerned, including the client himself, the defendant, in the course of his transaction did what is so common: referred to the defendant as "selling the hotel." I suppose that, sitting here, if I have heard that sort of inaccurate language used once, I have heard it used a thousand times; and I cannot attach any importance to the circumstance that the actual legal character of the transaction was not B perhaps properly appreciated by the parties at the time, or, if appreciated, at any rate was not properly described. What we have to look at is what exactly was done, and what was the transaction which the plaintiffs were instrumental in bringing about. It was what I have said it was, and nothing more.

The next matter in the case relates to the rate of commission. The case put forward by the plaintiffs below was that by a verbal agreement they were C entitled to be remunerated on the basis of £25,000, which was the £10,000 plus the £15,000 mortgage, and to be remunerated on the basis of a certain scale which they said had been agreed over the telephone with the defendant. Croom-Johnson, J., found that no such agreement was in fact made with regard to the rate of commission. The case seems to have been put to him mainly, if not entirely, on the basis of the alleged verbal agreement over the telephone, and it was combined, as I have said, with the allegation that the price on which D the commission was to be calculated was to be £25,000. Croom-Johnson, J., having negatived any such agreement did not have his attention directed, apparently, to what seems to me to be the really conclusive matter on the subject of the rate of commission. Accepting the judge's finding that no agreement as to the rate which the plaintiffs were demanding was come to in that telephone conversation, I read the letter of Oct. 10, 1941, which purported to confirm what had been said over the telephone. I do not find that the language E of the letter itself, even if it be inaccurate as purporting, or appearing, to confirm an agreement, is any assistance either way. The substantial point of it is that in that letter there is enclosed, or set out, a scale of remuneration, and the recipient of that letter must have understood that those were the terms on which the plaintiffs were willing to work for him. With that letter before him he allowed them to continue. He allowed them to do the work. Letters and F interviews took place, and as a result of those exertions, the transaction which he wished to bring about was in fact brought about. It seems to me quite impossible for him now to turn round and say: I am not to be held to that scale set out in that letter, because, as Croom-Johnson, J., found (and this was the matter, I think, which affected his mind), I, the defendant, thought that this was the usual or recognised scale. The judge goes on to say:

> I find that he did not intend to make himself liable to pay anything more than what G he regarded as the normal or usual commission.

With deference to Croom-Johnson, J., I do not think that is the proper way to approach the matter. The fact that the defendant had in his head that this was the usual scale seems to me neither here nor there. This was the plaintiffs' scale, be it a usual one or an unusual one, and that is the scale the defendant must be taken to have agreed to accept. Even though at the time he received H that letter he was under the mistaken impression that this was the usual scale, he could not make that an excuse afterwards for saying: "I never agreed to this scale." He agreed to it by conduct for better or for worse, and whatever it is, be it high or be it low, he is bound by it, in my opinion. That seems to me to be a perfectly clear case of a contract to be inferred from the conduct of the parties, and it is to be inferred quite irrespective of the failure to prove the alleged verbal agreement over the telephone.

There is only one other matter about it to which I think I should refer. The scale of commission set out is one which is described as a scale of commission "in respect of a sale relating to leasehold or freehold hotels"; and it provides for 5 per cent. on the first £5,000 and 2½ per cent. on the residue of the purchase money, and 5 per cent. on the amount of stock taken over. Quite obviously that particular scale is one the language of which is designed to cover the case where what is sold is a freehold hotel or a leasehold hotel. This language is inapt to cover the sale of shares in a hotel company. Nevertheless, it cannot be disputed, as I have said, that the plaintiffs were employed to bring about the transaction which they ultimately did bring about, namely, the sale of shares; and when the parties have agreed, as, in my opinion, they have agreed, that this document shall be the scale applicable, then the court must take that document, however inappropriate its language to the sale of shares, and apply it to the sale of shares and make it work. That is a task which presents no difficulty at all, because on the true construction of this document as imported into a contract relating to a sale of shares, the proper construction, in my opinion, in the present case is beyond question: 5 per cent. on the £5,000, 2½ per cent. on the remainder of the cash purchase price, namely, £5,000.

How is the phrase "5 per cent. on the amount of stock taken over" to be applied to the facts of this case? There again, I think there can be no difficulty at all. The purchase price was arrived at by taking £10,000 plus an added sum, which I will call x, representing the value of the stock; and applying this scale to that state of affairs, it seems to me that the proper application of it is that the defendant is bound to pay 5 per cent. on that element in the purchase price of the shares which was fixed by reference to the value of the stock. That, in my opinion, is the proper construction of this document in the contractual context in which we find it, namely, instructions to an agent to bring about a sale of the client's shares in the company.

The result of it is that the judgment of CROOM-JOHNSON, J., in my opinion, does not give the plaintiffs all that they are entitled to. He accepted the view, in which I agree with him, that they were only entitled to remuneration on the £10,000 plus the value of the stock, whatever it was. He gave them commission at what he considered to be a reasonable rate. That reasonable rate was considerably lower than the rate mentioned in the letter. He brought the result out at a sum of £207 10*s.* on the £10,000, to which he added a sum of £42 10*s.* as representing a reasonable percentage on the stock (the exact value of the stock was apparently not before him) bringing out a sum of £250. On the basis which I consider the right one, the plaintiffs will get 5 per cent. on the £5,000, that is, £250; 2½ per cent. on the remaining £5,000, that is, £125, and they will get 5 per cent. on whatever the value of the stock was.

In consequence the appeal must be allowed and the judgment of CROOM-JOHNSON, J., varied by inserting the appropriate figure.

MACKINNON, L.J.: I agree. CROOM-JOHNSON, J., gave a very careful judgment about all the details of this rather complicated case, indeed, of two complicated cases. I agree with all of his judgment except the final passage where he says: "There being no agreement as to the amount of remuneration I proceed to inquire what is reasonable remuneration." I think, having regard to what LORD GREENE, M.R., has said, that there was, by the conduct of the defendant, an agreement to pay the scale therein mentioned and that, therefore, the result which LORD GREENE, M.R., has indicated is the proper result in this case.

GODDARD, L.J.: I agree.

Appeal allowed.

Solicitors: *H. C. Morris, Woolsey, Morris and Kennedy* (for the appellants); *Scadding & Bodkin* (for the respondent).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

Re OSMUND (*deceased*), MIDLAND BANK EXECUTOR AND TRUSTEE CO., LTD. *v.* THE ATTORNEY-GENERAL AND MASON.

[CHANCERY DIVISION (Bennett, J.), **November 26, 30, December 1, 1943.**]

Trusts—No complete disposition of beneficial interest—Non-charitable purpose—Resulting trust.

By her will the testatrix devised and bequeathed all her real and personal estate to her trustees upon trust in their absolute discretion to apply the same to the medical profession for the furtherance of psychological healing in accordance with the teaching of Jesus Christ. The question to be determined was whether the gift was a valid and effective charitable trust or, in the alternative, failed for uncertainty or any other cause :—

HELD : the gift was not for a charitable purpose and there was no complete disposition of the beneficial interest. The gift, therefore, failed.

[**EDITORIAL NOTE.** Where a gift by will is non-charitable, the property cannot be given to trustees to distribute as they think fit. That would be a delegation by the testator of his will-making power. The property may be given to trustees to divide between certain beneficiaries in such proportions as they think fit. In the present case the court has construed the gift as one in which the testator has left the terms of his disposition so uncertain that the trustees have in fact to fill in his dispositions for him.

AS TO BENEFICIAL DESTINATION OF THE PROPERTY NOT EXHAUSTED, see HALSBURY, Hailsham Edn., Vol. 33, pp. 142, 143, para. 240 ; and FOR CASES, see DIGEST, Vol. 43, pp. 643-647, Nos. 789-819.]

Cases referred to :

*(1) *Houston* v. *Burns*, [1918] A.C. 337 ; 8 Digest 297, *739* ; 87 L.J.P.C. 99 ; 118 L.T. 462.

(2) *Income Tax Special Purposes Comrs.* v. *Pemsel*, [1891] A.C. 531 ; 8 Digest 241, *1* ; 61 L.J.Q.B. 265 ; 65 L.T. 261.

(3) *Morice* v. *Durham (Bp.)* (1805), 10 Ves. 522 ; 8 Digest 293, *705*.

(4) *Bowman* v. *Secular Society, Ltd.*, [1917] A.C. 406 ; 8 Digest 265, *270* ; 86 L.J.Ch. 568 ; 117 L.T. 161.

(5) *A.-G.* v. *National Provincial & Union Bank of England*, [1924] A.C. 262 ; Digest Supp.

(6) *Re Dean, Cooper-Dean* v. *Stevens* (1889), 41 Ch.D. 552 ; 8 Digest 261, *259* ; 58 L.J.Ch. 693 ; 60 L.T. 813.

(7) *Re Dalziel, Midland Bank Executor and Trustee Co., Ltd.* v. *St. Bartholomew's Hospital*, [1943] Ch.D. 277 ; [1943] 2 All E.R. 656.

(8) *Re Hooper, Parker* v. *Ward*, [1932] 1 Ch. 38 ; Digest Supp. ; 101 L.J.Ch. 61 ; 146 L.T. 208.

SUMMONS to determine whether a gift in the will of the testatrix was an effective charitable trust or failed for uncertainty or any other cause. The facts are fully stated in the judgment.

A. Guest Mathews for the trustees.

H. O. Danckwerts for the Attorney-General.

E. M. Winterbotham for the next of kin.

Danckwerts : In the present case there is a valid charitable gift because (*a*) it is for the furtherance of the teaching of psycho-therapy, and (*b*) it is for the advancement of healing, which is for the general benefit of the community. [Counsel referred to *Pemsel's* case (1).]

Winterbotham : Unless the testator makes a complete disposition of the beneficial interest in favour of individuals or institutions or charitable purposes the next of kin are entitled. The present gift is for the furtherance of healing, which is not a charitable purpose. There is no beneficial disposition to the medical profession or the trustees because the primary purpose of the gift is for the furtherance of psycho-therapy. Therefore the next of kin are entitled. [Counsel referred to *Houston* v. *Burns* (1), *Morice* v. *Bishop of Durham* (3), *Bowman* v. *Secular Society* (4), *A.-G.* v. *National Provincial & Union Bank of England* (5), *Re Dean* (6), *Re Dalziel* (7), and *Re Hooper* (8).]

BENNETT, J. : The question raised by this summons arises on a very short will of the testatrix made on Aug. 1, 1942. She died on Sept. 27 of the same year. She appointed the Midland Bank Executor and Trustee Co. executors and trustees of her will and she disposed of her estate (which is of the value of £7,000 approximately) by these words :

> I give devise and bequeath all my real and personal estate to the company [that is the Midland Bank Executor and Trustee Co., Ltd.] upon trust in their absolute discretion to apply the same to the medical profession for the furtherance of psychological healing in accordance with the teaching of Jesus Christ.

Those are the whole of her words. She made a codicil by which she disposed of a motor caravan, but that was the only other disposition she made.

The question which the summons asks is :

> That it may be determined as to whether or not the gift by the said will to the plaintiffs of all her real and personal estate " upon trust in their absolute discretion to apply the same to the medical profession for the furtherance of psychological healing in accordance with the teaching of Jesus Christ " is a gift upon a valid and effectual charitable trust or, in the alternative, fails for remoteness uncertainty or any other cause.

It certainly does not fail for remoteness : there is no question raised upon that matter. The gift takes effect immediately, and there is no trust in respect of the capital ; it is not tied up. The only question, I think, is whether the disposition which this testatrix has made is a disposition for charitable purposes.

I can decide the case, I think, upon the principles laid down by LORD HALDANE in his speech in *Houston* v. *Burns* (1). The passage from LORD HALDANE'S speech upon which I propose to rely as the foundation of my decision is at p. 342 :

> My Lords, by the law of Scotland, as by that of England, a testator can defeat the claim of those entitled by law in the absence of a valid will to succeed to the beneficial interest in his estate only if he has made a complete disposition of that beneficial interest. He cannot leave it to another person to make such a disposition for him unless he has passed the beneficial interest to that person to dispose of as his own. He may, indeed, provide that a special class of persons, or of institutions invested by law with the capacity of persons to hold property, are to take in such shares as a third person may determine, but that is only because he has disposed of the beneficial interest in favour of that class as his beneficiaries. There is, however, an apparent exception to the principle. The testator may indicate his intention that his estate is to go for charitable purposes. If these purposes are of the kinds which the law recognises in somewhat different ways in the two countries as charitable, the courts will disregard a merely subordinate deficiency in particular expression of intention to dispose of the entire beneficial interest to a class and will even themselves, by making a scheme of some kind, give effect to the general intention that the estate should be disposed of for charitable purposes.

" Charitable purposes " in this country are divided into four classes by LORD MACNAGHTEN in his well-known speech in *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (2), where LORD MACNAGHTEN defines " charity " in its legal sense as comprising four principal divisions at p. 583 :

> . . . trusts for the relief of poverty, trusts for the advancement of education, trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.

What I think I have to ascertain in this case, from the language which this testatrix has used, is whether the Midland Bank Executor and Trustee Co., Ltd., are bound to apply her estate for one or other of those charitable purposes. It is suggested that they are bound to apply her estate either for the advancement of learning or for some other purpose beneficial to the community, and have no discretion which enables them to apply the estate of the testatrix for any other purposes. The question all depends upon the true interpretation of the words that the testatrix has used. She gives to her trustees, in the first place, an absolute discretion as to the way in which they are to apply her estate—an absolute discretion so long as they apply her estate to the medical profession for the furtherance of psychological healing in accordance with the teaching of Jesus Christ.

Psychological healing has been the subject of an affidavit made by Dr. Hinds-Howell, consulting physician to St. Bartholomew's Hospital, in which he says that :

> . . . " psychological healing " is well-known and recognised in the medical profession and is embraced in the well-recognised practice of psycho-therapy. It is not possible to give a concise outline of the practice of psycho-therapy but in essentials it entails discovering the mental factors which are causing symptoms of physical or mental distress or nervous and emotional disorders and helping the individuals to re-adjust themselves to those factors through their mental processes and so to restore them to health without resort to the aid of surgical treatment. There are many doctors

> in this country and also hospitals and clinics which specialise in the application of modern medico-psychological treatment or psycho-therapy, and I am able of my own knowledge to say that the following hospitals and clinics specialise in this treatment or have departments: All hospitals in the country with teaching schools attached to them; The Tavistock Clinic, London; The Maudsley Hospital, London; many hospitals throughout the country to which no teaching schools are attached but which I cannot specify of my own knowledge.

With regard to the last matter with which the testatrix deals, the words "in accordance with the teaching of Jesus Christ," the deponent goes on to say:

> . . . I do not think there is any direct teaching or instruction by Jesus Christ in the Bible in this particular method of treatment but, in my opinion, Christ's instructions to his disciples to heal the sick would definitely cover the psychological form of healing by the medical profession to which I have hereinbefore referred.

As I have said, the real question is whether the absolute discretion which the testatrix has given to her executors as to the way in which psychological healing in accordance with the teaching of Jesus Christ is to be furthered is limited in the way in which counsel for the Attorney-General suggests to furtherance by charitable means. I find no language in the will which enables me to place that limitation upon the absolute discretion which the testatrix by her words has given to her executors. To take an extreme case, it seems to me that, if they came to the conclusion that there was some extremely wealthy man suffering from chronic dyspepsia and that it would further psychological healing if they were to pay somebody to go and try to cure him of his chronic dyspepsia, they might apply the money of the testatrix in paying such a healer to go and try to cure such a patient. In my judgment, such an application would not be an application of the estate for a charitable purpose, but it seems to me it would be within the absolute discretion which the testatrix has by her will given to her executors. I find myself unable to place upon the absolute discretion which this testatrix has given to her executors the limitation which counsel for the Attorney-General suggests I am bound by the language of her will to put upon it.

For these reasons it seems to me that the disposition which this testatrix has made is not a disposition of her estate for charitable purposes and, that being so, and having regard to the opening language of LORD HALDANE's speech which I have read, she has not made a complete disposition of the beneficial interest in her estate and, therefore, in my judgment, the next of kin of the testatrix are entitled to that estate. The gift, for these reasons, I declare to be invalid.

Declaration accordingly. Costs of all parties to be paid out of the estate.

Solicitors: *Ridsdale & Son*, agents for *W. H. Heelis & Son*, Hawkshead (for the trustees); *Herbert Smith & Co.* (for the next of kin); *Treasury Solicitor* (for the Attorney-General).

[*Reported by* R. L. ZIAR, ESQ., *Barrister-at-Law.*]

CASELEY *v.* BRISTOL CORPORATION.

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and Goddard, L.JJ.), **December 3, 6, 7, 1943.**]

Highways—Excavation near highway—Dock basin—47ft. from highway at nearest point—Injury to person wandering from highway—Fog.

The corporation, the appellants, owned a dock basin known as the Cumberland Basin. On a very foggy night, in the black-out, C., who was walking home, wandered from the road, which was a public highway, and fell into the basin and was drowned. Between the highway and the basin there was a strip of land 47 feet wide at its narrowest point. This land was the property of the corporation who were the successors in title of a company which constructed the basin under an Act of 1803. It was contended for the respondent that the corporation had committed a breach of its common law duty to users of the highway in that it had maintained an unfenced basin adjoining the highway. It was also contended that the strip of land was indistinguishable from the highway and as the night was foggy the corporation was under an obligation to take special precautions. Further, it was said that the deceased was a licensee:—

HELD: (i) the corporation was under no obligation to fence the basin and had committed no breach of duty.

(ii) assuming that the deceased man was a licensee, the corporation were under no liability as a licensee must take a place as he finds it.

[**EDITORIAL NOTE.** It is settled by authority that there is no duty to fence a highway. Excavations which practically adjoin the highway must be fenced for it is presumed that to some small extent persons will stray from the highway even when using it lawfully and for a proper purpose. In the present case the dock basin was 47ft. away at its nearest point and the duty to fence does not extend to a danger so far removed from the highway.

As to Duty to Fence Dangers Near Highway, see HALSBURY, Hailsham Edn., Vol. 3, pp. 149, 150, para. 260; and for Cases, see DIGEST, Vol. 7, pp. 286-289, Nos. 157-168.]

Cases referred to:

*(1) *Hardcastle* v. *South Yorkshire Ry. and River Dun Co.* (1859), 4 H. & N. 67; 7 Digest 286, *157*; 28 L.J.Ex. 139; 32 L.T.O.S. 297.

*(2) *Binks* v. *South Yorkshire Ry. and River Dun Co.* (1862), 3 B. & S. 244; 7 Digest 287, *159*; 32 L.J.Q.B. 26; 7 L.T. 350.

*(3) *Mersey Docks & Harbour Board* v. *Procter*, [1923] A.C. 253; 36 Digest 15, *59*; 92 L.J.K.B. 479; 129 L.T. 34.

(4) *Hounsell* v. *Smyth* (1860), 7 C.B.N.S. 731; 7 Digest 287, *158*; 29 L.J.C.P. 203; 1 L.T. 440.

(5) *Hastie* v. *Edinburgh Magistrates*, [1907] S.C. 1102; 36 Digest 70, *450 v.*

(6) *Geddis* v. *Bann Reservoir Proprietors* (1878), 3 App. Cas. 430; 38 Digest 25, *137.*

Appeal by the defendants from a judgment of Charles, J., Bristol Assizes, dated July 2, 1943. The facts are fully set out in the judgment of Lord Greene, M.R.

H. D. Samuels, K.C., and *J. Scott Henderson* for the appellants.

N. R. Fox-Andrews for the respondent.

Samuels, K.C.: It is said that the corporation have brought a nuisance to the highway or adjacent to or adjoining the highway. As, however, there is a strip of land 47ft. wide at its narrowest point between the basin and the highway, it cannot be right to say that a nuisance has been brought to, or near to, the highway. Unless the excavation was near to the highway, it could not constitute a nuisance. In the present case, the distance is twice what it was in *Binks* v. *South Yorkshire Ry. Co.* (2), and in that case it was held that no nuisance had been committed. If, in the present case, the corporation had allowed people to wander over the area, they would still have been under no liability. In *Hastie* v. *City of Edinburgh* (5), where a child fell into an unfenced pond, there was held to be no liability upon the authority. In the present case, the statute, which authorised the construction of the basin and the road, imposed no obligation to fence. [Counsel referred to *Hardcastle* v. *South Yorkshire Ry. Co.* (1)].

Fox-Andrews: In the present case there was no evidence that the deceased man was walking where he had no right to be. The well-known classification of trespassers, invitees and licensees is not apt when one is dealing with a highway unless it is clear that the road in question is a private road or subject to some restriction. There was nothing to show that the public had been excluded from the use of the strip of land at any time since the road was made and had been open to the public. Having regard to the general character of the place, the corporation should have erected a fence. As the deceased man had done nothing wrong, the respondent was entitled to rely upon the words of Lord Sumner in *Mersey Docks & Harbour Board* v. *Procter* (3). In the present case, the corporation are liable by reason of their having inherited the obligations placed upon the Bristol Dock Co. in respect of the fencing of the road from the basin or the basin from the road. [Counsel referred to *Hardcastle* v. *South Yorkshire Ry. Co.* (1), *Hounsell* v. *Smyth* (4), *Binks* v. *South Yorkshire Ry. Co.* (2), and *Geddis* v. *Bann Reservoir Proprietors* (6)].

Lord Greene, M.R.: It is always distasteful to this court to have to reverse a judgment of the trial judge in a case of this kind. But, in my opinion, with all respect to the judge, he has held the defendants to have been under a duty to the deceased man which goes beyond what the law imposes upon them. The deceased met his death by falling into a basin known as the Cumberland Basin, in the Bristol Docks, belonging to the Bristol Corporation. The Bristol Corporation are the successors of a company of proprietors incorporated under an Act of 1803, 43 Geo. III, c. 140, which empowered the company to construct certain works on the River Avon, including this particular basin. That Act was followed by a later Act of 1806, 46 Geo. III, c. 35.

The deceased man was employed at some works somewhere near the north bank of the River Avon. In order to travel from his place of employment to his home, he walked, when it was necessary or convenient to do so, along a road called Hotwell Road ; he then turned to the right, over the swing bridge which is thrown across the lock leading into the west end of Cumberland Basin ; he then turned to the right along the road described on the large plan as the "alternative road." After proceeding along that road, he turned again to the right, and so across another swing bridge into the neighbourhood in which he lived. The alternative road runs at some distance from the edge of the Cumberland Basin on its southern side. The space between the road and the basin is occupied at two points by sheds belonging to the corporation and used in connection with its port undertaking. This space is admittedly the property of the corporation and is used by them for their dock purposes. The distance between the road and the edge of the basin at the narrowest point of the intervening strip is 47ft. The road is unfenced ; but there is a row of lamp-posts, not lit during the present black-out, running along the north side of the road. The night on which the deceased man met his death was very foggy indeed. The judge found as a fact that he fell into the basin at the same point as did a witness called Phillips, with whom he was walking at the time. That point was at the narrowest point of the intervening strip, that is to say, 47ft. from the road.

It was argued before us that there was no evidence on which the judge could find that the deceased man fell into the basin at that point, or on that day ; or, at any rate, that he ought not to have found that he did fall into the basin at that point on that occasion. In my opinion, there was ample evidence on which the judge could find as he did. I do not propose to discuss it. It is only necessary for me to say that I should have come to the same conclusion myself.

It is agreed that the road in question was a road constructed pursuant to the powers in one or other of these two Acts. The actual section in which the road appears to be specifically mentioned is a section of the later Act of 1806, which recited the desirability of constructing a particular road ; and by sect. 42 the dock company was empowered "to make and maintain such road," the direction of which was mentioned in the section. I will not discuss the question whether this particular piece of road was part of the road mentioned in that section, because it is common ground that it was.

The corporation, in its original defence, alleged that the road was a private road ; but that contention was abandoned. It is agreed now, and it was agreed at the trial, that the road is a public highway, subject to certain powers in the corporation to close it temporarily, when, in the course of their dock operations, they are, for example, moving a cargo landed on the south side of the Cumberland Basin over the road to their ground on the south side. But, for all practical purposes, we must take it that the road is a public road.

The first argument, and the case put in the forefront of the statement of claim, was to this effect. It was said that the corporation had committed a breach of its common law duty towards the users of that highway by maintaining an unfenced basin adjoining the highway. The judge accepted that argument ; but, in my opinion, it cannot be supported. The basin was, as I have said, 47ft. at its nearest point from the highway. In my opinion, in those circumstances, it is impossible to apply the common law principle which imposes liability on persons owning land adjoining the highway in respect of holes, quarries, or matters of that kind maintained close to the highway. The principle upon which that rule of law is based is that the duty is a duty to the user of the highway as such when using the highway. The reason why a person who maintains an excavation beside a highway is held to be liable is that a person using the highway in the ordinary course of using it may be liable to fall into the excavation if he slips, or makes a false step, or does any of the usual things a person using a highway may be likely to do. I quote in this connection the passage frequently quoted from *Hardcastle* v. *South Yorkshire Ry. Co.* (1). It is in the judgment of POLLOCK, C.B., on p. 74, where he says :

> When an excavation is made adjoining to a public way, so that a person walking upon it might, by making a false step, or being affected with sudden giddiness or, in the case of a horse or carriage way, might, by the sudden starting of a horse, be thrown into

> the excavation, it is reasonable that the person making such excavation should be liable for the consequences; but when the excavation is made at some distance from the way, and the person falling into it would be a trespasser upon the defendant's land before he reached it, the case seems to us to be different. We do not see where the liability is to stop. A man getting off a road on a dark night and losing his way may wander to any extent, and, if the question be for the jury no one could tell whether he was liable for the consequences of his act upon his own land or not. We think that the proper and true test of legal liability is, whether the excavation be substantially adjoining the way, and it would be very dangerous if it were otherwise—if in every case it was to be left as a fact to the jury, whether the excavation were sufficiently near to the highway to be dangerous.

Applying that principle, which is well-established, it is, in my opinion, quite impossible to say that the existence of this basin was a danger to the users of the highway as such users. The only way in which a person could fall into the basin would be if he wandered from the highway and that could not occur if he was a mere user of the highway.

Two further arguments were put forward, which were of this nature. First of all, it was said (and the judge who saw the spot found it as a fact), that the highway was for all practical purposes—I am paraphrasing what I understand his findings to be—indistinguishable from the adjacent strip so far as the surface was concerned. He said the only distinction lay in a slight camber of the roadway. Accepting that finding, the argument based upon it was that the obligations of a person owning land adjoining the highway are extended when the area between the highway and the excavation is so similar to the surface of the highway as to be indistinguishable. In other words, it is said that, if the area between the highway and the excavation has become indistinguishable, the right of the user of the highway is *pro tanto* extended, and he is to be deemed a user of the highway when he is walking on the intervening area which, so far as surface or boundaries are concerned, has become indistinguishable from the highway. In my opinion, on principle, there can be no justification for that proposition. The right of the public is to use the highway. If the boundary between the highway and the adjoining land has become obliterated and the two present the appearance of being merged into one, the law still is that the right of the public is to use the highway and nothing but the highway. When a man leaves the highway he becomes in the normal case a trespasser. It would be no answer for him to say: "Well, I could not see where the highway began and where it ended."

There is authority on that matter which is to be found in *Binks* v. *South Yorkshire Ry.* (2). The facts in that case, so far as relevant to this point, are set out on p. 247. From the statement of facts it appears that the grass between the footpath there in question and the towing-path had been destroyed by traffic and the defendants, for the purpose of repairing the road and footpath "had covered the surface of both with ashes or cinders." In relation to the argument I have just been considering, BLACKBURN, J., on p. 253, says this:

> In order to distinguish this case from that to which I have referred [*Hardcastle* v. *South Yorkshire Ry. Co.* (1)], it was argued that such alterations had been made in the towing-path that they obliterated the distinction between it and the footway, and so rendered it not noticeable, especially at night, and consequently dangerous. But I do not think that that amounts to making the canal adjoin the footway, if it did not do so before. There may possibly be cases where the owner of land adjoining a way may, by his acts, induce the public to go near to an excavation in his land so as to get into danger; in which case it would be the same thing whether the way were a highway or not. But that should be distinctly proved, whereas the only evidence adduced here amounts to nothing of the kind.

Applying that language to the facts of the present case, the circumstance that the surface of the adjoining strip resembled that of the roadway did not have the effect of making the basin adjoin the roadway. That is the first argument.

The second argument was based on the fact that the night was a foggy one. If I understand it correctly, the argument is this. Although in ordinary times the adjoining landowner may not be liable because his excavation is too far from the public roadway, nevertheless, he is under a special duty in times of fog, because then a person may very well wander from the highway and fall into the excavation. In my opinion, that argument cannot be sustained. It is not the case that the duty of the landowner varies according to whether the day is foggy or not foggy, any more than it varies according to whether the night is dark or is lit by the moon. The person who finds himself in a fog on a public highway has no more right to wander off the highway than he has in clear weather. The rule in relation to excavations is that they must be a danger to persons using the highway in a lawful manner and with reasonable care. A person who finds himself in a thick fog, or on a pitch dark night without any illumination, cannot be said to be using the highway with reasonable care if he progresses outside its bounds; it is for him to see that he does not run into danger. If he cannot safely move at all, then he would have to stop; but, if he does move, he obviously must move with that extra caution which the occasion demands. It is not for the landowner to take special precautions to deal with a fog; it is for the passenger on the public way himself to take whatever precautions may be necessary for his own safety. The possibility of presence of fog cannot alter the law that an excavation is only dangerous, in the sense in which we are discussing, to the users of the highway if it is so adjacent to the highway that persons using the highway run the risk of falling into it.

The question of fog was dealt with in the speech of LORD SUMNER in *Mersey Docks and Harbour Board* v. *Procter* (3). That was the case of a workman in the dock area going in a fog apparently to the latrine and losing his way and falling into the dock. LORD SUMNER makes several observations in relation to fog. He found that the workman in that case was a mere licensee; and he deals with what a licensee must do. He says, for instance, on p. 274:

> If he will walk blindfold, he walks at his peril, even though he is blindfolded by the action of the elements.

In my opinion, that observation applies to the case of a person who is not a licensee, but is exercising his right to walk along the public highway. Again, on p. 274, LORD SUMNER says:

> A fog I take to be the typical case of a fortuitous but expected hazard, in which everyone must, and knows that he must, walk warily.

I need not go further into the other observations of LORD SUMNER in relation to fogs. In my opinion, there is not a particle of authority for the proposition that, in the case of this common law obligation, there is any distinction to be drawn between foggy weather and any other weather. That disposes of the first branch of the argument.

The next branch of the argument was to this effect. It was said that the deceased man, when he left the road and walked across the intervening strip, was a licensee of the corporation; and the judge so held. I do not intend to occupy time by examining the question whether there was evidence upon which the judge could find that the deceased man was a licensee; but, for the purposes of the argument, I will accept that finding. What is the position of a licensee? He must take the premises as he finds them. The owner of the land must not prepare traps for him. Subject to that, the licensee has no claim upon him. In the present case the workman knew of the existence of the basin. There can be no question of the basin being a trap. This basin and this roadway have existed for over 100 years; and to describe the basin as a trap is a complete misuse of language. If, when he left the road and entered upon the strip, he did become a licensee, I can find no particle of justification for the view that he had any right to expect that the basin should be fenced, or that some precautions should be taken for his safety. I think it is important to observe that the question of the duty of the corporation to the deceased man as a member of the public using a public way and its duty to the deceased man as a licensee on the corporation's premises are completely distinct. The measure of duty is quite different. The foundation upon which the duty is based is quite different. A man using the highway does not get his rights as user of the highway extended by leaving the highway and becoming a licensee.

Counsel for the respondent, if I understood his argument rightly, did at one stage suggest that, if the deceased man was a licensee, the practical effect was to bring the basin to the neighbourhood of the road: in other words, the duty of the corporation, in those circumstances, to the deceased man as a licensee was the same as its duty towards him as a user of the road. If the basin had been beside the road, and the deceased man had fallen into it, it is contended there would have been liability as the basin would have been adjacent to the road; similarly, it was said, there is a liability for maintaining the basin in a position adjoining the licensed area since that area must, in view of the licence, be regarded as an extension of the road. In my opinion, that is quite wrong. The duty of the adjoining landowner to the user of the road is a duty to him as such user. If he leaves the road and becomes a licensee on an adjoining strip, the duty to him is as licensee and nothing but licensee. He has left the road; and the question of the duty to him as user of the road falls out of the picture altogether. His rights, and the liabilities and obligations of the landowner, must, at that stage be ascertained by reference to the relationship of licensor and licensee and nothing else.

I think it would be convenient now to cite a passage from the speech of LORD SUMNER in *Mersey Docks and Harbour Board* v. *Procter* (3), on p. 274, on the position of licensees:

> A licensee takes premises, which he is merely permitted to enter, just as he finds them. The one exception to this is that, as it is put shortly, the occupier must not lay a trap for him or expose him to a danger not obvious nor to be expected there under the circumstances. If the danger is obvious, the licensee must look out for himself: if it is one to be expected, he must expect it and take his own precautions. If he will walk blindfold, he walks at his peril, even though he is blindfolded by the action of the elements. As usual in cases of duties of care, the reasonable man is the standard on both sides. The licensor must act with reasonable diligence to prevent his premises from misleading or entrapping a licensee, who on his side uses reasonable judgment and conduct under circumstances which can be reasonably foreseen. The licensee is to take reasonable care of himself and cannot call a thing a trap, the existence of which a reasonable man would have expected or suspected, so as to guard himself from falling into it.

Every word of that passage applies to the present case. In my opinion, therefore, the argument based on the proposition that the deceased man fell into this basin while walking as a licensee over this strip entirely fails.

Counsel for the respondent asked us to allow an amendment to his pleading, alleging that the intervening strip was a public highway. That application we refused. That was an entirely different case to anything that had been suggested before. The statement of claim, on its true construction, clearly limited the public highway to the road in question; and there was no evidence at all to support any allegation that the adjoining strip was a public highway. In those circumstances, it would not have been proper to allow the amendment.

The last argument presented for the respondent again involved an amendment of the pleading. If there had been any real substance in the point (which turns on the true construction of these two Acts of Parliament) I should have been inclined to allow him to make the amendment. He said that he had not had an opportunity of seeing these two Acts which, like so many early Acts of this character, are practically unobtainable by the ordinary practitioner. Extracts from the Acts were furnished by the corporation, giving the passages which, in their view, affected the question. But counsel for the respondent, when he saw the Acts, thought there were certain sections in them which would enable him to present a different case. In my opinion, the case he presents based on those sections is one which cannot be accepted; and, therefore, there would be no advantage in allowing the proposed amendment.

I will state quite shortly the effect of the argument on this part of the case. The only specific reference to this road is to be found in the Act of 1806. The Act of 1803, which established the dock company and provided for the voluntary or compulsory purchase of the necessary lands and the execution of the works, the making of bridges, the making of canals and cuts, the erection of swing bridges, and so forth, contained a general section, sect. 40, which recited:

> It will be necessary and expedient to make bridges over the intended course of the Avon and also to build and made drawbridges or swivel bridges over the canals, cuts or entrances to be made by virtue of this Act . . . and to alter, raise or lower the roads, grounds or avenues, or to open new roads or avenues leading thereto.

Then it enacts: "That it shall be lawful for the said directors and they are hereby required"—I am reading it shortly—"to make drawbridges and swivel bridges," to keep them in repair, "and to raise, level or sink the grounds, roads or avenues, or make new roads or avenues adjoining to or leading to the bridges and works hereby authorised to be made and to fence the same in with rails, posts and banks where necessary." It was said that that section applies to

this particular road. I will assume that to be the case, although, speaking for myself, I feel some doubt about it, because in the absence of argument identifying the various places mentioned, I find it extremely difficult to see exactly what roads were intended to be referred to, or to what the section was intended to apply. But I will assume in favour of the argument of counsel for the respondent that it did apply to this particular road. I do so notwithstanding the fact that, when, in the later Act, this road comes to be specifically authorised, no mention is made of fencing it. It is said that difficulty is got over because the later A
Act contains a section, extending the clauses, powers and provisions contained in the earlier Act to the various provisions and authorities in the new Act. Let me assume, therefore, that, under the statutes the undertakers were authorised and required to make this road; it would then be covered by the words "and to fence the same in with rails, posts and banks where necessary." The phrase "where necessary" has been assumed in argument to extend to something more than the usual provision where compulsory powers are given requiring B
the undertakers to fence off the land taken from the land not taken. That is a very common stipulation to find; and there are provisions of the same character in this very Act. Certainly my first impression of the meaning of the words "where necessary" in this context would be that they were intended to be limited to that particular matter. However, I express no opinion upon the point; and I will assume, for the sake of argument, that the words "where C
necessary" are not confined to the erection of boundary fences, but extend to matters which I may compendiously describe as security matters.

The question then arises, what is the measure of the obligation that the words impose? I do not think it necessary or desirable to express any general opinion as to the limits of those words. All I need do is to consider whether they apply to the present case. What is said is that it was necessary to fence this road, because of the existence of the basin 47ft. away. If that is the duty which D
the legislature imposed on the undertakers, it was imposing a duty far, far higher than that imposed by the common law. I cannot construe these words as imposing an obligation to fence this road, because 47ft. away, over land belonging to the corporation, upon which no user of the road would (apart from licence) have any right to put his foot, there existed this basin. I have no hesitation in saying that the words "where necessary" cannot possibly apply to this case. That being so, the argument must fail. E

I hope I have covered all the points which counsel for the respondent quite properly put before us. He was defending a judgment obtained by a woman who has suffered a most grievous misfortune. No one can help sympathising with her. But this court is not here to administer sympathy, but to administer the law. In my judgment, the corporation has been guilty of no breach of its duty to this man, who met his death for reasons for which they are in no way responsible in law. F

In the result the appeal must be allowed.

MACKINNON, L.J.: I agree. So far as the common law is concerned, the result in this case seems to me to be manifestly concluded by a number of decisions—it is sufficient to specify *Hardcastle* v. *South Yorkshire Ry. Co.* (1), *Hounsell* v. *Smyth* (4), *Binks* v. *South Yorkshire Ry. Co.* (2), and *Mersey Docks* G
and Harbour Board v. *Procter* (3). In *Procter's* case (3), the facts very much resemble those in the present case, in that they concerned the unhappy fate of a man who, in a fog, went astray and fell into a dock. In that case, LORD CAVE, L.C., delivering the first opinion, quoted as the true exposition of the law the material passage in the judgment of POLLOCK, C.B., in the first case to which I referred, *Hardcastle* v. *South Yorkshire Ry. Co.* (1).

As to the alternative claim for breach of alleged statutory duty, I agree with H
what has been said by LORD GREENE, M.R., ; and I do not desire to add anything except this. If there were any such duty, namely, to fence the side of this road where necessary, I should doubt very much if it could be alleged, on any fair meaning of the words "where necessary," that the duty was broken. If this place on this night was in the condition it had been for some 130 years, without so far as we know any disaster happening, it seems difficult to say that there was such a breach. The truth is that this unhappy accident was the result much more of what is called the "black-out" than of the fog. It is apparent

from the plan that there were, on the northern edge of this road, between Waterford Shed and Cork Shed, four lamp-posts in a distance of between 80 and 140 feet. If they had been alight, it seems most unlikely that this unfortunate man would have strayed as he did in the fog. I agree that the appeal should succeed.

Goddard, L.J.: I agree with the finding of the judge in the beginning of A his judgment, that there was evidence that this man fell into the basin at the time and at the place described by the witness Phillips. For the rest, I find myself in complete disagreement with the judge. One difficulty that I have is to find on what he has really based his judgment, and what legal duty he finds in the corporation which was broken. The first passage in which he states his reason is that in which he says:

> B It [the road] was a public highway all the time, and there ought to have been a fence or some posts and chains, or some barrier which would prevent people who stray in a thick fog, for example, off the highway from falling into this deep basin.

It is all very well to say that there ought to have been a fence; but why ought there to have been a fence? There is no obligation on the corporation to put up a fence unless there was some legal duty. The cases which have been cited, and to which the judge makes no reference whatever in his judgment, clearly C show that there is no duty to fence a highway, or something which a person can get to from the highway, unless it is so near the highway that a man making a false step, or overcome by temporary giddiness, would fall into the excavation. The fact is, if I may quote one sentence from Lord Sumner's speech in *Mersey Docks and Harbour Board* v. *Procter* (3), at p. 273: "The suggestion is a mere impulse of compassion."

The second ground on which the judge puts his judgment is that the man D was a licensee upon this land, which was adjoining the highway. If he were a licensee, he took the place as he found it. He was a man who was very well acquainted with the place. It is abundantly clear, from the decision of the House of Lords, that, if a man walks about in a fog, he cannot complain if he meets with a misfortune due to his being unable to see where he is going.

So far as the alternative claim which counsel for the respondent sought to E set up, is concerned, it seems to me that the words in the statute "and to fence the same in with rails, posts and banks where necessary," are words representing the common law obligation. I cannot see how it can be said that it is necessary to fence in something which the law definitely requires should be fenced in. If this basin was so near to the road as to be in itself a danger, then the common law would have given the deceased all the protection he needed. If, on the other hand, it is so far removed from the road that the common law does not F require it to be fenced in, I am unable to see how it can be said that it is necessary to fence it in. I think in all probability those words were inserted in the Act so that it would not be open to the undertakers to say that, if there was something adjoining the road which the common law would require to be fenced in, they would not be entitled to say: "We made the road where the statute told us to make it, and as we made it in accordance with the statute, we are not liable for any fencing in, because the statute did not require us to fence." G Accordingly, the statute used the words "to fence the same in with rails, posts and banks where necessary," to put upon the undertakers, who are exercising their statutory powers, the same obligation as the common law puts upon them if they were responsible for making an excavation at or adjoining a highway. I think that is the only reason why those words appear. I think really that point which is raised under the statute is only the same point which was raised on the other part of the case put in another way.

H *Appeal allowed with costs.*

Solicitors: *Robins Hay & Waters,* agents for *Josiah Green,* Town Clerk, Bristol (for the appellants); *W. H. Thompson* (for the respondent).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

MACLAY *v.* DIXON.

[COURT OF APPEAL (Scott, L.J., Asquith and Uthwatt, JJ.), **November 10, 29, 1943.**]

Landlord and Tenant—Rent restriction—Furnished letting—Bona fide letting—Intention to defeat Act—Substantial part of rent applicable to furniture—"Substantial."

A cottage was let by the respondent's predecessor in title to the appellant. A
It was intended that the letting should not be subject to the Rent Acts and to prevent this it was intended that the letting should be a furnished one. The landlord had no furniture and the appellant sold some of his furniture to the landlord which was then included in the letting. In Feb., 1941, the premises and the furniture were bought by the respondent and the tenancy was continued. In June, 1942, the respondent entered into a new agreement with the appellant for a furnished letting at £80 per annum. B
The county court judge found as a fact that £13, part of this rent, represented the amount paid for the furniture. It was contended that (i) this was not a *bona fide* furnished letting; (ii) the amount paid for the furniture was not substantial:—

HELD: (i) this was a *bona fide* furnished letting.

(ii) the amount paid for the furniture was substantial. C

[**EDITORIAL NOTE.** Where a statute does not make contracting out illegal, no objection can be taken that the parties so arrange their affairs that the restrictions imposed by the statute are avoided. The mere fact that the parties set out to arrange a letting which would be outside the Rent Acts does not prevent such a letting being a *bona fide* letting within the terms of the Act. Where both parties agree to avoid the restrictions of the Act, it cannot for that reason be said that the letting is not a *bona fide* one.

AS TO FURNISHED LETTINGS, see HALSBURY, Hailsham Edn., Vol. 20, pp. 314, 315, D
para. 370; and FOR CASES, see DIGEST, Vol. 31, pp. 560, 561, Nos. 7078-7084.]

Cases referred to:

(1) *Yorkshire Railway Wagon Co. v. Maclure* (1882), 21 Ch.D. 309; 10 Digest 737, *4607*; 51 L.J.Ch. 857; 47 L.T. 290.

(2) *Inland Revenue Comrs. v. Westminster (Duke)*, [1936] A.C. 1; Digest Supp.; 104 L.J.K.B. 383; 153 L.T. 223; 19 Tax Cas. 490.

APPEAL by the tenant from a decision of His Honour JUDGE JENKINS, K.C., E
given on July 14, 1943. The facts are fully set out in the judgment of the court delivered by SCOTT, L.J.

H. J. Astell Burt for the appellant.

A. T. Denning, K.C., and *S. Seuffert* for the respondent.

SCOTT, L.J. [delivering the judgment of the court]: This case under the Rent Restriction Acts turns on the question whether the dwellinghouse was F
bona fide let at a rent which included payments in respect of the use of furniture, and whether the amount of rent fairly attributable to the furniture, regard being had to the value of the same to the tenant, formed a substantial portion of the whole rent. The relevant sections are: 1920 Act, sect. 12 (2) proviso (i); 1923 Act, sect. 10; 1939 Act, sect. 3 (2) (*b*). Their effect is to take out of the Acts a house which is let with furniture in it only if the part of the rent G
attributable to the use of the furniture, "regard being had to the value of the same to the tenant, forms a substantial portion of the whole rent."

The county court judge answered both questions in the affirmative and his decisions are binding on us unless the appellant can satisfy us that there was no evidence to support his findings, or that he made some error of law. In my opinion there was evidence and he did not err in law. Broadly speaking we agree with the reasons for his judgment of which he has given us a note, H
although we think his conclusion may also be supported by the respondent from a slightly different angle. The facts are these. The house in question is a four-roomed gardener's cottage in the grounds of and close to a larger house, which in Oct., 1940, was occupied by Stolterforth who then owned both. He did not want to let at all but was willing to let to the appellant for a limited time and then quarterly, provided that the house could remain outside the Rent Restriction Acts. He explained to the appellant that he could, therefore, only let if it contained furniture of his which would prevent the Rent Restrictions Acts

applying. The appellant accordingly offered to sell some of his furniture to Stolterforth and then to have that included in the letting. A considerable number of articles were put into a schedule to the proposed agreement and the respondent paid £25 for them by cheque, and the appellant promised to buy the furniture back if at any time Stolterforth ceased to be the owner. On that footing he acquired the tenancy, the whole basis of the letting being that it was a furnished tenancy, to which the Acts did not apply. In Feb., 1941, the respondent purchased both house and cottage from Stolterforth, bought from him the furniture in the list, paid him for it and moved into occupation of the main house with his family. On June 19, 1942, he entered into a new tenancy agreement with the appellant, containing a schedule of the furniture which he had so bought, at a rent of £80 to include both house and furniture. He had five children and his wife was shortly to have another and he expected to need the cottage as extra accommodation, as their house was not large. He accordingly gave the appellant notice to quit in due form, to expire on Mar. 25, 1943. Of the £80 rent the county court judge held that £6 represented rates, leaving £74 as the rent, and out of that he held that £13 represented payment for the portion of the furniture in the cottage which the landlord owned. Again both parties intended the tenancy to be one to which the Rent Restriction Acts would not apply. This fact was unblushingly admitted by the appellant.

The first issue was whether, on the assumption that the portion of the rent attributable to the furniture was "substantial," the transaction was *bona fide*—to use the phrase of the Act. The judge held without hesitation that it was, and I am satisfied that there was ample evidence in support of that conclusion. Even as between the respondent's predecessor and the appellant, it was clearly established, out of the appellant's own mouth, that the sale of the furniture by the appellant was a real sale, and that both parties were quite deliberately arranging to make the whole transaction one to which the Rent Restriction Acts did not apply. There was no shadow of deception practised by the landlord upon the tenant. In my opinion, they were both entitled so to arrange the matter, as not to attract the control of the Acts, or, putting it positively, as to prevent the Acts from applying. If the actual transaction was not within the Acts, it made no legal difference that the parties had intentionally kept it out of the Acts. It was argued that the intention to keep it out of itself showed want of *bona fides*; but unless the court has other material on which to hold that the whole thing was a sham, that intention was irrelevant. These Acts were intended by Parliament to be easily understood by the people, and I humbly deprecate the use of Latin words in such legislation. This particular phrase has passed into the vernacular. I do not hazard a conjecture as to what it means in the minds of those whose lips glibly pronounce the words, but I venture to translate the statutory phrase as "in good faith"; and I ask "good faith" by whom and to whom? You cannot have good faith in the air. It is a moral conception, involving a moral duty of some one to some one. There was no breach of that duty from the appellant either to the respondent's predecessor in title or to the respondent, or *vice versa*; because they understood each other perfectly. Is it good faith owed by the parties to Parliament? There are no other persons concerned. Be it so; but the only duty of a citizen to Parliament is to obey its laws; and what the parties did here was within the law, for the reasons I have already given. Indeed on that point the decided cases, binding on us, are conclusive. They say in terms that to beg the question by such a phrase as "evading the Act" is to indulge in confusion of thought. If the Act of Parliament does not forbid, it allows: see *Yorkshire Railway Wagon Co.* v. *Maclure* (1), per LORD JESSEL, M.R., at pp. 313-316, and LINDLEY, L.J., at pp. 317,318; and *Commissioners of Inland Revenue* v. *Duke of Westminster* (2), per LORD TOMLIN, at pp. 19-21. Finally I would add that as between respondent and the appellant there is even less excuse for attacking the *bona fides* of the transaction than there was as between Stolterforth and the appellant in the original letting; for the appellant intended to take the house from the respondent as a house partially furnished with what he knew was already the respondent's own furniture; and he knew also that the respondent was unwilling to let at all except as a house which would remain outside the Acts. Counsel for the appellant placed much reliance on the letter of Oct. 18, 1940, from Stolterforth to the appellant; but we were informed that

that letter was never seen by the respondent till discovery in the action.

In the result, I cannot regard the defence based on the words "*bona fide*," as consistent with common honesty on the part of the appellant. We do not feel satisfied that the defence based on the word "substantial" is consistent with honesty.

On the issue raised by the word "substantial" the county court judge had evidence to satisfy the statutory criterion imposed by the word "substantial." The appellant had had the law explained to him by Stolterforth before he entered into the first agreement, and he had then sold to Stolterforth a considerable number of articles of furniture needed to furnish such a gardener's cottage of 4 rooms, and that the appellant so regarded the quantity as sufficient to satisfy the statute is evident from his cross-examination; for at the time when he went into the witness box he must certainly be taken to have known all about the statutory criterion imposed by the word "substantial." On this question of fact the judge was entitled to take into account the whole of the appellant's evidence as recorded in the judge's notes and to have regard to his demeanour, and indeed to his whole attitude on the issue, which was cardinal in his defence and turned on the word "substantial." Even apart from these aspects, on the mere list I should say that it was substantial, as it looks as if it was nearly sufficient to furnish a sitting room and half of a bedroom out of the four rooms.

The fact that the appellant had brought a lot of very valuable furniture into a cottage of that type would not take from the landlord's portion its attribute of "substantial" if in itself that portion was substantial; the Act does not require the landlord's furniture to be a substantial proportion in either value or weight, relatively to the whole, but only that his position should be positively or absolutely in itself substantial. This meaning is corroborated by the history of the provision which was introduced into the legislation to modify the earlier law, judicially ascertained, to the effect that any quantity of furniture, however small, in itself, would satisfy the law as it was previously, unless the quantity was so negligible as to be ignored under the maxim *de minimis non curat lex*.

For these reasons the appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Drake Son & Parton* (for the appellant); *Saxton & Morgan* (for the respondent).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

Re BAKU CONSOLIDATED OILFIELDS, LTD.

[Chancery Division (Bennett, J.), **November 8, 1943.**]

Companies—Winding up—Substratum gone—Property confiscated in Russia.

The company was formed to acquire the undertakings of four other companies carrying on an oil business in Russia. Before the undertakings could be acquired, they were confiscated and since 1920 the company had been engaged in an endeavour to substantiate a claim against the government in Russia. It had not otherwise carried on any business and had considerable assets:—

Held: in the circumstances the whole substratum of the company had gone and a compulsory order ought to be made. Such claim as the company had against the authorities in Russia could be equally well enforced by a liquidator.

[**EDITORIAL NOTE.** Where a company had ceased to carry on business and its whole substratum had gone, it is just and equitable that an order for compulsory winding up should be made.

As to Winding Up where Whole Substratum Gone, see HALSBURY, Hailsham Edn., Vol. 5, pp. 545-548, para. 885; and for Cases, see DIGEST, Vol. 10, pp. 822-825, Nos. 5358-5374.]

Petition for the winding up of a company on the ground that the whole substratum of the company was gone. The facts are fully stated in the judgment.

Charles E. Harman, K.C., and *Harold Lightman* for the petitioners.

H. Wynn-Parry, K.C., and *M. L. Gedge* for the company and shareholders opposing the petition.

BENNETT, J.: This is a petition by two gentlemen who are the holders of fully-paid shares in the company, on the ground, *inter alia*, that the company has ceased to carry on its business since 1920; and that the whole substratum of the company is gone. The nominal capital of the company was £2,500,000, divided into 1,250,000 A preferred ordinary shares of £1 each, and 1,250,000 B ordinary shares of £1 each. It appears from art. 4 of the memorandum of association that the purpose of the company was to acquire the undertakings of four separate limited companies, carrying on the business of getting and selling oil in or near Baku. Agreements were entered into by the Baku Consolidated Oilfields, Ltd., with these four companies then carrying on business in or near Baku. The name of the company indicated that the intention was to consolidate certain existing oilfields and to carry them on. The object was to amalgamate these four companies or undertakings, and carry on their business: but, apparently, the respondent company never got from these companies a title to their respective undertakings. Shortly after the respondent company was formed, the undertakings and businesses of the four companies were confiscated. It seems pretty clear that, in no true sense of the word did the Baku Consolidated Oilfields, Ltd., carry on any business at all. It has been engaged since 1920 in an endeavour to substantiate a claim against the U.S.S.R. Government for loss by confiscation of the properties it was formed to acquire, and for which it has paid.

The company has issued and there are outstanding 669,026 A preferred ordinary shares. It has also issued and there are outstanding 1,151,461 of the B ordinary shares. The assets, apart from claims in respect of the forfeited properties, consist of office furniture, which is valued at £111; sundry debtors, £1,850; investments which cost the company £91,501, and were estimated on Sept. 30, 1942, to have a market value of £86,203, and between £27,000 and £28,000 cash—assets which can be realised to-day at just over £100,000. On those figures it is pretty plain that the only shareholders at present interested in the assets of the company are the holders of the A preferred ordinary shares.

The petition is supported by 122 shareholders, who own 102,000 A shares and 52,000 B shares. It is opposed by shareholders who hold 174,000 A shares and 173,000 B shares. Amongst the opponents is the Custodian of Enemy Property, in whom are vested the shares of the largest shareholder, a Netherlands company, which holds 108,246 A shares and 253,320 B shares. If you deduct that holding and the holding of the directors of the company, the A preferred ordinary shareholders who are opposing the petition have holdings amounting, I think, to 13,000 A preferred ordinary shares. Of course, the opposition of the Custodian is to be kept in mind; but he has not been represented by counsel. All that the court knows is that he has intimated his opposition to a compulsory order. It may well be that the reason is that, not being able to get into communication with the holder of the shares which are vested in him, he desires the *status quo* to be maintained. It may also be that, having regard to his large holding in the B ordinary shares, a holding which is far in excess of his holding of A shares, he has preferred to take his chance and wait.

In my judgment, it is clear on the facts that the purpose for which this company was originally formed has gone. It can never carry on the business it was formed to carry on, that of consolidating the undertakings of these four oil-producing companies at Baku and selling the oil. That seems to me to be clear. It also seems to me to be clear that the majority of the shareholders have no right to compel a minority to embark upon any other undertaking. It seems to me the only question is whether the company should be kept alive for the purpose of putting forward its claim in respect of the confiscation of its properties, because that claim may be prejudicially affected if a winding-up order should be made.

The claim is not the claim of this company alone. It is a claim which is wrapped up and connected with the claims of all the British creditors in respect of properties which were confiscated in the year 1920 or thereabouts and stands on the same footing as all those claims. It is clear from the evidence that the directors of the company no longer expect their claims to be met by sums coming from Russia. Their hope seems to be that some day or other their claims may be met out of funds in this country which are in the hands of British banks, and were put there when the late Czarist Government was the Government of Russia.

That hope seems to have been held by British creditors of Russia for many, many years; 23 years have now elapsed since most of the claims arose; but they are still waiting for a settlement. It costs this company to keep going £1,500 per annum in directors' fees, office adminstration, remuneration of auditors and general expenses. The chairman and one other director—I think there are two now and one is a Netherlands subject—have offered to give up their remuneration: but still it seems to me to be a large sum to pay simply for keeping the claim of this company alive. Nobody has any hope at the present moment that anybody is likely to consider or deal with the claim. A

Apart from that, it seems to me the shareholders have the right to have divided amongst them the quite substantial assets which the company still possess. It does not seem to me that the claim is likely to be prejudiced by making a winding-up order. The claim which has to be preferred is not being preferred by the Baku Consolidated Oilfields, Ltd., because it was not their properties which were confiscated when the confiscation took place. It was B the claim of the four companies which the Baku Consolidated Oilfields, Ltd., was formed to amalgamate. All those four companies are in liquidation; and I see no sound reason advanced for coming to the conclusion that the claim of this company is likely to be prejudicially affected if it is put forward by a liquidator instead of by the directors of a going concern.

In my judgment, the creditors and shareholders of this company who now want C to have their share of the company's assets paid over to them have reached the time, the company being no longer able to carry on, when they are entitled to ask the court to make an order for the winding up of the company. For these reasons, I think the usual compulsory order must be made.

Order for compulsory winding up.

Solicitors: *Rubenstein, Nash & Co.* (for the petitioners); *Herbert Smith & Co.* (for the company and opposing shareholders). D

[*Reported by* HUBERT B. FIGG, ESQ., *Barrister-at-Law.*]

TEDMAN *v.* WHICKER.

[COURT OF APPEAL (Scott, L.J., Asquith and Uthwatt, JJ.), **November 11, 12, December 1, 1943.**] E

Landlord and Tenant—Rent restriction—Standard rent—Rent reduced during hostilities—Progressive rent—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (*c.* 17), *s.* 12 (1)—*Rent and Mortgage Interest Restrictions Act,* 1939 (*c.* 71).

A house was let for 1 year from July 1, 1942, and then quarterly subject to three months' notice to determine the tenancy. The rent reserved was £150 per annum "except as hereinafter provided." A subsequent F clause provided for the reduction of the rent by £38 per annum until the conclusion of hostilities by reason of the fact that the garden could not be put in order until then. The landlord attempted to exact the full £150 as from Oct. 1, 1942, and the tenant applied to have the standard rent determined:—

HELD: upon the true construction of the tenancy agreement, the rent G was £112 per annum during the continuance of hostilities and £150 per annum thereafter. It was a progressive rent and the standard rent was £150 per annum.

[**EDITORIAL NOTE.** This case follows the decision in the *Bryanston* case (1), but, so far as progressive rent is concerned—a matter left rather open in the earlier case—it is now clear that a rent which is increased by one step only is a progressive rent.

AS TO STANDARD RENT, see HALSBURY, Hailsham Edn., Vol. 20, pp. 312-314, H para. 369; and FOR CASES, see DIGEST, Vol. 31, pp. 564-566, Nos. 7117-7132.]

Cases referred to:

*(1) *Bryanston Properties Co., Ltd.* v. *Edwards*, [1943] 2 All E.R. 646.

(2) *Wheeler* v. *Wirral Estates, Ltd.*, [1935] 1 K.B. 294; Digest Supp.; 104 L.J.K.B. 30; 152 L.T. 111.

(3) *Queen's Club Gardens Estate, Ltd.* v. *Bignell*, [1924] 1 K.B. 117; 31 Digest 447, *5932*; 93 L.J.K.B. 107; 130 L.T. 26.

(4) *Carter* v. *S.U. Carburetter Co.*, [1942] 2 K.B. 288; [1942] 2 All E.R. 228; Digest Supp.; 107 L.T. 248.

Appeal by the tenant from the decision of His Honour Judge Hancock, given on July 30, 1943, at the Kingston-on-Thames County Court. The facts are fully stated in the judgment of the court.

A. T. Denning, K.C., and *S. P. J. Merlin* for the appellant.

Stephen Murray for the respondent.

Uthwatt, J. [delivering the judgment of the court]: This is an appeal from a decision of the Kingston-upon-Thames County Court, made on an application by the appellant for the determination of the standard rent of the premises, No. 8, The Brambles, Woodside, Wimbledon, which are rated at £52 per annum. The premises were first let by an agreement dated July 1, 1942, made between the respondent as landlord and the appellant as tenant. The matter in issue depends in part on the construction of the tenancy agreement and in part on the construction and the application to the facts of the case of the definition of "standard rent," contained in the Increase of Rent and Mortgage Interest (Restrictictions) Act 1920, s. 12 (1) (*a*) as amended by the Rent and Mortgage Interests Restrictions Act, 1939. That definition as applicable to dwelling-houses of the class to which the house under consideration belongs runs as follows:

> The expression "standard rent" means the rent at which the dwellinghouse was let on Aug. 3, 1914, or, where the dwellinghouse was not let on that date, the rent at which it was last let before that date, or, in the case of a dwellinghouse which was first let after the said Aug. 3, the rent at which it was first let: Provided that, in the case of any dwellinghouse let at a progressive rent payable under a tenancy agreement or lease, the maximum rent payable under such tenancy agreement or lease shall be the standard rent.

Under cl. 1 of the tenancy agreement the landlord let the premises to the tenant:

> . . . for a term of one year from July 1, 1942, and afterwards quarterly subject to 3 months' notice on either side at an inclusive yearly rental of £150 (except as hereinafter provided) clear of all deductions except landlord's property tax . . .

payable at certain stated times. By cl. 2 (1) the tenant agreed "to pay the rent at all times in manner aforesaid without any deductions." By cl. 2 (14) the tenant agreed to keep the garden assigned to the premises in a neat and tidy condition. Cl. 3 provided, *inter alia*, that, if the said rents or any part thereof were in arrear, the landlord might re-enter. Cl. 4 (1) was as follows:

> The landlord hereby agrees with the tenant as follows: (1) That in view of the impossibility of obtaining the necessary labour and materials during hostilities to reinstate the gardens to accept a reduction of £38 for the period of hostilities only, the rent to revert to the reserved figure immediately and without notice after the cessation of hostilities in which Britain is now engaged.

At the trial some stress was laid upon the derelict condition of the garden and it appears to have been argued on the part of the landlord that there was either an implied obligation upon the landlord to reinstate the gardens after the end of hostilities or an implied obligation on the tenant to spend £38 per annum upon the gardens during the war, leading in either case, it was suggested, to the inference that the true rent throughout was £150. Inasmuch as on the hearing of this appeal counsel for the landlord was not called upon, the point has not been argued before us. We are content to deal with the case upon the footing favourable to the tenant (and we think it the right footing) that there is no such implied obligation and that there is merely stated a reason, not a very convincing reason, for requiring to be paid during the continuance of hostilities a sum lower than that required to be paid after their determination.

The first question is whether on the construction of the tenancy agreement, considered apart from the provisions of the Act, the rent payable under the agreement during the continuance of hostilities is £150 or £112 (that is, £150 less £38). The rent reserved in the reddendum is "£150 except as hereinafter provided," and the exception can refer only to £150 as reduced during the period of hostilities under cl. 4 (1). The covenant to pay rent is not a covenant to pay £150 but to pay the rent generally and that necessarily refers to the rent for the time being reserved by the reddendum. In cl. 3 the reference is to "rents" and not "rent." Cl. 4 (1) is not throughout consistent in expression. The sum of £150 is obviously the sum referred to as "the reserved figure" but the sum of £150 as reduced is described as the rent which is to revert to the reserved figure. The word "revert" is an inaccurate word, but the outstanding point is that the reduced sum is there treated as rent. As a matter of construction of the agreement the rent reserved by the agreement is, in our opinion, during the continuance of hostilities £112 and thereafter £150.

That being the construction of the tenancy agreement, considered apart from the Act, the next question is whether, for the purposes of the definition of "standard rent", the rent at which the premises are let is £112 rising to £150, or is £150. In our view it is £112 rising to £150. As was observed by LORD GREENE, M.R., in *Bryanston Property Co., Ltd.* v. *Edwards* (1), the Act contemplates the substance of the obligations of the tenant, or as DU PARCQ, L.J., put it in the same case, one ought not to be too technical in construing the Act. In this case the substance of the agreement is, in our opinion, an agreement to pay a rent which is to be increased upon the happening of a specified event, and not a rent of £150 to stand reduced to £112 until a certain event happens. The rent of £150 is a reality as well as the rent of £112, for it will be observed that the tenant might well find himself under a present liability to pay the increased rent without the opportunity of determining his tenancy before the increased rent became payable. No technicality is involved in treating the rent for the purposes of the Act as one which increases from £112 to £150.

We would add that we are not suggesting that, for an increased rent to be taken into account for the purposes of the Act, it must be one the active incidence of which it is not open to the tenant to avoid by determining his tenancy. That point is not before us. It is only for the purpose of emphasising what is involved in the substance of the transaction that we observe upon the chance of the tenant under the present tenancy agreement having to pay the increased rent willy-nilly.

One other matter may be referred to upon this part of the case. The tenancy agreement states a reason for the reservation of a lower rent until a particular point of time. It is not necessary to consider the value of the reason, for, assuming the transaction embodied in a tenancy agreement to be a reality, the rent may be made to vary for good reason, bad reason, or no reason at all.

The remaining question is whether these premises were let at a progressive rent payable under the tenancy agreement. Upon this point we have the advantage of the views expressed by LORD GREENE, M.R., in *Bryanston's* case (1). We agree with the views expressed by him and that agreement renders it unnecessary to deal at any length with much of the elaborate argument presented to us by counsel for the appellant. It was not contended, and it could not with any prospect of success be contended, that the rent was not a progressive rent. Any such contention to succeed must be based on the view that a progressive rent involves more than one step. The phrase "progressive rent" is not a term of art and the implication of more than one step is rejected both by the ordinary meaning of language and by the authority of *Wheeler* v. *Wirral Estates, Ltd.* (2), and *Bryanston's* case (1) to which we have already referred. The substantive point taken is that, accepting the position that the rent is a progressive rent, the progressive rent is not a progressive rent payable under a tenancy agreement. It was argued that the word "payable" should be read as meaning "in fact has become payable in events which have happened," or that the words "payable under a lease or tenancy agreement" should be read as meaning "necessarily becoming payable under, and during the term of, the lease or tenancy agreement." In our opinion the proviso is not patient of either construction. The short answer to this contention is that the reference both in the substantive part of the definition and in the proviso is to the terms of the letting. Events, having an effect on the amount of the rent, which have happened or which may happen do not come into the picture.

We are confirmed in our rejection of the first gloss by the fact that under sect. 11 of the Act of 1923, the county court is given power on the application of the landlord or tenant to determine summarily any questions as to the amount of the standard rent of any dwellinghouse. Such an application may be made at any time and, if it be so made, the court, one would naturally assume, must then be in a position to deal with it. There can be only one standard rent and acceptance of the first gloss would negative the court's power to deal conclusively with this application unless all events which might bear upon the maximum rent had been ascertained. That is an impossible position. This criticism of the first gloss does not apply to the second gloss; but the strain the second gloss places upon the language of the section passes the breaking point and it may fitly be left at that.

The argument of counsel for the appellant on construction was largely concerned with the general policy of the Act and the manœuvres on the part of landlords rendered possible by the construction of its provisions which he sought to displace. Upon this we observe only, that so far as the court in construing the Act is concerned at all with the policy, it is concerned with the policy embodied in it as gathered from its terms and with the means provided in the Act for giving effect to that policy. The policy of this Act, so far as the ascertainment of the standard rent of dwellinghouses first let after Sept. 1, 1939, is concerned, is to leave that standard rent to be determined by the terms of the first tenancy agreement. The generous landlord is indeed protected in that the standard rent is not to be less than the rateable value at the critical date. Subject to that, the terms of the first bargain fix the standard rent whatever may be the circumstances of the landlord, the tenant or the property. The landlord, concerned with the terms of the first letting not only as fixing his immediate return but also as fixing the standard rent, in determining his course of action in relation to the first tenancy is entitled to have one eye on the Act while having his other eye on the paper embodying the tenancy terms. The Act is addressed to him. Why should he wander in the dark when a lamp is ready to hand? The argument for the tenant in the ultimate analysis amounted only to this, that bargaining between the landlord and the tenant on the occasion of the first letting when the landlord had the terms of the Act in mind and could order his course accordingly, might very well result in a rent which ought not to be regarded as the standard rent. Whether that be so or not, it is not for us to express an opinion. But, assuming it to be so, the result suggested is a criticism on the policy of the Act and not an argument upon its construction.

The county court was, in our opinion, right in holding that the standard rent of these premises is £150. The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Oswald Hanson & Smith* (for the *appellant*); *S. Seifert & Co.* (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

DUDLEY *v.* DUDLEY.

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and Goddard, L.JJ.), **December 13, 14, 1943.**]

Rent charges and Annuities—Annuity free of tax—Secured by separation deed—What amounts to variation—Agreement by wife not to reclaim tax—Finance Act, 1941 (*c.* 30), *ss.* 25 (1), 27 (1).

On June 16, 1932, a husband and wife entered into a deed of separation by which the husband covenanted to pay to the wife for her maintenance and support "such a sum as, after deduction of income tax for the time being payable in respect thereof, will leave a clear sum of £1 15*s*. per week." On Sept. 20, 1939, the parties entered into a supplemental deed by which the wife covenanted not to make any claim for tax deducted in arriving at the amount of the payments already made or thereafter to be made, provided she should receive not less than £1 15*s*. per week as provided by the deed of June, 1932. The husband contended that by reason of the Finance Act, 1941, s. 25, he was only liable to pay the wife twenty twenty-ninths of £1 15*s*. a week:—

HELD: the terms of the supplemental deed were not a variation of the original deed within the meaning of the Finance Act, 1941, s. 25.

[**EDITORIAL NOTE.** The point here is a very short one but of much practical importance. The Act of 1941 does not apply where there has been a variation of the deed since Sept. 3, 1939. The effect of the supplemental deed was merely to add a covenant by the wife not to reclaim any tax deducted at the source and this is held not to amount to a variation of the deed since the husband's liability under the deed is not altered.

FOR THE FINANCE ACT, 1941, s. 25, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 34, p. 119.]

Appeal by the plaintiff (the wife) from an order of Croom-Johnson, J., dated June 19, 1943. The facts are fully set out in the judgment of Lord Greene, M.R.

S. Seuffert for the appellant.

F. H. Lawton for the respondent.

Lord Greene, M.R. : This is a very unfortunate piece of litigation, because, so far as I understand the facts, it was never really necessary. The parties are husband and wife, not in comfortable circumstances, who entered into a separation deed on June 16, 1932. Under that deed, the husband agreed to pay to his wife for her maintenance and support.

> . . . such a sum as, after the deduction of income tax for the time being payable in respect thereof, will leave a clear sum of £1 15*s.* per week.

There is no question as to the effect of that covenant. It is a covenant to pay a gross sum which can be calculated by taking the net sum of £1 15*s.*, and adding to it, according to a well-known formula, the amount of tax referable to a net sum of that amount. The covenant is a covenant to pay the gross sum. That covenant is performed not, of course, by paying the gross sum to the payee, but by paying the net sum to the payee and paying the tax to the Revenue. As soon as that is done, the covenantor has discharged his obligations towards the payee.

The present action was started with a view to determining what, in the events which have happened, is the effect of the Finance Act, 1941, s. 25, on the obligations and rights of the parties. The matter came before Croom-Johnson, J., on these materials only—the separation deed and a supplemental deed, to which I shall presently refer. The wife was claiming that sect. 25 did not apply and that the husband remained liable to pay her a net sum of £1 15*s*. On the other hand, the husband was contending that sect. 25 did apply ; and that, accordingly, under the section (to which I shall refer in a moment in more detail) he was only liable to pay her 20/29ths of £1 15*s*.

The circumstances in which the supplemental deed came to be executed were not before Croom-Johnson, J., But having regard to the recitals in the supplemental deed, it seemed to us extremely difficult, if not impossible, to decide this matter without understanding what that deed provides and what the object of it was. We had supplied to us some correspondence which had taken place between the solicitors to the parties and also some correspondence with the inspector of taxes which shows that there was in one quarter or the other, or perhaps in both, some fundamental misapprehension as to the income tax law. Indeed, that is not to be wondered at, when I find that the contributions of the inspector of taxes to the discussion were calculated to obscure rather than to clarify the position.

But, so far as one can ascertain from that correspondence, and the statement of counsel, the position was this. The husband, in making his return of total income, for the purposes of claiming his allowances, had not referred to this separation deed and his obligations under it. The result of its omission (if it had been the right course to take) would have been to enable him, when the allowances had been taken into account, to use part of the tax referable to this covenant to discharge his own tax liability. That is a course which appears to be forbidden by the Income Tax Act, 1918, s. 17, which, as amended, says :

> A claimant shall not be entitled to allowance or deduction or relief in respect of any income the tax on which he is entitled to charge against any other person, or to deduct, retain, or satisfy out of any payment which he is liable to make to any other person.

The husband ought, in his return, to have referred to this covenant, because the tax payable in respect of the covenanted sums was not his tax, but the tax of the payee, in that those sums are part of the payee's income and not part of his own income for tax purposes. However, that was the position ; and the inspector was saying that the husband was not entitled to do that.

Looking at it from the point of view of the wife, the position was this. It appears that she had a very small independent income of £20 per annum, or something of that order ; and she apparently fell under the income tax limit even when the sums payable under this covenant were taken into account. Accordingly, she was in a position to reclaim from the Revenue the whole or part of the tax which had been deducted from the gross covenanted payments. That she had not done; nor, apparently, did she desire to do so.

In those circumstances the local inspector seems to have made this suggestion. If the wife would waive any claim she might have to repayment of tax, he, the inspector, would allow the husband to do what he wanted to do. The inspector was afraid that, if he made that concession to the husband, the wife might then come in and claim the tax back; and in consequence the Revenue would lose. That seems to have been the proposal. As a matter of fact it appears from the correspondence that, although that proposal was made (and indeed, the local inspector agreed to it, as appears from the letter of Jan. 10, 1940), when this action of the inspector found its way back to the head office, the head office would have nothing to do with it. Although they did not go back on the arrangement so far as the past was concerned, the inspector was forbidden to continue it for the future, with the result that that arrangement was only to operate down to and including the tax year 1938-1939. I mention that to show the extraordinarily unfortunate position in which these two parties have been placed owing to an attitude on the part of the inspector, which I have no doubt was adopted in perfect good faith and intended to be helpful, but has led them to enter into a transaction which, by its obscurity, has resulted in this unfortunate litigation.

In the circumstances there was really no practical difficulty in the situation. The wife could have reclaimed this tax. She could then do what, apparently, she was always willing to do, hand it back to the husband, who then would have been in a perfectly satisfactory position, so far as the tax was concerned. Instead of which they adopted a most roundabout way of doing it, largely, apparently, at the suggestion of the inspector of taxes. I am not criticising his goodness of intention and I am sure he wished to be helpful, but the result has been most unfortunate, because the whole of this transaction, which was carried out with a view to securing the concession which he wished to make, has now become perfectly useless, because the concession has been withdrawn by higher authority.

There is one more matter to which I must refer. The correspondence shows that during the discussions the wife was afraid that she might, in some future circumstances, be subjected to an assessment in respect of this £1 15*s*. That was an entire misconception. The tax referable to that £1 15*s*. was paid once and for all by the husband. She could never in any circumstances, apart from some exceptional type of legislation, have been made liable to a second assessment in respect of that £1 15*s*., which, by the very terms of the deed, reached her hand after tax had been paid. Nevertheless, she was frightened that that might take place. The supplemental deed is dated Sept. 20, 1939, long before the Finance Act of 1941 was passed, or indeed in contemplation, but in fact 17 days after Sept. 3, which was the crucial date mentioned in sect. 25. It is made between the husband and wife; and is expressed to be supplemental to the deed of separation, which is called the "principal deed." It contains these recitals:

> Whereas the husband has to date paid to the wife the net sum of £1 15*s*. per week as provided by the principal deed, as the wife hereby acknowledges, and whereas the inspector of taxes has raised an assessment upon the husband for income tax in respect of the said payments [that was inaccurate] and whereas the husband is desirous to obtain concessional relief in respect of the said income tax [that, again, is inaccurate] Now This Deed Witnesseth that the wife hereby declares (subject always to the proviso hereinafter contained) that she does not make any claim for tax deducted in arriving at the amount of the said payments already made or that shall hereafter be made under the principal deed.

I can give no meaning to these words except that the wife was promising to the husband that she would not make any claim against the Revenue to have refunded to her the tax deducted. That was its purpose and for this reason. The husband would only be able to obtain the concession from the inspector if his wife agreed herself not to claim against the Revenue. Therefore, he was interested in obtaining from her an undertaking, which he could enforce, not to put forward a claim the result of which would be that he would lose his concession. So far the deed is intelligible. Then it goes on to this proviso:

> Provided always and it is hereby declared that the intention of the parties is that

> under no circumstances shall the wife receive less than a net amount of £1 15*s.* a week after payment or deduction of tax and that the declaration by the wife [that is the declaration that she will not make any claim for tax deduction] hereinbefore contained shall not apply to any payment in respect of which the wife shall be called upon to bear or pay income tax and that should the wife at any future date be called upon to bear or pay income tax in respect of the receipt of the said sum of £1 15*s.* per week, the husband will indemnify and reimburse the wife in respect thereof, so that she shall actually receive and be paid the net sum of £1 15*s.* per week.

That proviso is contemplating the possibility that at some future time a tax A
assessment will be raised against the wife in respect of this £1 15*s.* It was put in, as I interpret it, to ensure that, if such assessment were to be raised against the wife in future, the husband would discharge it for her. It was something which it is almost impossible to suppose would ever happen; because the tax is paid and has been paid by the payer. However, that appears to be the object of this proviso. B

I shall have to come back in a moment to the supplemental deed: but at this point I ought to refer to sect. 25 (1) of the 1941 Act, which provides:

> Subject to the provisions of this section, any provision, however worded, for the payment, whether periodically or otherwise, of a stated amount free of income tax, or free of income tax other than sur-tax, being a provision which (*a*) is contained in any deed or other instrument . . . (*b*) was made before the third day of September, 1939; and (*c*) has not been varied on or after that date, shall, as respects payments falling C
> to be made during any year of assessment, the standard rate of income tax for which is ten shillings in the pound, have effect as if for the stated amount there were substituted an amount equal to 20/29ths thereof.

The object of that Act passed in 1941 was to remedy the hardship caused by the very great increases in the rate of income tax to persons who had bound themselves to pay annuities or annual sums in effect free of tax. The result of the provision is, so to speak, to share the increased burden of tax in a way D
thought equitable by the legislature as between payer and payee. But it is not done by re-allocating the tax in any way: it is done by writing down the amount of the net sum to be paid. Therefore, it is not true in law, although it may be true in substance, to say that the payee by this statute is having a burden of tax cast upon him; he is having the net amount reduced by a conventional figure. The section applies to a covenant in this form by reason of sect. 27 (1); and the covenant is to be treated accordingly as a provision for the E
payment in the present case of £1 15*s.* free of income tax.

It is to be noticed particularly that the section is dealing with what is described as the provision for the payment "of a stated amount free of income tax." It is only to apply where that provision was made before Sept. 3, 1939. Accordingly, if it had not been for the supplemental deed, there could be no question that the covenant in the original separation deed was a provision F
for the payment of a stated amount free of income tax. It was made before Sept. 3, 1939; and the liability of the covenantor, accordingly, would have been scaled down to 20/29ths of £1 15*s.*

It is said that the supplemental deed has changed the position. In order that the section can apply, it must be possible to predicate of the provision for the payment of the stated amount that it had not been varied on or after Sept. 3, 1939. In this case it is said on the one side that it has been varied G
by the supplemental deed. On the other side it is said that the supplemental deed effects no variation of the provision for payment. One would have expected, I think, that the section would have excluded from its operation any case where a covenant entered into before Sept. 3, 1939, had been recognised after that date as being still binding. If all the parties had done after Sept. 3 was to affirm the earlier covenant, that should, one would have thought, have been sufficient to take the case out of the section, because it could have been said that here H
the parties, with the increased tax liability on the covenantor before their eyes had nevertheless, affirmed his liability to pay notwithstanding the increased tax. However, the legislature has not thought fit to word it in that way; because, in order to take a case out of the section, you must find not an affirmation, not a confirmation but a variation. What does that mean? First of all, what must be found to have been varied is the provision for the payment of the stated amount. The question of whether there has or has not been a variation, as it seems to me, must be examined without reference to the Act of 1941 at all. In other

words, you must look at the original provision, regarding it, in the case of a deed, simply as a contractual obligation. You must then look at the alleged variation, regarded again as a contractual obligation, and ask yourselves the question: Has the latter varied the former merely taken as a contract? If, as a result of that examination, one finds that the latter has introduced no variation into the contract as to the provision of the stated amount, then one is unable to bring the case within sect. 25 (1) (*c*); because a mere restatement A or confirmation of an existing obligation, in my opinion, cannot be treated as a variation of the provision within the meaning of the section.

That brings one back to the supplemental deed itself. First of all, it is said that the undertaking by the wife not to make a claim against the Revenue for return of tax deducted is a variation of the provision for the payment of £1 15*s*. I cannot so regard it. The obligation down to that point remains exactly as it was before, namely, to pay a gross sum consisting of £1 15*s*. plus B x; an obligation which, as between the covenantor and covenantee, is satisfied by paying £1 15*s*. to the covenantee and x to the Revenue. That clause does not affect in any way the obligation to make the payment. It is merely an arrangement by which the wife agrees not to make a claim against the Revenue which, under the statute, she is entitled to make on the footing that too much tax has been paid in respect of her income.

C Then it is said, if that argument be not right, nevertheless the rest of the deed has the effect of imposing on the convenantor a covenant that in no circumstances shall the wife receive less than the net amount of £1 15*s*. per week after payment or deduction of tax. That is precisely what the covenantor had covenanted by the separation deed—that and nothing more and nothing less. Regarded purely from a contractual point of view, this provision which I have just read neither adds nor detracts from the already existing obligation D of the husband to pay the gross sum which will leave a net sum of £1 15*s*. per week. As I construe it, it is nothing more than a reaffirmation of the existing obligation, inserted as a proviso to an undertaking by the wife not to make a claim against the Revenue the effect of which would have been to upset the friendly arrangement which the husband was proposing to make with the inspector of taxes.

Therefore, in my view, this document cannot be construed as amounting E to a variation of the provision for the payment of £1 15*s*. per week free of tax. It is merely a reaffirmation of that in emphatic language by way of a proviso on the wife's undertaking not to make a claim against the Revenue, in order that the husband might thereby obtain a collateral benefit.

Therefore, in my opinion, the effect of the application of sect. 25 is to entitle the husband to discharge his liability to the wife on payment of 20/29ths of £1 15*s*.

F That really disposes of the question at issue. I should say that the decision of CROOM-JOHNSON, J., was to the same effect, but his approach to the matter was different, largely due to the fact that he had not before him the surrounding circumstances which we have had before us, sufficiently at any rate to make it clear how the supplemental deed came to be executed; nor had he before him the knowledge of the facts to which the recitals refer.

G MACKINNON, L.J.: I agree. I think the material point is that the later deed of Sept., 1939, did not vary the provision contained in the earlier deed; in truth it only reaffirmed it to the same purport. That is to say, I do not think it is possible for the wife to say that the section of the Act of 1941 about 20/29ths did not apply to the payments she was receiving. I do not think I desire to add anything further to the very full analysis of the position made by LORD GREENE, M.R.

H GODDARD, L.J.: I agree.

Appeal dismissed.

Solicitors: *Church, Rendell & Co.*, agents for *Percy H. Chappell, Stourbridge* (for the appellant); *Haslewood, Hare & Co.*, agents for *Higgs & Sons*, Brierley Hill, Staffs (for the respondent.)

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

CONQUEROR PROPERTY TRUST, LTD. *v.* MAYOR, ALDERMEN AND BURGESSES OF THE BOROUGH OF BARNES.

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J., Macnaghten and Tucker, JJ., **November 25, 1943.**]

Landlord and Tenant—Rent restriction—Standard rent—Letting to company with same directors and shareholders as lessor for short period at high rent—No intention to occupy—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (*c.* 17), *s.* 12 (1) (*a*)—*Rent and Mortgage Interest Restrictions Act,* 1939 (*c.* 71), *Sched. I.*

The appellant company were the owners of certain flats which came within the Rent Restriction Acts. By agreements under seal and dated Dec. 9, 1939, the appellants let, for the first time since their construction, four of the flats on conditions and covenants usual for such tenancies. The terms were for one month from Dec. 1, 1939, at rents payable in advance at rates varying from £210 to £250 per annum. The tenants were a company of which the directors and to a fair extent the shareholders were the same as those of the appellant company. The tenant company never intended and did not at any time occupy the premises, nor did it derive any benefit from the agreements and the rents payable thereunder were not in fact paid until May, 1940, when the appellants were about to let one of the flats to an independent tenant. In 1942, in reply to written requests from the then tenants, the appellants stated that the standard rents of the flats were the rents payable under the agreements of Dec. 9, 1939. The appellants were charged under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 11, with having made statements with regard to the standard rents of the premises which were false in a material particular. The prosecution argued that the lettings of Dec. 9, 1939, were mere show and pretence and not lettings within the meaning of the Act :—

HELD : the letting referred to in the Act means a real letting by a landlord who intends to let to a tenant who intends to take, and does not include a document executed merely in an attempt to establish a standard rent.

[**EDITORIAL NOTE.** Shortly after the commencement of the present war, in certain parts of England property could be let only at a much lower rent than it usually commands. Where there was a first letting after 1939, the result would be to saddle the property with a low standard rent. Many ways out of this difficulty have been attempted, some of which seem at present to have proved successful. The method here adopted, however, had been held to be no proper letting of the property and the standard rent is the lower rent taken on the first *bona fide* letting.

AS TO STANDARD RENT, see HALSBURY, Hailsham Edn., Vol. 20, p. 312-314, para. 369 ; and FOR CASES, see DIGEST, Vol. 31, pp. 564, 565, Nos. 7117-7127.]

Cases referred to :

(1) *Davies* v. *Warwick*, [1943] K.B. 329 ; [1943] 1 All E.R. 309.
(2) *Carter* v. *S.U. Carburetter Co.*, [1942] 2 K.B. 288 ; [1942] 2 All E.R. 228.
(3) *Chamberlain* v. *Farr*, [1942] 2 All E.R. 567.

APPEAL by way of case stated from a decision of the Appeals Committee of the Surrey Quarter Sessions affirming a decision of the Mortlake Petty Sessional Court convicting the appellant company on charges under the Increase of Rent and Mortgage (Restrictions) Act, 1920, s. 11.

H. J. Wallington, K.C., and *Valentine Holmes* for the appellant company.
C. Erskine Symes for the respondents.

MACNAGHTEN, J. [delivering the judgment of the court] : This is an appeal by way of case stated by the Surrey Quarter Sessions for the opinion of the court.

The appellant, the Conqueror Trust, Ltd., is the owner of a large block of flats, known as Sheen Court, and was convicted by the Mortlake Petty Sessional Court on each of four summonses charging it with an offence under sect. 11 of the Increase of Rent and Mortgage (Restrictions) Act, 1920, in that it had supplied a statement in writing as to the standard rent of the flat mentioned in the summons which was false in a material particular. On appeal to the Surrey Quarter Sessions the convictions were upheld. Hence the present appeal to this court.

Sheen Court, which is situate partly in the borough of Barnes and partly in the borough of Richmond-on-Thames, was erected by the appellant between the years 1935 and 1937. Some of the flats were let before the commencement of the present war. The four flats in question, Nos. 39, 40, 53 and 86, were vacant on that date and had never been let previously. The rateable values of the flats are £28, £34, £34 and £28.

By the Rent and Mortgage Interest Restrictions Act, 1939, it was provided that the expression "standard rent" means the rent at which a dwelling-house was let on Sept. 1, 1939, or where a dwelling-house was not let on that date the rent at which it was last let before that date, or in the case of a dwelling-house which was first let after Sept. 1, 1939, the rent at which it was first let. The standard rents of the 4 flats are, therefore, the rents at which they were first let after that date.

By four agreements under seal dated Dec. 9, 1939, the appellant let these four flats for one month from Dec. 1, 1939, at a rental at the rate of £250 per annum in respect of Nos. 39 and 40, £240 in respect of No. 53, and £210 in respect of No. 86. The agreements are in the usual form for such tenancies. The landlord agreed to let and the tenant to take the flat and to hold it for a period of one month from Dec. 1, 1939, paying and yielding a rental at the rate of so much per annum. The tenant agreed to pay the rent monthly in advance; to keep the flat in good and tenantable repair as a private dwellinghouse or residential chambers.

The tenant in each case was a limited liability company—Knight & Co., Ltd. The directors of the appellant company, the Conqueror Property Trust, Ltd., and the directors of Knight & Co., Ltd., are the same, and to a fair extent the same persons are shareholders in both companies. The case states that Knight & Co., Ltd., never intended to occupy or use any of the flats, and the agreements were merely for the purpose of establishing standard rents. Knight & Co., Ltd., got nothing out of the transaction and entered into it because of the community of interest between the two companies. Although the agreements provided for the payment of the first month's rent on the day of signing of the agreements no rent was in fact paid until May of the following year. In that month the appellant was about to let one of the flats to an independent tenant, and apparently it was then thought desirable, in order to preserve the position that payment of rent under these agreements should be made.

In the autumn of 1942 the persons who had then become tenants of these four flats exercised their right to demand from their landlord a statement as to what was the standard rent, and in response to the demand the appellant stated that the standard rents were of the amounts set out in the agreements of Dec. 9, 1939.

Before the petty sessional court the appellant was convicted of the charge laid against it and was fined £10 and costs on each summons.

The question is whether the agreements, made on Dec. 9, 1939, were agreements to let a dwellinghouse within the meaning of the Rent Restrictions Acts. Counsel for the appellant insisted that the agreements were, on their face, perfectly valid and effective agreements to take the flats and to pay the rents. But a document may be executed with no intention that it should be acted upon, but merely for the purposes of show. The case for the prosecutors, the corporation of Barnes, was that these agreements were documents that were executed for the purpose of show—that they were shams, and, therefore, were not lettings within the meaning of the Rent Restrictions Acts. That was the view of the matter held by both the petty sessional court and by the court of quarter sessions. Indeed, it is difficult to see how any court could have come to any other conclusion.

The letting that is referred to in the Rent Restrictions Acts obviously means a real letting by a landlord who really intends to let to a tenant who really intends to take. It does not include a fictitious document executed merely for the purpose of being paraded as a document establishing a standard rent. The question submitted for the opinion of the court, whether the court of quarter sessions came to a correct determination in point of law, must be answered in the affirmative. The statement made by the appellants as to the standard rent of each of these four flats was false in a material particular, and the convictions must be upheld.

Appeal dismissed with costs.

Solicitors: *Stikeman & Co.* (for the appellant company); *A. C. Fox*, Town Clerk (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

McMAHON *v.* DAVID LAWSON, LTD.

[HOUSE OF LORDS (Viscount Simon, L.C., Lord Thankerton, Lord Russell of Killowen, Lord Macmillan and Lord Wright, **October 19, December 7, 1943.**]

Workmen's Compensation—Average weekly earnings—Concurrent contracts of service—One contract of service where workman is not a "workman" within the Act—Workmen's Compensation Act, 1925 (c. 84), *ss.* 3 (2) (*e*), 10 (ii).

The appellant, who was admittedly entitled to compensation during incapacity resulting from an accident, was earning 18*s.* per week as a part-time omnibus driver in the employ of the respondents and £2 10*s.* per week and board and lodging estimated at 25*s.* per week under a contract of service with his father in whose house he was living. The Act excludes from the definition of workman a member of the employer's family dwelling in his house and it was contended that in computing the average weekly earnings of the appellant, the sum earned from his father could not be taken into account, since, in the case of that contract of service, he was not a workman within the Act:—

HELD: upon the proper construction of sect. 10 (ii) of the Act of 1925, there was no reason to restrict the meaning of "concurrent contracts of service" by supplying the words "in which the employee is a 'workman' within the meaning of the Act," and the appellant was entitled to include both his sets of earnings in computing his average weekly earnings.

[**EDITORIAL NOTE.** The Workmen's Compensation Act 1925 s. 10 (ii) provides that a workman shall be entitled to base his compensation upon the remuneration he receives from concurrent contracts of service as well as what he receives from the employment in which he was injured. It is here contended that the concurrent contracts of service must be such that the workman could have claimed compensation if he had been injured in an accident arising out of and in the course of them. It is shown however that it has already been decided in the House of Lords that this is not the case and the workman can include remuneration received in all concurrent contracts of service.

AS TO AVERAGE WEEKLY EARNINGS AND CONCURRENT CONTRACTS OF SERVICE see HALSBURY, Hailsham Edn., Vol. 34, pp. 937, 938, para. 1283; and FOR CASES, see DIGEST, Vol. 34, pp. 426, 427, Nos. 3467-3473.]

Cases referred to:

*(1) *Raphael (Owners)* v. *Brandy*, [1911] A.C. 413; 34 Digest 427. *3470*; 80 L.J.K.B. 1067; 105 L.T. 116; 4 B.W.C.C. 307; *affg.*, [1911] 1 K.B. 376.

(2) *M'Sweeney* v. *Clan Line of Steamers, Ltd.*, [1935] S.C. 651; Digest Supp.; 28 B.W.C.C. Supp. 154.

(3) *Conroy* v. *William Baird & Co., Ltd.*, [1940] S.C. 446; 33 B.W.C.C. Supp. 94.

APPEAL by the workman from the decision of the First Division of the Court of Session. The facts are fully set out in the opinion of VISCOUNT SIMON, L.C.

James Walker and *George Reid* for the appellant.

T. F. Blades, K.C., and *Sherwood Calver* for the respondents.

VISCOUNT SIMON, L.C.: My Lords, the appellant met with an accident arising out of and in the course of his part-time employment by the respondents, and is admittedly entitled, under the Workmen's Compensation Act, to a weekly payment from them during his incapacity resulting from this injury. The only question now to be decided is whether the amount of that weekly payment is to be arrived at by reference solely to what he was earning from the respondents (which was 18*s.* per week) or whether his average weekly earnings are to be computed by including also what he was earning under another contemporary part-time contract of service entered into with his father, in whose house he was living. This latter employment would not constitute him a "workman" under the Act of 1925 (see sect. 3 (2) (*c*)), and consequently, if the appellant had met with an accident while serving his father, the statute would give him no compensation on that account. But it still remains to construe and apply sect. 10 (ii) of the Act, which is as follows:

> Where the workman had entered into concurrent contracts of service with two or more employers under which he worked at one time for one such employer and at

> another time for another such employer, his average weekly earnings shall be computed as if his earnings under all such contracts were earnings in the employment of the employer for whom he was working at the time of the accident.

The question is whether the appellant is a "workman" who has "entered into concurrent contracts of service" with two employers, when, as regards one of the two contracts of service, he is not a "workman" within the meaning of the Act. LORD MONCRIEFF, when delivering the leading opinion in the A First Division of the Court of Session, put the question thus:

> Can one who, being admittedly a workman sues an employer for compensation, refer to earnings drawn by him from another employer in whose service he is not a workman?

The Inner House, confirming the view of the Sheriff-Substitute, unanimously answered this question in the negative.

There is undoubtedly a powerful argument to be advanced for this view, and B the correct answer might well be regarded as doubtful, were it not that the exact question of construction has already been the subject of decision by this House—a circumstance which escaped the notice of everybody until after the arguments in the present appeal were concluded. In *Owners of S.S. Raphael* v. *Brandy* (1), the injured workman was a stoker serving on board a merchant ship, but he was also a Royal Naval Reserve stoker, in which character he received an annual C retaining fee of £6. This retaining fee was held by the House of Lords to be "earnings" under a "concurrent contract" of naval service with the Crown, and it was further decided that it had to be taken into account in calculating the stoker's average weekly earnings, notwithstanding that the Act does not apply to persons in the naval service of the Crown: sect. 9 (1) of the Act of 1906, now sect. 33 (1) of the Act of 1925. What is particularly striking is that, while the decision in this House was unanimous, in the English Court of Appeal the D rival constructions were set out with emphasis and clearness in the judgment of FLETCHER MOULTON, L.J. (with whom COZENS-HARDY, M.R., agreed), and in the dissenting judgment of FARWELL, L.J., respectively. My noble and learned friend LORD THANKERTON has, in the opinion which he is about to read, extracted the essential passages, so I need not reproduce them here. The consequence is that it is beyond dispute that in *Brandy's* case (1), this House, with these contrasted views before it, deliberately adopted that for which the E present appellant contends.

It follows that the three questions of law appended to the stated case should be answered in the negative, and the appeals must, therefore, be allowed, with costs here and below.

LORD THANKERTON: My Lords, the facts of this case have been sufficiently F stated by my noble and learned friend, who has also stated the short question raised on the construction of the second rule prescribed in sect. 10 of the Act for the purposes of the provisions of the Act relating to "earnings" and "average weekly earnings" of a workman.

Since the hearing of this appeal was concluded—in common with your Lordships—my attention has been drawn to the decision of this House in *Owners of S.S. Raphael* v. *Brandy* (1), which clearly settled the question of construction G raised in the present appeal. I regret that the attention of the courts below was not called to this decision. This House unanimously affirmed the decision of the Court of Appeal, and the opinion of FLETCHER MOULTON, L.J., who, along with COZENS-HARDY, M.R., formed the majority, on the question of construction raised in the present appeal was approved in this House, while the dissenting opinion of FARWELL, L.J., was rejected. The injured workman was a stoker on board a merchant ship, and was also a Royal Naval Reserve H stoker, in respect of which he received an annual retaining fee of £6. After holding that the £6 was earnings under a contract of service with the Crown, and having in view the exception of persons in the naval or military services of the Crown under sect. 9 (1) of the Act of 1906—re-enacted almost *verbatim* as sect. 33 (1) of the Act of 1925—FLETCHER MOULTON, L.J., proceeded to deal with the provision as to concurrent contracts contained in Sched. I, para. 2 (*b*) of the Act of 1906—re-enacted *verbatim* as sect. 10 (ii) of the Act of 1925, as follows at p. 383:

> This being so, the claim is rightly made, and the only question is whether the contract

> of service with the Crown comes within the provision as to concurrent contracts which is found in Sched. I, para. 2 (*b*), which relates to concurrent contracts of service. Now there is nothing whatever in the Act to say that a contract of service with the Crown is not a contract of service. It is perfectly true that the employer is in such a case shielded from claims under such contract of service, but that is in these contracts the personal privilege of the Crown and does not arise from the contract with the Crown being declared by the Act not to be a contract of service at all. The language of Sched. I, para. 2 (*b*), is perfectly general. The contracts of service therein referred to are not restricted to contracts of service under which the employer is liable to claims under the Act. Not only is this true with regard to the language of the paragraph, but it is also necessitated by the evident aim and object of the paragraph. It is intended to enable the tribunal to arrive at a proper estimate of the average weekly earnings of the workman for the purpose of measuring the compensation under a contract of service under which an employer is liable.

Contrast this with the opinion of FARWELL, L.J., at p. 384 :

> I am of opinion that the effect of sect. 9 is to exclude the Crown and persons in the naval or military services of the Crown from the operation of the Act, and that sect. 13 must accordingly be read as if the words " other than the Crown " were written into the definition of " employer " [now sect. 5 of the 1925 Act] and the words " other than persons in the naval or military services of the Crown " were written into the definition of " workman " [now sect. 3 of the 1925 Act]. Turning next to Sched. I, para. 2, it seems obvious to me that the " workman " and " employer " therein mentioned are the only workmen and employers to whom the Act applies, and that clause (*b*) cannot be read so as to give two different meanings to the words " employer " and " workman " according to the circumstance whether the accident happened while he was in the service of the Crown or of the employer. It is clear that if the accident happened while he was in the service of the Crown he would get no compensation under the Act at all because he is not a workman nor is the Crown an employer within the meaning of the Act. I fail to see how I can treat Crown and workman as within the Act when the workman is in the employment of another person. Two conditions have to be fulfilled before cl. (*b*) has any application. If they are stated in two sentences instead of in one, the matter becomes clear : " If a man being a workman within the Act has entered into a contract of service with an employer within the Act under which he worked at one time for such employer, and the same man being a workman within the Act has entered into another contract with an employer within the Act under which he worked at another time for such second employer, the two contracts being concurrent." Under these words no question arises, and I can see no ground on which the meaning of the words " workman " and " employer " can be varied in such a case so as to make "employer" include the Crown in one but not in the other and "workman" include a man in the naval or military services of the Crown in one case but not in the other.

These contrasted views and their reception in this House appear to me to demonstrate that the question of construction in this appeal cannot be differentiated from the question of construction which was considered and decided by this House in 1911, and, though the view of FARWELL, L.J., commands my sympathy, the importance of continuity of decision in statutory construction constrains my adherence to the earlier decision of this House.

I would like to associate myself with the criticisms of LORD MONCRIEFF on the form of the stated case. There is another point to which I would like to advert. This case has been decided on relevancy before the arbitrator and in the Court of Session, and, in my opinion, it was rightly so dealt with, for the only material fact in dispute was the existence of the appellant's alleged contract of service with his father, but I agree with the opinion of LORD HUNTER in *M'Sweeney* v. *Clan Line of Steamers, Ltd.* (2), at p. 656, where he said :

> More than once, judges in this court have expressed the view that it is extremely undesirable that arbitrators should throw out applications by workmen under the Workmen's Compensation Acts on the plea of relevancy. There may be very exceptional cases where such a course would be justified.

The present case, in my opinion, is such an exceptional case, for the only point in the case is a clear-cut one, there is only one material fact in dispute, and the matter is suitable for discussion on relevancy. Even if the recent tendency is towards written pleadings in such applications, these should not be as strictly treated as they would be in an ordinary civil action. Apart from a few exceptional cases of which the present case and *Conroy* v. *William Baird & Co.* (3) are examples, I am of opinion that the Act of 1925 intended to secure by sect. 49 that the application should be heard, tried and determined after evidence before any appeal by stated case was taken, and should not be tried piecemeal. I agree with the motion proposed by VISCOUNT SIMON, L.C.

LORD RUSSELL OF KILLOWEN: My Lords, the object of the Workmen's Compensation Act, 1925, is to secure (subject to a limit as to amount) compensation to a workman to whom personal injury by accident, arising out of and in the course of the employment, is caused. For brevity's sake, I refer only to accidents which injure, but do not kill the workman. The person liable to pay the compensation is the employer in whose employment the workman was working at the time of the accident. The object of the compensation is to make good (subject always to a limit of amount) the damage which he sustains in the way of loss of earning power, by reason of the accident which has befallen him in the employment of that employer.

Sects. 1 to 7 of the Act deal with the "Right to Compensation," and define the conditions which must be fulfilled before a workman can establish a claim to such compensation. Sects. 8 to 13 of the Act deal with the "Amount of Compensation," and provide how the amount payable by the employer is to be ascertained. For the present purpose it is sufficient to say that the compensation payable, in the case of a non-fatal accident, is a weekly payment during the incapacity for work, and is calculated by reference to (among other factors) the workman's "average weekly earnings." Sect. 10 enacts that, for the purpose of the provisions of the Act relating to "average weekly earnings," certain rules are to be observed of which the second runs thus:

> (ii) Where the workman had entered into concurrent contracts of service with two or more employers under which he worked at one time for one such employer and at another time for another such employer, his average weekly earnings shall be computed as if his earnings under all such contracts were earnings in the employment of the employer for whom he was working at the time of the accident.

This provision is clearly inserted with the object of securing to the workman (within the prescribed limits as to amount) compensation for his loss of earning power both in reference to the wages paid him by the employer in whose employment the accident occurred and the wages paid him by other concurrent employers. The whole burden is thrown upon the employer against whom the workman has (under sects. 1 to 7) established his right to compensation.

The sole question on this appeal is whether under the said second rule, the appellant is entitled to have his average weekly earnings computed as if his earnings under a concurrent contract of service with his father (in whose house he dwells) were earnings in the employment of the respondents.

But for the definition of the word "workman" which is contained in sect. 3 of the Act, there could, I conceive, be no answer to the appellant's claim. He is a workman (within the definition) who has established his right to compensation against the respondents. He claims to have the amount fixed, and in accordance with the second rule of sect. 10. He is without doubt "the "workman" referred to in that rule, and he has in fact entered into a contract of service with his father which is concurrent with his contract of service with the respondents, and under these two contracts he worked at one time for his father and at another time for the respondent. He fits exactly and in all respects into the words of the rule. It is said, however, that because of the statutory definition of workman, his earnings in the employ of his father are not earnings under a concurrent contract of service within the meaning of the second rule.

The relevant words of sect. 3 are as follows:

> 3. (1) In this Act, unless the context otherwise requires, the expression "workman," subject to the exceptions hereinafter mentioned, means any person who . . . works under a contract of service . . . with an employer, whether by way of manual labour, clerical work or otherwise . . .
>
> (2) The following persons are excepted from the definition of workman, that is to say: (*a*) any person employed otherwise than by way of manual labour whose remuneration exceeds three hundred and fifty pounds a year; or . . . (*e*) a member of the employer's family dwelling in his house.

As I understand the argument it is that because the appellant is *vis-a-vis* his father not a workman within the definition, he is only to be compensated for his loss of part-time earning power, and that his earnings under his contract of service with his father are to be ignored.

My Lords, I am unable to accede to this argument. It appears to me to be neither reasonable, nor in accord with the wording of the second rule.

It is true that, had the accident occurred during his employment by his father, he could recover no compensation at all. That is because the Act, for some reason unknown to me, gave him no right to compensation against his father. But since the accident occurred during his employment by the respondents, the Act does give against them the rights which the words of the Act define, one of which is that, in computing his average weekly earnings, there shall be included his earnings under all concurrent contracts of service with other employers. This right is given to him because he is a workman within the definition who has suffered loss of earning power by accident arising out of and in the course of his employment. I can find nothing in the second rule to deprive him of that right, or to exclude from it concurrent contracts of service with other employers as against whom the workman whose compensation is being quantified would have no claim for injury by accident arising out of or in the course of his employment by them. *Owners of S.S. Raphael* v. *Brandy* (1) is a decision of your Lordships' House against any such exclusion.

The words "employers," "employer" and "contracts of service" in the second rule bear their ordinary meanings without any restriction or qualification, for there is nothing in the Act to cut them down in any way. The reference in the second rule to "the workman" appears to me to be merely a reference to the person whose compensation (the right to which he has established) is being quantified.

The First Division appear to have reached their conclusion by drawing inferences as to how the second rule should be construed. Thus LORD MONCREIFF said that, since the right conferred by it:

> . . . is in terms conferred upon one who is described as a workman it seems a proper inference that the average weekly earnings to be computed shall be earnings which he earns as a "workman."

In the same way the LORD PRESIDENT said:

> It appears to me that sect. 10 is concerned throughout with the "earnings" and "average weekly earnings" of a "workman" meaning thereby a man in the capacity of workman within the meaning of the Act.

For myself, I see no justification for drawing these inferences, the result of which appears to be contrary to the intention of the Act, viz., to compensate the workman for loss of earning power; not to compensate only for loss of earnings under particular contracts of service. If proper effect is to be given to this intention, the inference should be the other way. To make the inclusion of earnings under a concurrent contract of service depend upon whether the workman who is to be compensated is *vis-a-vis* the concurrent employer within the definition, seems to me to be in conflict with that intention, and may lead to strange results. For instance, two workmen employed by A at the same wage are injured in the same accident while in that employ. Each has concurrent contracts of service with his own father. The one who earns the larger wage under his concurrent contract lives with his father, the other does not. The man with the larger loss of earning power may get the smaller compensation. Take another case. A "workman" (within the definition) who has established his claim for compensation against A, may have entered into a concurrent contract of service with B under which he is employed otherwise than by way of manual labour. If his remuneration thereunder does not exceed the amount mentioned in sect. 3 (2) (*a*), his earnings thereunder will increase the compensation payable by A. If it does exceed that amount, and his earnings thereunder cannot be taken into account, the compensation for the loss of the greater earning power may again be smaller than the compensation for the loss of the smaller earning power.

My Lords, I think it better to follow strictly the words of the second rule than to draw an inference that it means something which it does not in terms state. I would allow this appeal.

LORD MACMILLAN: My Lords, the appellant, while employed as a part-time workman by the respondents at 18*s*. per week suffered personal injury by an accident arising out of and in the course of his employment. At the time of the accident the appellant was also employed for the rest of his time by his father with whom he lived, receiving from him a weekly wage with board and lodging. The question is whether, in computing the compensation payable to the appellant by the respondents, his average weekly earnings are to be reckoned as those which he received from the respondents alone or those which he received from both the respondents and his father.

The Workmen's Compensation Act, 1925, s. 10 enacts that, "for the purposes of the provisions of this Act relating to 'earnings' and 'average weekly earnings' of a workman," certain rules are to be observed. The second of these rules provides that:

> Where the workman had entered into concurrent contracts of service with two or more employers under which he worked at one time for one such employer and at another time for another such employer his average weekly earnings shall be computed as if his earnings under all such contracts were earnings in the employment of the employer for whom he was working at the time of the accident.

If both the appellant's employers had been strangers to him there can be no doubt that the compensation payable to him by the respondents would, under the rule just quoted, have been reckoned on the basis of his combined earnings from both employments. But sect. 3 (2) of the Act provides that certain persons "are excepted from the definition of workman" and among those excepted persons are "a member of the employer's family dwelling in his house," which was the position of the appellant as regards one of his two employments, namely, the employment in which he did not meet with the accident. It is plain, therefore, that, if the appellant had been injured in his father's employment, he would have had no claim to compensation from his father as his employer, and, of course, no claim to compensation from the respondents. The appellant, however, maintains that, in computing the compensation payable to him by the respondents, his earnings in his father's employment must be taken into account.

I confess that, unaided or unembarrassed by authority, I should have read the second rule in sect. 10 as applying only where a person was employed as a workman within the meaning of the Act under each of the concurrent contracts of service in question. But the decision of this House in *Owners of S.S. Raphael* v. *Brandy* (1), apparently not cited in the Court of Session and not referred to in the debate at your Lordships' Bar, is, in my opinion, conclusive of the matter to the opposite effect. There the workman who was injured in an ordinary civil employment was held entitled under the 1906 Act, Sched. I (2) (*b*), reproduced in the second rule of sect. 10 of the 1925 Act, to bring into the computation of his compensation an annual retainer of £6 paid to him as a stoker in the Royal Naval Reserve, although sect. 9 of the Act (now sect. 33 of the 1925 Act) expressly provided that the Act should not apply to persons in the naval service of the Crown. The respondents' argument in the present appeal was precisely that which FARWELL, L.J., stated so clearly in the Court of Appeal in *Owners of S.S. Raphael* (1), and which was rejected by his colleagues and by this House. The contracts of service under the rule, said FLETCHER MOULTON, L.J., "are not restricted to contracts of service under which the employer is liable to claims under the Act"; and that was also the decision of this House. When Parliament in 1925 re-enacted in the second rule of sect. 10 of the present Act the exact words of Sched. I (2) (*b*) of the Act of 1906, it must be taken to have done so in the knowledge that the meaning of the words it was using was that attributed to them by this House in 1911.

I am accordingly of opinion that the appeal should be allowed. I would only add that I agree with the observations of my noble and learned friend LORD THANKERTON regarding the conduct of arbitrations under the Act and the statement of cases on appeal.

LORD WRIGHT: My Lords, this appeal has been argued on the assumption of a fact which is denied by the respondents, but is crucial to a final decision in the appellant's favour. The question at issue can be shortly stated.

The appellant while working for the respondents sustained an injury by accident arising out of and in the course of his employment. There is no dispute that he is entitled to compensation from the respondents as a workman within the meaning of the Workmen's Compensation Acts. But the contest is as to the rate of compensation and that arises in this way. He was in the respondents' part-time employment as an omnibus driver at an average weekly wage of 18*s*. But he was also, it is assumed, serving under a contract of service with his father at an average weekly wage of £2 10*s*. plus board and lodgings estimated at 25*s*. a week. He claims to be entitled in virtue of the Workmen's Compensation Act, 1925, s. 10 (ii), to compensation on the basis of adding together his weekly earnings under the contract of service with the respondents and his weekly earnings under the contract of service with his father. This computation would obviously give him a much larger rate of compensation and one more adequate to his loss than that offered by the respondents, who have contended that the only earnings to be taken into account are those received under the appellant's employment with the respondents. The dispute turns entirely on the true construction of the Workmen's Compensation Act, in particular sects. 3 and 10 (ii).

Sect. 10 (ii) of the Act provides that, where the workman had entered into concurrent contracts of service with two or more employers, under which he worked at one time with one such employer and at another time for the other such employer, his average weekly earnings should be computed as if his earnings under all such contracts were earnings in the employment of the employer for whom he was working at the time of the accident. This provision occurs in the part of the Act which specifically deals with "Amount of Compensation." The respondents object that, whatever might be the effect in other cases, here the provision is excluded by reason of the definition of workman in sect. 3 of the Act of 1925, which, by subsect. (2) excepts from the definition (*inter alia*) "a member of the employer's family dwelling in his house." According to the case stated this description is applicable to the appellant. It is accordingly contended on behalf of the respondents that, in consequence, sect. 10 (ii) cannot operate as it otherwise would so as to enable the appellant to include his earnings under his employment with his father in computing the compensation to which he is entitled from the respondents, because that employment and those earnings are excluded from the provisions of the Act and cannot be brought in under sect. 10 (ii).

Now it is clear that sect. 3 would have the effect of preventing the appellant from claiming under the Act compensation from his father if he had been injured in the employment of his father. In a question with his father he would not be a person entitled to compensation, because he would not be a "workman."

Sect. 3, however, comes in the part of the Act that deals with "Right to Compensation," while sect. 10 (ii) comes within the part which deals with the "Amount of Compensation," which is a different matter. It presupposes that the right has been established. Once the claimant has qualified as a "workman" within the meaning of the Act in respect of the particular employment in which he was working and in which he was injured, a different portion of the Act, that dealing with the *quantum* of compensation, has to be considered. In that context, it is said, the words of sect. 10 (ii) literally apply to the present case, since the appellant had entered into concurrent contracts of service, the one with the respondents and the other with his father. It has not been contested that he was a "workman" *quoad* the former employment, and the actual words of the Act do not carry the condition of being a "workman" according to the definition of sect. 3 into sect. 10 (ii). All that the section requires is that the claimant should have entered into a concurrent contract of service with an employer other than the employer in whose service he was injured. He need not be a "workman" within the definition of the Act in regard to that contract. "Concurrent," in my opinion, means no more than "running at the same time." The word "employer" is apt to describe the father: indeed, in sect. 3 (2) (*e*) the word "employer" is used. The relevant words are "a member of the employer's family dwelling in his house." There is then, in my opinion, nothing in the actual words of sect. 10 (ii) to justify limiting them in the way the respondents desire. So to limit the provision would involve inserting words to the effect that, though in the one contract of service, under which he is claiming, he must satisfy the express statutory definition of "workman," yet, as a matter of implication and by intendment of law, he must also and equally satisfy that definition in respect of the other employment. To my mind, there is no justification, still less necessity, for making that implication. To do so, I think, would be contrary to the general object of the Act which is that a man who sustains injury by accident arising out of and in the course of his employment, should be compensated by the employer in whose service he was injured for his loss of earning capacity. The obligation to compensate is thrown on that employer. Without sect. 10 (ii) the compensation would be imperfect, because it would not include the loss of the earnings in the other employment, though they were as much lost by reason of the accident as the man's earnings in the employment in the course of which the accident occurred. If this result had been intended, the legislature, I think, would have made the matter clear. I see no sufficient reason to introduce by way of implication the exception to the right to compensation under sect. 3 (2) into the alien context of sect. 10 (ii) which is concerned with the scale of compensation once the definition in sect. 3 has been satisfied. Qualifications which are not expressed can only be implied if they are necessary to give effect to what the legislature must have intended. To my own way of thinking, though it is true that, in construing a statute the principle applies that the different provisions must be read together, that is only true in so far as the different provisions are in substance coherent and the one set are plainly necessary to supplement or qualify the other. But I cannot myself see any sufficient reason for bringing into sect. 10 (ii) the limitations expressed in sect. 3 which have a different purpose from that of sect. 10 (ii) and are enacted *alio intuitu*. To do so would not, to my mind, be to supplement sect. 10 (ii), but *pro tanto* to defeat its purpose. The employer's liability, it may be observed, is limited by the scale of maximum amounts of compensation fixed by the Act.

This conclusion, which I arrived at after the argument, is confirmed by a decision of this House, very pertinent, though not cited by counsel on either side. It is the decision in *Raphael* v. *Brandy* (1), under the Workmen's Compensation Act, 1906. The claimant was a seaman who was injured while in the employment of the shipowner. He was also in the service of the Crown, in that he was subject to be called up for service in the Royal Naval Reserve and was paid an annual retaining fee. He claimed that he had entered into concurrent contracts of service, one with the shipowner and the other with the Crown, and that, under the provisions of the Workmen's Compensation Act, 1906, Sched. I, para. 2, which corresponded with sect. 10 (ii) of the Act of 1925, he was entitled to have his earnings under the latter contract brought into the assessment of his compensation. The objection taken was that, by sect. 9 (1) of the Act of 1906, which corresponded with sect. 33 of the Act of 1925, the Act was not to apply to persons in the naval and military service of the Crown. The House rejected that objection, affirming the decision of the majority of the Court of Appeal. FARWELL, L.J., who dissented, would have read into Sched. I, para. 2, of the Act of 1906, after the word "workman," the words "being a workman within the Act," and after the word employer, "being an employer within the Act." That construction was rejected. FLETCHER MOULTON, L.J., in the Court of Appeal, said, at p. 383:

> The language of Sched. I, para. 2, is perfectly general. The contracts of service therein referred to are not restricted to contracts of service under which the employer is liable to claims under the Act.

He added that the object of the paragraph was to enable the tribunal to arrive at a proper estimate of the average weekly earnings of the workman for the purpose of measuring the compensation under a contract of service under which an employer was liable. I think that that decision does in principle cover the present case.

Appeal allowed.

Solicitors: *Kingsford, Dorman & Co.*, agents for *Maguire, Cook & Co.* and *Allan McDougall & Co.* (for the appellant); *Caporn & Campbell*, agents for *Ross & Ross* (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Dictum of VISCOUNT SIMON, at p. 45, *applied.* MACKRELL *v.* MACKRELL. [1948] 2 All E.R. 858.

Dictum of LORD SIMON, L.C., at p. 45, *applied.* COOK *v.* COOK. [1949] 1 All E.R. 384.

Followed. VINEY *v.* VINEY. [1 2 All E.R. 204.

HENDERSON *v.* HENDERSON

[HOUSE OF LORDS (Viscount Simon, L.C., Lord Thankerton, Lord Russell of Killowen, Lord Macmillan and Lord Wright), **November 17, December 15, 1943.**]

Divorce—Condonation—Cohabitation renewed on promise by wife as to future conduct—Promise subsequently withdrawn.

A wife admitted to her husband that she had committed adultery with the co-respondent. The husband having received her promise that she A would have nothing to do with the co-respondent in the future, forgave her and had sexual intercourse with her. On the following morning she withdrew her promise and the husband left the house. It was contended that in the circumstances there was no effective condonation of the adultery:—

HELD: condonation cannot be treated as cancelled because an erring wife makes promises as to her future conduct and afterwards withdraws B such promises. It is fraudulent misstatement of fact and not assurances as to future conduct which may remove the disabling consequences of condonation. The adultery had, therefore, been condoned.

[**EDITORIAL NOTE.** There is no such thing as contingent condonation. Previous matrimonial offences may be revived by later offences after condonation; but the mere withdrawal of a promise does not destroy condonation which has been confirmed by the renewal of intercourse. C

AS TO CONDONATION, see HALSBURY, Hailsham Edn., Vol. 10, pp. 679-684, paras. 1004-1014; and FOR CASES, see DIGEST, Vol. 27, pp. 336-342, Nos. 3161-3228.]

Cases referred to:

*(1) *Cramp* v. *Cramp and Freeman*, [1920] P. 158; 27 Digest 338, *3179*; 89 L.J.P. 119; 123 L.T. 141.

(2) *Roberts* v. *Roberts and Temple* (1917), 117 L.T. 157; 27 Digest 339, *3182*.

(3) *Snow* v. *Snow* (1842), 2 Notes of Cases, Supp. i; 27 Digest 342, *3231*. D

(4) *Edgington* v. *Fitzmaurice* (1884), 29 Ch.D. 459; 35 Digest 32, *240*; 53 L.T. 369.

*(5) *Sneyd* v. *Sneyd and Burgess*, [1926] P. 27; 27 Digest 342, *3223*; 95 L.J.P. 22; 135 L.T. 124.

APPEAL by the petitioner from a decision of the Court of Appeal (SCOTT, MACKINNON and GODDARD, L.JJ.), confirming a decision of HODSON, J. The facts are fully stated in the opinion of VISCOUNT SIMON, L.C.

Gilbert Beyfus, K.C., and *M. Turner-Samuels*, for the appellant. E

R. Bush James, K.C., and *Ifor Lloyd*, for the respondents.

VISCOUNT SIMON, L.C.: My Lords, the appellant petitioned for divorce from his wife, who is the first respondent, on the ground of her adultery with the second respondent. The suit was defended, but HODSON, J., who tried the case, found that the adultery was proved. Both the respondents had made admissions of their guilt. The petitioner, however, in the course of his F evidence, stated matters which raised the question of condonation, and it is this question which has caused the present appeal to be brought to this House. The trial judge reached the conclusion that the appellant had condoned his wife's misconduct and consequently refused the decree for which he asked. The Court of Appeal (SCOTT, MACKINNON and GODDARD, L.JJ.) confirmed the conclusion of HODSON, J.

The testimony as to condonation was contained in the appellant's own evidence G in chief. He stated that, after his wife had admitted to him her adultery, he told her that she must entirely break off all acquaintance with the co-respondent if he (the husband) were to remain with her, and that she promised to do so. Thereupon the husband and wife went to bed together; he forgave his wife and had sexual intercourse with her that night at her suggestion. Early the next morning her attitude changed and she said she did not see why she should stop seeing the co-respondent, and that, if she denied the adultery, the co- H respondent ought to do so too. Upon this, the appellant left the house and never lived with her again.

It was argued that there was no condonation, since the appellant's forgiveness of his wife was conditional on her promise to have no more to do with the co-respondent and this promise was withdrawn after he had had intercourse with her. HODSON, J., rejected this contention. He pointed out that there was no evidence that the wife and the co-respondent has associated together since the promise was given and added:

I can see no ground for finding that the respondent when she made the promise was making a fraudulent representation as to her future intention.

The trial judge referred to the judgment of MCCARDIE, J., in *Cramp* v. *Cramp and Freeman* (1), at p. 170 and agreed with his conclusion that:

> . . . a husband who has sexual relations with his wife after knowledge of her adultery, must be conclusively presumed to have condoned her offence.

The Court of Appeal also held that the husband's actions, after he knew the facts as to his wife's unfaithfulness, amounted to condonation which deprived A the appellant of the right to a decree based on those facts, and that whether condonation should be regarded as a question of law or a question of fact, the conclusion in the present case that there was condonation was right, and was fatal to the appellant's claim.

I entertain no doubt that the conclusion in the courts below was correct. Condonation in connection with the law of divorce has been defined in a variety of phrases in many previous judgments. The essence of the matter is (taking B the case where it is the wife who has been guilty of the matrimonial offence) that the husband with knowledge of the wife's offence should forgive her and should confirm his forgiveness by reinstating her as his wife. Whether this further reinstatement goes to the length of connubial intercourse depends on circumstances, for there may be cases where it is enough to say that the wife has been received back into the position of wife in the home, though further C intercourse has not taken place. But where it has taken place, this will, subject to one exception, amount to clear proof that the husband has carried his forgiveness into effect. The exception is that, if the intercourse was induced by a fraudulent misstatement of fact by the wife, that circumstance will prevent the husband's actions from having the effect of condonation; for example, in *Roberts* v. *Roberts and Temple* (2), where the husband petitioned for a dissolution of his marriage on the ground of the wife's adultery and it appeared that D she had confessed the adultery but had denied, in answer to his question, that she was pregnant in consequence of it, whereupon the husband forgave her and had marital relations with her. It was held by HILL, J., that, since the wife knew she was pregnant and had induced the acts of her husband by false and fraudulent statements, he had not condoned her adultery and was entitled to his decree. I think this decision was right and the view subsequently expressed by MCCARDIE, J., in *Cramp* v. *Cramp* (1) should not be understood E to cover the exceptional case where the guilty party has made a deliberately false statement and has thereby brought about a situation which would otherwise have been proof of condonation.

It has been more than once pointed out that the conclusion of condonation by an innocent wife of her husband's previous misconduct is not in all cases so strictly drawn from the fact of subsequent intercourse, for there may be F instances where the innocent wife, owing to the difficulties of her situation, may have no means of immediately breaking off relations. In *Snow* v. *Snow* (3) DR. LUSHINGTON discusses at length whether, where a husband has been guilty of cruelty, a wife can ever maintain a suit where co-habitation was continued after the last act, and he concludes that subsequent co-habitation is not universally a bar to the wife's suit for the reason above stated. But I know of nothing in the earlier decisions, either in the ecclesiastical courts or in the Divorce G Court in England, which supports the view that a husband who has intercourse, which is not induced by the fraud of the wife, after knowledge of the facts of his wife's adultery, should not thereby be regarded as condoning his wife's misconduct.

Counsel for the appellant in his ingenious argument advanced the proposition that condonation by the husband is not established by the resumption of intercourse, if that intercourse was obtained by a promise given by the wife to the H husband as to her future conduct which is not genuine or sincere at the time when it was given. To that contention there are two answers. In the first place, the facts in the present case and the findings of the trial judge do not involve the view that the wife was not genuine and sincere at the time when she made the promise to her husband that she would keep away from the co-respondent's company. HODSON, J., negatives the view that the respondent when she made the promise was making a fraudulent misstatement as to her future intentions. On the contrary, he finds that in the morning, after the promise had been given and intercourse had taken place, the respondent changed her mind.

But further, the proposition is itself unsound in law. There cannot be such a thing as contingent condonation by a husband of his wife's adultery—certainly not when the condonation includes the irrevocable act of sexual connexion. It is, of course, quite true that condonation is subject to one implied condition, but that is the condition that, if the spouse who has been forgiven past matrimonial offences is proved to commit a further matrimonial offence in the future, then the past offences are revived and become available as further ground for a divorce. But condonation cannot be treated as cancelled because an erring wife who makes promises as to her future conduct withdraws the promise later on. Condonation is not a contract in which one party may claim to be discharged by the other's repudiation.

Condonation is not a contract at all; it is the overlooking of past wrongs accompanied by action on the part of the aggrieved spouse which shows that they are really forgiven, and the circumstance that the guilty party, before or at the time of condonation, makes promises as to future conduct cannot lead to the consequence that previous offences are no longer condoned, if and when the promises are afterwards repudiated. The result might be different if it could be shown that the husband's forgiveness and taking back of his wife was procured by the wife deliberately misrepresenting her true state of mind, for, as Bowen, L.J., said in a well-known passage, the state of a person's mind, when it can be definitely ascertained, may be as much a fact as the state of his digestion (*Edgington* v. *Fitzmaurice* (4), at p. 483). But that is not the same thing as saying that the husband is not to be treated as condoning if he believed in the wife's promise to behave as she should in the future. Lord Merrivale, P., in *Sneyd* v. *Sneyd and Burgess* (5), rightly insisted that belief is not the test. It is fraudulent misstatement of fact, not assurances as to future conduct, which may remove the disabling consequences of condonation.

I move that this appeal be dismissed.

Lord Thankerton: My Lords, I agree.

Lord Russell of Killowen: My Lords, I also agree.

Lord Macmillan: My Lords, I agree.

Lord Wright: My Lords, I agree.

Appeal dismissed.

Solicitors: *Isadore Goldman & Son* (for the appellant); *Maude & Tunnicliffe* (for the respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

ATHEL LINE, LTD. *v.* LIVERPOOL AND LONDON WAR RISKS INSURANCE ASSOCIATION, LTD.

[King's Bench Division (Tucker, J.), **November 22, 1943.**]

Insurance—Marine insurance—General average—Convoy instructed by Admiralty to return to port—Whether obedience to orders a general average act—Marine Insurance Act, 1906 (*c.* 41), *ss.* 66, 87—*York-Antwerp Rules,* 1924, *rr. A, C, E.*

The plaintiffs were the owners of two ships which were insured with the defendants against the consequences of warlike operations by or against the King's enemies, general average payable according to the York-Antwerp Rules, 1924, if so claimed. The ships formed part of a convoy sailing in 1940 to England from Bermuda and at all material times the masters of the vessels were under a legal duty to obey the orders of naval officers in charge of the convoy. During the voyage, in order to safeguard the convoy against the activities of an enemy raider, the Admiralty instructed the naval officer in charge that the convoy was to return to Bermuda. Appropriate orders were conveyed to the masters of the vessels and the instructions were carried out. In consequence the voyages of the vessels were delayed and the plaintiffs claimed that the additional expense thereby occasioned was allowable as general average recoverable under the insurance policy:—

Held: the obedience of the master of a ship to the lawful orders of a superior authority without the opportunity of exercising judgment or discretion does not amount to a general average act within the meaning of the York-Antwerp Rules, 1924, r. A.

[**EDITORIAL NOTE.** A general average loss must be voluntarily incurred. This case turns wholly on the fact that a loss due to Admiralty orders which statute compelled the master to obey cannot be said to be voluntarily incurred. It is due to the necessary obedience to an order given under statutory authority.

As to General Average, see HALSBURY, Hailsham Edn., Vol. 18, pp. 324-327, paras. 448-455; and for Cases, see DIGEST, Vol. 41, pp. 593-594, Nos. 4169-4192, p. 599, Nos. 4242-4248, pp. 601, 602, Nos. 4279-4291.]

Cases referred to:

A *(1) *Vlassopoulos* v. *British & Foreign Marine Insurance Co., Ltd.*, [1929] 1 K.B. 187; Digest Supp.; 98 L.J.K.B. 53; 140 L.T. 44.

(2) *Ralli* v. *Troop* (1894), 157 United States Reports 386.

(3) *Price* v. *Noble* (1811), 4 Taunt. 123; 41 Digest 603, *4298*.

(4) *Papayanni & Jeronica* v. *Grampian S.S. Co., Ltd.* (1896), 12 T.L.R. 540; 41 Digest 597, *4228*; 1 Com. Cas. 448.

Action by the shipowners against insurers claiming that loss arising from B delay in voyage was recoverable under a policy of insurance. The facts are fully set out in the judgment.

A. J. Hodgson for the plaintiffs.

F. A. Sellers, K.C., and *Patrick Devlin* for the defendants.

Tucker, J.: In this action the plaintiffs claim under two policies of marine insurance subscribed by the defendants upon the motor vessels Athelbeach C and Athelqueen respectively in which the plaintiffs are interested as the owners. The policies are in identical terms so far as material, and cover the vessels for 91 days from Aug. 23 to Nov. 24, 1940, *inter alia*, against the consequences of hostilities or warlike operations by or against the King's enemies, general average and salvage to be payable according to York-Antwerp Rules, 1924, if so claimed.

The claim is in respect of ship's contribution to general average expenditure D alleged to have been incurred for the purpose of avoiding perils insured against and consisting of the expenses of returning to Bermuda on Nov. 6, 1940, while on a voyage from the West Indies to the United Kingdom and of detention there from Nov. 8 to Nov. 10 and in respect of the prolongation of the voyages by six days. No question arises as to amount or proportions, it being agreed that, if the plaintiffs are entitled to succeed, the sums recoverable are £332 4*s.* 9*d.* E in respect of the M.V. Athelbeach and £365 13*s.* 9*d.* in respect of the M.V. Athelqueen.

The facts are agreed and set out in an agreed statement which reads as follows:

1. The plaintiffs are the Athel Line, Ltd., and are and were in 1940 and at the time of the matters hereinafter referred to the owners of the British motor vessels Athelbeach and Athelqueen.

2. In the month of Nov., 1940, the said vessels and each of them were respectively insured and covered against war risks under two policies of marine insurance subscribed F by or for the defendants, the Liverpool and London War Risks Insurance Association, Ltd.

3. The Athelbeach and the Athelqueen were in Nov., 1940, proceeding on a voyage or voyages from the West Indies to the United Kingdom, each vessel being laden with a full and valuable cargo of molasses.

4. At the time aforesaid Great Britain was at war with the Axis Powers who were attempting by air and U boat warfare and by commerce raiders to sink and destroy G as opportunity offered every British merchant vessel and her cargo and thereby to cut off essential supplies to the United Kingdom. Both the plaintiffs and the defendants are companies registered in England.

5. In the interest of the efficient prosecution of the war and with a view to securing the maximum safety of sea-borne commerce the British Admiralty under powers conferred in the Defence (General) Regulations had assumed complete control over the movements of all merchant ships this control being executed (*inter alia*) by means of routeing and sailing instructions or through the orders of naval commodores in H command of convoys. In the case of vessels actually under convoy the masters were in particular at all times under a legal duty to carry out the orders of such commodores.

6. On Nov. 3, 1940, the Athelbeach and the Athelqueen in the course of their voyage or voyages aforesaid left Bermuda in convoy with other vessels under the escort and protection of H.M.S. Montclare and at the time of the events referred to in the next two paragraphs the whole convoy and escorts were proceeding northwards to a position in the Atlantic Ocean where it was expected that the Athelbeach and Athelqueen and certain other vessels of the convoy would join another convoy bound for the United Kingdom from Halifax. While so proceeding the merchant vessels of the convoy were subject to the authority and orders of the commodore of the convoy.

7. On Nov. 5, 1940, the British convoy homeward bound from Halifax to the United Kingdom and immediately preceding that in which the Athelbeach and the Athelqueen were to proceed was attacked in a position of about 52° 30′ N., 32° W. by a heavily armoured and powerful German warship. The escort of this convoy included H.M.A.C. Jervis Bay. This vessel engaged the enemy but was sunk after an engagement lasting 15 minutes. Thereafter a number of the ships in the convoy of the Jervis Bay were sunk or set on fire or disabled. Among others the Rangitiki and the Cornish City were sunk and the tanker San Demetrio was set on fire and disabled.

8. Owing to the knowledge that an enemy raider was operating in the North Atlantic the Admiralty at 00.53 on Nov. 6 made an immediate signal to the senior officer of H.M.S. Montclare as follows: "Convoy B.H.X.86 is to return to Bermuda." In consequence of this order the Athelbeach and the Athelqueen in common with the other ships in their convoy received from their commodore an order to put about immediately. At the time when these orders were given the position of the raider aforesaid is estimated by the Admiralty at approximately 1,350 miles from the position of the convoy, which was about 38° 26′ N. 57° 55′ W. or 472 miles from Bermuda. The masters of the Athelbeach and the Athelqueen at once obeyed the orders and in compliance therewith the vessels were put about and by 2.30 a.m. on Nov. 6, 1940, they were around and headed back to Bermuda with their escort whither they proceeded pending the completion of the new naval dispositions necessitated by the presence of the new raider. They anchored at Bermuda at 2.17 p.m. on Nov. 8, 1940. The said vessels were detained by naval orders at Bermuda until Nov. 10, 1940, when they each received fresh sailing orders to proceed to Halifax on independent passage in accordance with routeing instructions from the N.C.S.O. Bermuda and they left accordingly and forthwith proceeded with their original cargoes.

9. Each of the said vessels was detained at the port of Bermuda from Nov. 8 to 10, 1940, and their voyages were prolonged by six days from Nov. 7 to 12, 1940, and extra fuel and stores were consumed and expenditure was incurred in entering and leaving Bermuda and during their detention there and the prolongation of their voyages in respect of additional wages and maintenance of their masters officers and crews.

10. The plaintiffs claim that the expenditure aforesaid and/or the cost of the additional fuel and stores consumed and the wages of the masters officers and crews and the expenses of entering and leaving Bermuda are all allowable as general average according to the York-Antwerp Rules, 1924, and that the proportion of each ship of such general average is recoverable under the respective policy subscribed by the defendants as having been incurred for the purpose of avoiding or in connection with the avoidance of a peril insured against, viz., the consequence of hostilities or warlike operations by or against the King's enemies.

11. The defendants deny all liability but it is agreed that if the plaintiffs are entitled to recover as general average at all, then the ships' proportion thereof and the sums due under the policies are as follows: Athelbeach policy, £332 4*s.* 9*d.*; Athelqueen policy, £365 13*s.* 9*d.*

12. It is agreed that the court may draw inferences of fact.

In addition, by consent of the parties, the written statement of the master of the M.V. Athelviscount, which was one of the ships in the convoy in question, was received in evidence, not for the purpose of varying the agreed statement of facts, but with a view to affording me possible assistance in drawing any necessary inferences. It is not necessary for the purpose of this judgment to read this statement as it does not, in my view, add anything to the agreed facts. It is common ground that, by virtue of the provisions of the Naval Discipline Act, 1866, and of Navigation Order No. 1, 1939, made in pursuance of powers conferred on the Lords Commissioners of the Admiralty by the Defence (General) Regulations, reg. 43, which in turn derive authority from the Emergency Powers (Defence) Act, 1939, the masters of these ships were at all material times bound by law to obey any navigation order issued by the naval officer in charge of the convoy.

Before considering whether the above facts disclose a right to contribution in general average it is necessary to refer to the relevant sections of the Marine Insurance Act, 1906, and the relevant rules of the York-Antwerp Rules, 1924. They are as follows. The Marine Insurance Act, 1906, s. 66, provides:

> (1) A general average loss is a loss caused by or directly consequential on a general average act. It includes a general average expenditure as well as a general average sacrifice. (2) There is a general average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common adventure. (3) Where there is a general average loss, the party on whom it falls is entitled, subject to the conditions imposed by maritime law, to a rateable contribution from the other parties interested, and such contribution is called a general average contribution . . . (6) In

the absence of express stipulation, the insurer is not liable for any general average loss or contribution where the loss was not incurred for the purpose of avoiding, or in connection with the avoidance of, a peril insured against.

Sect. 87 provides :

> (1) Where any right, duty, or liability would arise under a contract of marine insurance by implication of law, it may be negatived or varied by express agreement, or by usage, if the usage be such as to bind both parties to the contract. (2) The provisions
> A of this section extend to any right, duty, or liability declared by this Act which may be lawfully modified by agreement.

The relevance of that section is that, in this case, the York-Antwerp Rules are incorporated in the policies, and therefore that section applies if and in so far as the York-Antwerp Rules differ in any respect from the implications of law arising from the Marine Insurance Act, 1906.

B Passing to the York-Antwerp Rules, 1924, r. A—which is the one principally involved in this case—reads as follows :

> There is a general average act when and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure.

Other rules read as follows :

> C C. Only such dangers losses or expenses which are the direct consequence of the general average act shall be allowed as general average . . .
>
> E. The onus of proof is upon the party claiming in general average to show that the loss or expense claimed is properly allowable as general average.
>
> X (*a*). When a ship shall have entered a port or place of refuge or shall have returned to her port or place of loading in consequence of accident, sacrifice, or other extraordinary circumstances, which render that necessary for the common safety, the
> D expenses of entering such port or place shall be admitted as general average ; and when she shall have sailed thence with her original cargo, or a part of it, the corresponding expenses of leaving such port or place, consequent upon such entry or return, shall likewise be admitted as general average.
>
> XI. When a ship shall have entered or been detained in any port or place under the circumstances, or for the purposes of the repairs mentioned in r. X, the wages payable to the master, officers and crew, together with the cost of maintenance of the same, during the extra period of detention in such port or place until the ship shall or
> E should have been made ready to proceed upon her voyage, shall be admitted as general average . . .

It has been decided in *Vlassopoulos* v. *British and Foreign Marine Insurance Co.* (1) that, in construing the York-Antwerp Rules the lettered rules enunciate the general principles and the numbered rules settle how the general principles are to be applied in what might otherwise be doubtful cases, and, if the case is
F clearly outside the lettered rules, then the numbered rules have no application. In considering whether the case comes within the general principles enunciated in r. A, it is necessary, in my view, to give effect to the whole of the language, carefully chosen as it no doubt was by experts with knowledge of the long history of the law and practice of general average. The sacrifice or expenditure must be extraordinary, it must be made or incurred intentionally, and made or incurred reasonably for the common safety for the specific purpose referred
G to, namely, preserving from peril the property involved in a common maritime adventure. If any of this language is inapplicable to the facts of a particular case then that case is not one involving a general average act. The rule, I think, clearly envisages the exercise by someone of his reasoning powers and discretion applied to a particular problem with freedom of choice to decide to act in one out of two or more possible ways, and the language is quite inappropriate to describe the blind and unreasoning obedience of a subordinate
H to the lawful orders of a superior authority.

Applying this test to the acts of the masters, I find that at 00.53 hours on Nov. 6, 1940, they received from the commodore of the convoy orders to put about immediately and that, as a result of further signals, they took a course which eventually brought them back to Bermuda. When they received the order to put about immediately they had no knowledge of the reason or reasons for the order, they did not know that it necessarily meant returning to a port of refuge, they had no means of assessing the degree of the risk, were unaware of the presence or position of the enemy raider, and merely carried out their duty of obeying the signal without applying their minds to what might have been a most difficult problem to decide had they been aware of the material facts. I am accordingly of opinion that, if the act relied upon as giving rise to the incurring of extraordinary expenditure is the act of the master in each case in taking the course which ultimately resulted in the vessels returning to Bermuda, such act does not bring the case within r. A.

It is said, however, that, if the act of the masters cannot be relied upon, none the less the act of the commodore who gave the order which the masters had to
obey will suffice and that this naval officer must be regarded as temporarily A
and for this purpose superseding the masters in command of their ships. Putting on one side for further reference the question whether the act of a stranger can give rise to a claim for general average contribution and assuming that it can, or that, in the circumstances described the commodore is not to be considered as a stranger, this argument requires further consideration of the facts.

What were the circumstances known to the commodore and what was the B
problem presented to him for decision when he did the act relied upon ? The facts show that he in his turn merely obeyed a signal received from the Admiralty and passed on to the masters of the ships in convoy the necessary signals to comply with the orders he had received. He knew that the order was to return to Bermuda and that, unless cancelled, this would involve return to the port of loading, but apart from this there is nothing to show that he had any more
information than the masters, or that he ever applied his mind to the solution C
of the difficult problem which must always confront someone under r. A.

I am, therefore, of opinion that the act of the commodore will not avail the plaintiffs. They seem to me to be driven to rely upon the act of the Admiralty in issuing the order to the commodore. What is the proper inference to be drawn as to the reasons for the issue of this order beyond the fact stated in
the agreed facts that it was owing to the knowledge that an enemy raider was D
operating in the North Atlantic and that the convoy proceeded to Bermuda "pending the completion of the new naval dispositions necessitated by the presence of the new raider" ? The inference necessary to support the plaintiffs' claim is that it was reasonably given for the common safety for the purpose of preserving from peril the M.V. Athelbeach and the M.V. Athelqueen and their cargoes involved in a common maritime adventure. The only inference that
I feel I can safely and properly draw from the agreed facts is that the order E
was given as part of the general strategic disposition of the naval and merchant shipping at the disposal of the Admiralty so as to minimise as far as practicable the risks to be incurred by all shipping in the North Atlantic, including, no doubt, those ships which made up this particular convoy, and to enable the available combatant ships to be deployed against the enemy to the best advantage. It is impossible to speculate with regard to the various factors and calculations
which may have required to be taken into consideration or as to the further F
facts within the knowledge of the authorities. Nor is it possible to estimate whether the same steps would have been taken if the Admiralty had been concerned only with the avoidance of peril by the Athelbeach and Athelqueen, or perhaps this particular convoy as a whole.

For these reasons I am of opinion that this case is not within the provisions
of r. A of the York-Antwerp Rules, 1924. G

I have considered the facts separately in so far as they affect the decisions taken by the masters, the commodore and the Admiralty. If this is not the correct approach, and the transaction should be viewed as a whole, it appears to me that the result is necessarily the same.

As I have formed a definite view on this aspect of the case, I think it undesirable that I should express any opinion with regard to the point which was
much discussed in argument before me and as to which there is no clear authority, H
namely, whether the act giving rise to a general average claim must be the act of the master, or some other member of the crew in case of his incapacity or unavoidable absence, or whether the act may in exceptional circumstances be that of a stranger, and whether there is any difference between English law on this subject and American law as laid down by the majority of the Supreme Court in *Ralli* v. *Troop* (2), in which connection *Price* v. *Noble* (3) and *Papayanni and Jeronica* v. *Grampian S.S. Co., Ltd.* (4) were cited. Nor do I express any view whether the expenses incurred in this case were extraordinary expenditure

within the meaning of r. X (*a*) if and in so far as these questions involve considerations distinct from those necessary to my decision as already expressed.

In the result, there must be judgment for the defendants with costs.

Judgment for the defendants with costs.

Solicitors: *William A. Crump & Son* (for the plaintiffs); *Hill, Dickinson & Co.* (for the defendants).

[*Reported by* R. Boswell Esq., *Barrister-at-Law.*]

Re PRIEST (*deceased*), BELFIELD *v.* DUNCAN AND OTHERS.

[Chancery Division (Bennett, J.), **October 15, 21, November 25, 1943**].

Wills—Testator domiciled in England—Attested holograph will made in Scotland not requiring attestation —Legatee wife of attesting witness—Wills Act, 1837 (*c.* 26), *ss.* 15, 35—*Wills Act,* 1861 (*c.* 114), *s.* 2.

The testator was a British subject domiciled in England, whose estate, at the time of his death, consisted solely of personal property. His will was made in Scotland and was attested by two witnesses and according to the law of Scotland was a valid holograph will not requiring attestation by witnesses. By his will the testator bequeathed one half of his residuary estate to his daughter V.M.B., and the other half to his daughter-in-law E.M.D. E.M.D. had been married to a son of the testator who had predeceased the testator and the only child of that marriage was E.A.P. The present husband of E.M.D. was one of the witnesses who attested the testator's will and the question to be decided was whether the legacy to E.M.D. was void under the Wills Act, 1837, s. 15. Counsel for E.M.D. contended (i) that s. 15 did not apply to the will because s. 35 of the Act provided that the Act should not extend to Scotland; and (ii), alternatively, that the will was an unattested holograph will made in Scotland and was admissible to probate in England under the Wills Act, 1861, s. 2:—

Held: (i) the effect of the Wills Act, 1837, s. 35, is merely that the Act shall not alter the law of Scotland. It does not affect the rule that the movable property of a testator must be administered in accordance with the law of the country in which he is domiciled at the time of his death.

(ii) upon the evidence it was impossible to hold that the testator intended to make an unattested holograph will in Scotland.

[**EDITORIAL NOTE.** A gift to a witness or his or her spouse to a will is void. The will here, however, was a holograph will made in Scotland and according to Scots law would have been valid without being attested by any witness. For this reason it was contended that the gift to a witness was good, but it is held that it was impossible to hold that in this case the testator intended to make an unattested holograph will and that the ordinary rule applied and rendered void the gift to the wife of the attesting witness.

As to Effect of Gifts to Attesting Witnesses, see HALSBURY, Hailsham Edn., Vol. 34, pp. 66-68, paras. 85, 88; and for Cases, see DIGEST, Vol. 44, pp. 274-277, Nos. 1070-1075, 1084-1100.]

Cases referred to:

(1) *Whicker* v. *Hume* (1858), 7 H.L. Cas. 124; 44 Digest 584, *4006*; 28 L.J.Ch. 3 6; 31 L.T.O.S. 319.

(2) *Campbell* v. *Beaufoy* (1859), John. 320; 11 Digest 370, *503*; 28 L.J.Ch. 645; 33 L.T.O.S. 199.

(3) *R.* v. *Lightfoot* (1856), 6 E. & B. 822; 3 Digest 398, *328*; 25 L.J.M.C. 115; 27 L.T.O.S. 235.

*(4) *Re Limond, Limond* v. *Cunliffe*, [1915] 2 Ch. 240; 44 Digest 277, *1103*; 84 L.J.Ch. 833; 113 L.T. 815.

Summons taken out by an executor of the testator to determine questions arising under the will of the deceased. The facts are fully set out in the judgment.

R. Ritson for the executor.

G. A. Russo for the testator's daughter-in-law.

Geoffrey Cross for others interested under the will.

Bennett, J.: The question to be decided on this summons is whether the gift contained in the will of William Alexander Priest to the defendant Elizabeth Mary Duncan of one half of all the testator's real and personal estate is rendered null and void by the provisions of the Wills Act, 1837, s. 15.

At the time when he made his will and also at the time of his death the testator was a British subject domiciled in England. He made his will on July 30, 1941, when he happened to be in Aberdeen. He used for the purpose a will form the formal parts of which indicate that it had been prepared for use by a Scottish testator. The form had an attestation clause which contemplated the execution of the will in the presence of two witnesses. The testator did in fact execute the will in the presence of two witnesses. One of these, J. W. C. Duncan, was the husband of the defendant, Mrs. Duncan. Excepting the formal parts, which are printed, the will is throughout in the handwriting of the testator and the dispositions of property and a direction relating to administration are contained in three clauses, all in the testator's own handwriting, which are as follows:

> (i) I give free of duty to my daughter, Victoria Mary Belfield, all my clothing, jewellery and personal belongings. (ii) Subject to the payment of my funeral and testamentary expenses and debts which with all duties shall be paid primarily out of my personal estate I give and bequeath all my real and personal estate as to one half thereof to my daughter Victoria Mary Belfield and one half to my daughter-in-law Elizabeth Mary Duncan. (iii) I direct that my solicitors, Messrs. Ravenscroft, Woodward & Co., of 15, John Street, Bedford Row, London, W.C.1. shall be employed in all matters connected with the administration of my estate.

The testator appointed his daughter, the defendant Mrs. Belfield, and her husband, the plaintiff, to be executors.

Before her marriage to J. W. C. Duncan the defendant Mrs. Duncan had been married to a son of the testator, W. G. Priest, who had predeceased the testator. The only child of the marriage was the infant defendant Elizabeth Ann Priest. At the time of the testator's death, on Nov. 22, 1942, his estate consisted entirely of personal property.

Upon these facts the originating summons now before the court asks these three questions:

> (i) Whether the defendant, Elizabeth Mary Duncan, is entitled to be paid one half share of the residue of the estate of the testator bequeathed to her by the said will. (ii) Whether there is an intestacy in respect of the one half share of residue bequeathed to the said Elizabeth Mary Duncan as aforesaid. (iii) Whether, in the event of an intestacy in respect of the said one half share of residue, the said Victoria Mary Belfield and Elizabeth Ann Priest are entitled to the said one half share of residue to be divided between them in equal shares.

It has been proved in these proceedings that, having regard to the fact (*a*) that the testator was a British subject, (*b*) that his will was made in Scotland and (*c*) that when he died his estate consisted solely of personal property, the said will would have been well executed according to the forms required by the laws in force in Scotland when the same was made even if the execution of the same by the testator had not been attested by witnesses. Although a printed form was used, the will would, I understand, be regarded by a Scots lawyer as a holograph will.

The Wills Act, 1837, s. 15, is as follows:

> If any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will.

If this section applies, it is clear upon the facts as I have stated them that the gift to the defendant Mrs. Duncan of one half of the testator's real and personal estate is null and void. I take it to be settled law that the movable property of a testator disposed of by his will must be administered in accordance with the law of the country in which the testator was domiciled at the time of his death: see *Whicker* v. *Hume* (1), *Campbell* v. *Beaufoy* (2).

The first point taken by counsel on behalf of the defendant Mrs. Duncan was that the Wills Act, 1837, s. 15, does not apply to the testator's will because it was made in Scotland, and the Wills Act, 1837, s. 35, enacts that this Act shall not extend to Scotland. The argument was, if I understood it correctly, that the effect of these words was to exclude the application of sect. 15 of the Act to the will of a testator domiciled in England if he made his will in Scotland. Counsel for Mrs. Duncan cited no authority to support his argument. In my judgment, sect. 35 of the Act has not the effect for which counsel argued. In my judgment, the effect of the section merely is that the Wills Act is not to alter or affect the testamentary law of Scotland: see *R.* v. *Lightfoot* (3).

The second point of counsel for Mrs. Duncan was that, since when he died the testator had no real or immovable estate to dispose of and made his will in Scotland and was a British subject, and since he might have disposed of all his personal estate by an unattested holograph will made in Scotland, the court ought to hold as a matter of fact that the testator's will was made under the Wills Act, 1861, s. 2, as an unattested holograph will to which sect. 15 of the 1837 Act did not apply. To support this argument counsel for Mrs. Duncan relied upon the decision of SARGANT, J., as he then was, in *Re Limond* (4). This case, counsel for Mrs. Duncan argued, was indistinguishable from the present case and bound me to decide in favour of his client. The headnote of the report in *Re Limond* (4) is as follows:

> The Wills Act, 1837, s. 15, does not apply to a will made in exercise of the privilege reserved to soldiers and seamen under sect. 11 of the same Act. On the conclusion of the Waziristan operations on the frontier of India in 1895 a portion of the force remained in the Tochi Valley as an escort to the party engaged in the delimitation of the frontier. The testator was a lieutenant in an Indian regiment forming part of this escort. While so serving the testator was mortally wounded by a fanatic and was carried into camp, where he dictated a will to his brother-in-law, whom he made his residuary legatee, and died on the next day. The will was signed by the testator and attested by his brother-in-law and another officer as witnesses. His estate consisted of personal property only: Held, that the testator was in "actual military service" within the meaning of the Wills Act, 1837, s. 11, at the time when he made his will. Held, also, that notwithstanding the attestation by two witnesses the will was a soldier's will made in exercise of the privilege reserved by sect. 11 and requiring no attestation; that sect. 15 of the Wills Act did not apply to a will so made; and that the gift to the attesting witness was therefore valid.

On p. 248 SARGANT, J., used the following language:

> Here the will in question was in fact executed in the presence of two witnesses who were present at the same time and who signed as witnesses in the presence of the testator, so that the will was a will which would have been good independently of the privilege given by sect. 11 of the Wills Act; but on the other hand it seems to me reasonably clear from the evidence that that was really a matter of chance or coincidence, and that what the testator was intending to do was to make a soldier's will. In Colonel Mein's account of the transaction as contained in the letter of June 18, 1914, he says this . . . And in a letter of May 15, 1895, which was written to his father-in-law, General Limond, by Captain Cunliffe, the writer says this: "Before the operation began Alex. asked me to write a rough will and to call Major Mein to witness and hear it dictated." I think, therefore, that, although in fact the will does fulfil the requirements of the Wills Act, still it was intended to be made as a soldier's will and is entitled to the privilege reserved by sect. 11.

It is, in my judgment, clear from the argument of SARGANT, J., that his decision was based upon the finding of fact that, although his signature was attested by two witnesses, the testator in that case was minded to make and did make a soldier's will in exercise of the privilege reserved by the Wills Act, 1837, s. 11.

It is impossible for me upon the evidence to conclude that the testator, Priest, intended to make an unattested holograph will disposing only of personal property which was to have legal operation and effect by force of the combination of law of Scotland relating to holograph wills and sect. 2 of Lord Kingsdown's Act. It would be wrong for me, having regard to the terms of this will, to conclude that the attestation of the testator's signature by two witnesses was a mere matter of chance or coincidence.

For these reasons, I propose on this summons to decide that the defendant Elizabeth Mary Duncan is not entitled to be paid one half share of the residue of the estate of the testator bequeathed to her by the said will and that there is an intestacy in respect of the one half share of residue bequeathed to her as aforesaid. Having regard to the Administration of Estates Act, 1925, s. 49, in the event of an intestacy in respect of the one half share, Victoria Mary Belfield and Elizabeth Ann Priest are entitled to one half share to be divided between them in equal shares, and I so decide.

Order accordingly. Costs of all parties to be paid out of the estate.

Solicitors: *Ravenscroft, Woodward & Co.* (for all parties).

[*Reported by* R. L. ZIAR, ESQ., *Barrister-at-Law.*]

CADZOW COAL CO., LTD. *v.* PRICE.
CADZOW COAL CO., LTD. *v.* MURPHY.

[HOUSE OF LORDS (Viscount Simon, L.C., Lord Thankerton, Lord Russell of Killowen, Lord Macmillan and Lord Wright), **October 21, December 7, 1943.**]

Workmen's Compensation—Accident arising out of employment—Explosion of firedamp in mine—Cause of ignition of firedamp inexplicable—Onus of proving that accident arose out of employment—Workmen's Compensation Act, 1925 (*c.* 84), *s.* 1.

The respondents were employed in the working of a coal-cutting machine in the appellant company's coal mine. The part of the mine in which the respondents were working was known to be one in which there was a likelihood of inflammable gas. While preparing the machine for its work, an explosion was caused by the ignition of firedamp in the mine and the respondents were injured. The cause of the ignition of the firedamp was inexplicable and the appellant company did not prove that either respondent was guilty of serious and wilful misconduct. The arbitrator held that the respondents had not discharged the onus of proving that the accident arose out of their employment :—

HELD : it is sufficient discharge of the workman's onus of proving that the accident arose out of his employment, if he proves that an accident of such character as that which in fact occurred is one to which his occupation is specially exposed. He is not required to explain the cause of the accident and to show that he was not guilty of serious and wilful misconduct.

[**EDITORIAL NOTE.** A workman claiming workmen's compensation is a plaintiff and has to prove his case. A plaintiff in an action for damages for negligence has to prove that there was negligence on the part of the defendant and, subject to the doctrine of *res ipsa loquitur*, if the accident is unexplained, it will not be shown that it was due to the negligence of the defendant. In a claim for workmen's compensation, however, the position is different. It is sufficient if the workman shows that his work took him to the place where the accident happened so that he was exposed to the consequences of it. How the accident happened is immaterial. What is material is that the workman was injured by an accident and that he was in the place where the accident happened by reason of his employment.

AS TO ACCIDENTS ARISING OUT OF EMPLOYMENT, see HALSBURY, Hailsham Edn., Vol. 34, p. 832, paras. 1167, 1168 ; and FOR CASES, see DIGEST, Vol. 34, pp. 276, 277, Nos. 2332-2340, pp. 323, 324, Nos. 2642-2651.]

Cases referred to :

(1) *Dennis* v. *White* (*A. J.*) *& Co.*, [1917] A.C. 479 ; 34 Digest 321, *2627* ; 86 L.J.K.B. 1074 ; 116 L.T. 774.

*(2) *Dover Navigation Co., Ltd.* v. *Craig*, [1940] A.C. 190 ; [1939] 4 All E.R. 558 ; Digest Supp. ; 109 L.J.K.B. 158 ; 162 L.T. 223.

(3) *Challis* v. *London & South Western Ry. Co.*, [1905] 2 K.B. 154 ; 34 Digest 315, *2585* ; 74 L.J.K.B. 569 ; 93 L.T. 330.

(4) *Trim Joint District School Board of Management* v. *Kelly*, [1914] A.C. 667 ; 34 Digest 270, *2300* ; 83 L.J.P.C. 220 ; 111 L.T. 305.

(5) *Lochgelly Iron & Coal Co., Ltd.* v. *Lindores*, [1929] S.C. 104 ; 22 B.W.C.C. 376 ; Digest Supp.

(6) *Thom* (*or Simpson*) v. *Sinclair*, [1917] A.C. 127 ; 34 Digest 320, *2619* ; 86 L.J.P.C. 102 ; 116 L.T. 609.

(7) *Brooker* v. *Thomas Borthwick & Sons* (*Australasia*), *Ltd.*, [1933] A.C. 669 ; Digest Supp. ; 102 L.J.P.C. 170 ; 149 L.T. 590.

CONSOLIDATED APPEALS by the employer against a decision that the accident arose out of the workmen's employment. The facts are fully set out in the opinion of VISCOUNT SIMON, L.C.

D. P. Blades, K.C., and *F. G. Watt* for the appellant.

Arthur P. Duffes, K.C, and *James Walker* for the respondents.

VISCOUNT SIMON, L.C.: My Lords, these two appeals have been consolidated in order to save time and expense, as the question in issue is the same in both. But it is necessary to regard each case as though it was being dealt with separately and, for convenience, I take the case of Price as an example of both.

Price was employed by the appellant company in the working of a coal-cutting machine in the appellant's mine at Dullatur Colliery, Dumbartonshire.

He and his fellow workman, Murphy (the other respondent), were preparing the coal-cutting machine for its work when an explosion occurred, which inflicted burns on the two men and has totally incapacitated them. The explosion was caused by the ignition of firedamp in the mine. No other miners of any category were at the time of the explosion working sufficiently near to be responsible for the ignition. The mine, or at any rate the part of it in which the respondent was working, was known to be one in which there was likely to be such a quantity of inflammable gas as would render the use of naked lights dangerous, and consequently the use of safety lamps was required under the Coal Mines Act, 1911, s. 32, and the two men before descending the pit had been searched, under sect. 35 of the Act, as a precaution against their taking into the mine any matches or other means of producing a naked light. As a result of such search no matches were found on them, and there was no evidence to suggest that either of them was carrying matches or had anything to do with the explosion. For the respondent to take matches into the mine would indeed be a criminal offence under sect. 35 and cannot, of course, be presumed without evidence, especially as each of the men at the arbitration denied any such suggestion on oath. The appellant company neither proved nor alleged that either of the workmen was guilty of serious and wilful misconduct.

The facts set out by the Sheriff Substitute in the stated case show that there was nothing connected with the condition or use of the coal-cutting machine which would suggest how the firedamp became ignited, and the cause of the explosion, therefore, remains unexplained—that is to say, while firedamp cannot explode unless heated to the explosion point, as it might be by a naked light, there was no evidence to show how such heating and consequent explosion could have occurred.

In these circumstances, the Sheriff Substitute in a careful judgment held that the respondent had not discharged the onus of proof resting on him that the accident arose out of his employment. The judges of the Second Division unanimously reversed this conclusion, and I have no doubt whatever that they were right in so doing. It is, of course, quite correct to say that an injured workman claiming compensation under the Workmen's Compensation Acts must prove that the accident which injured him arose out of and in the course of his employment, but that is an entirely different thing from saying that the workman cannot recover unless he can show affirmatively exactly how the accident happened. The Lord Justice Clerk was, I think, thoroughly justified in observing that:

> . . . it was a matter of judicial knowledge, in view of half a century of legislation and statutory rules and orders bearing upon safety in coal mines, that the risk of such an explosion is notoriously a risk inherent in the employment of coal getting underground . . .

at any rate in a mine where an accumulation of inflammable gas was to be expected and where the prohibition against the possession of matches, etc., was applied. In such a case (to use the language of LORD FINLAY in *Dennis* v. *White* (1)), the risk of injury by explosion is a risk "inherent in the employment," or, as LORD ATKIN said in *Dover Navigation Co.* v. *Craig* (2) at p. 196:

> This particular risk of injury by accident was inherent in the nature of the employment; it was a necessary incident to the performance of the . . . work.

There is a long line of cases beginning with *Challis* v. *London & South Western Ry. Co.* (3) (where an engine driver was injured by a stone dropped by a mischievous boy from a road bridge crossing the line when the engine was passing underneath), and including well-known decisions of this House, such as *Trims School* v. *Kelly* (4) (assault on schoolmaster of an industrial school), *Dennis'* case (1) already quoted (risks of street traffic), and the *Dover Navigation* case (3) (risk of a seaman in West African ports catching yellow fever), which show that a workman's accident should be regarded as arising "out of his employment" if the risk of such an accident is one to which his occupation is specially exposed. In that event, the workman discharges the onus which is on him to prove that the accident arises out of his employment by proving that it was the operation of this special risk which injured him.

The fallacy involved in the other view is to suppose that the claimant does not prove that the accident arose out of his employment unless he proves

affirmatively exactly how the said risk to which he was exposed came to operate. That is not so. The contrary is established by the decision of this House in *Lochgelly Iron & Coal Co., Ltd.* v. *Lindores* (5). It is surely evident that a sailor, who is specially exposed by reason of the nature of his employment to infection from yellow fever, has not to prove how he caught it before he can say that his misfortune arose out of his employment, and that a servant whose duty is to cycle along crowded streets and is consequently exposed by reason of his employment to the risk of traffic accidents is not required to prove exactly A
how such an accident occurred before he can say that it arose out of his employment. Similarly, in the present case. Inasmuch as the risk of explosion in the mine is a risk inherent in the employment of the respondent, he satisfies the requirement that he must prove that the accident arose out of his employment by proving that the accident arose out of an explosion.

The other view, which I entirely reject, appears to me to proceed from what is nothing less than a misreading of the Act. Those who maintain the other B
view seem to me to be asserting that, if an accident was due to the serious and wilful misconduct of the workman, it could not be an accident arising out of the employment. If that were correct, then there might be much force in the argument that the workman must prove exactly how the accident came about, and, in effect, must negative all suspicion that it was brought about by his own serious and wilful misconduct. This, I think, is what the Sheriff Substitute means by his conclusion No. 23—" It is not proved that the accident C
arose out of his employment." But this is not the proper way of looking at the matter. An accident may well arise out of a workman's employment, even though the workman was proved by his employer to be guilty of serious and wilful misconduct. The fact, if it were the fact, that the workman had been deliberately and dangerously careless does not in itself affect the proposition that he is exposed, owing to the nature of his employment, to a special risk. D
If the language of sect. 1 of the Act of 1925 is examined, it will be at once seen that " serious and wilful misconduct " is a bar to the remedy otherwise open to an injured workman, and is not introduced for the purpose of narrowing the conception of the accident in respect of which a claim might be made. Indeed, this construction which I have indicated is inevitable if sect. 1 is considered in relation to injuries that result in death or in serious and permanent disablement. For in such cases, the defence of " serious and wilful miscon- E
duct " is not open to the employer and compensation must be paid notwithstanding the workman's misconduct. But no compensation under the Act is ever liable to be awarded unless the accident arises out of the employment.

I move that the appeals be dismissed with costs.

LORD THANKERTON: My Lords, I agree. Although these appeals are consolidated, the right of each respondent to compensation under the Work- F
men's Compensation Act is a distinct individual right in law. This consideration appears to have been lost sight of by the arbitrator, and I will make some comment on this aspect of these appeals later on.

It is clear that the operative ground of the arbitrator's decision against the claimants is embodied in finding (23), viz.: " It is not proved that the accident arose out of his employment or was due to a cause incidental to it." In my G
opinion, the Second Division were clearly right in reversing this decision, both on the terms of the statute and on a long course of decisions in this House.

The case of a firedamp explosion in a mine with consequent injuries to a workman is perhaps one of the most typical cases of an accident arising out of the employment within the meaning of sect. 1 (1) of the Act, and—in non-fatal cases such as the present—the only answer open to the employer is an averment of serious and wilful misconduct on the part of the claimant workman, as H
provided in proviso (*b*) of the subsection. It is to be noted that such misconduct, if proved, does not negative the fact that the accident has arisen out of the employment, but bars the right of recovery.

It is clear, in my opinion, that the workman has to prove the opening paragraph of the subsect. (1), before any question as to the accident having been caused by his misconduct emerges, i.e., before the proviso comes into the picture. The words of this paragraph are not " by accident the cause of which arises out of the employment," and the arbitrator's failure to observe that it is the accident—not its cause—that has to arise out of the employment, appears to have led him astray, in spite of the long series of decisions in this House.

In the present case, the presence of firedamp in the mine rendered the mine dangerous and rendered applicable statutory provisions enacted with regard to the safety of the miners at work, and it is the breach of certain of these provisions that was averred by the appellants—an averment which they have failed to prove. It is not possible to maintain that the risk of danger created by the presence of firedamp did not constitute a risk which was part of the risks of the employment, and one to which the respondents were exposed by reason of their having to carry on their work in that mine. That, in my opinion, is amply sufficient to establish that the accident arose out of the respondents' employment, irrespective of determination of the means by which sufficient heat was engendered to cause the firedamp to explode. This left it open to the appellants to seek to establish that, although the accident arose out of the employment within the meaning of the opening paragraph of subsect. (1), the respondents were barred from recovering compensation by reason of proviso (*b*). The appellants sought to do so, and they failed.

I agree with the views expressed by Viscount Simon, L.C., and I also agree with the views expressed by the majority of the judges in the Court of Session, and I find it unnecessary to go into the cases again. I am unable to agree with the view which Lord Mackay appears to hold, if it involves any distinction as to the burden of proof on claimants for compensation, according as the injuries were fatal or non-fatal, beyond the ordinary rules of evidence, where the best evidence is not available.

As regards the consolidation of the two cases, I desire to point out that an allegation of wilful and serious misconduct under proviso (*b*) is separately made in each case, and in each case, it must be brought home to "that workman," as the proviso says, i.e., to the particular claimant in question. Thus, even if the appellants had proved the presence of matches or of a naked flame, they would have failed in the case of Cyrus Price unless they had proved that he was responsible for the lighting of the match or the exposure of the naked light, and in the case of Donald Murphy unless they had proved his responsibility.

I agree with the motion proposed by Viscount Simon, L.C.

Lord Russell of Killowen: My Lords, the opinion of Viscount Simon, L.C., is also my own and I desire to add nothing to it.

Lord Macmillan: My Lords, it is undoubtedly incumbent on a workman who seeks the benefit of the Workmen's Compensation Act to establish that the injury in respect of which he claims compensation arose out of and in the course of his employment. Otherwise he is not within the Act. But in the present case I agree with the judges of the Second Division that the arbitrator misdirected himself in law as to the nature of the onus which the workman has to discharge. An accident may, in my opinion, be proved to have arisen out of a workman's employment although he is unable to explain how or why it happened. An accident is essentially a fortuitous occurrence and many accidents are inexplicable in the sense that it is not possible to account for their occurrence on scientific or indeed on any grounds.

The arbitrator here found that the respondents, two coal-cutting machine men employed by the appellants, were injured by an explosion due to the ignition of firedamp in the appellants' pit while they were engaged in preparing a coal-cutting machine for work at the face. He found negatively that the ignition of the firedamp was not due to any defect in the plant and that there was no evidence of the respondents having possessed or lighted any match. But he found himself unable to ascertain affirmatively how the firedamp came to be ignited. In this state of the evidence he held it not proved that the accident arose out of the respondents' employment or was due to a cause incidental to it. The respondents apparently sought to prove that the ignition was due to something wrong with the plant but failed to establish this.

In my opinion the respondents proved all that was required of them. They proved that at the time of the accident they were engaged in the work which they were employed to perform at a place where they were employed to work, that the place was one where there was a danger of the explosion of firedamp as evidenced by the precautions in force there, and that an explosion of firedamp in fact occurred in consequence of which they were injured. Their employment involved a risk which unhappily became an actuality. That they failed to show how the ignition took place or attempted an explanation which was not accepted is to my mind beside the question.

The case indeed appears to me too clear for argument and I should dismiss the appeal.

Lord Wright : My Lords, the two workmen, the respondents in this case, while employed in the appellant's colliery as coal-cutting machine men were seriously but not permanently injured by an explosion of firedamp. They were at the time engaged together in preparing a coal-cutting machine for its work. The arbitrator before whom the claims came has after a most elaborate investigation reached the conclusion that, though the explosion might have been caused by ignition due to the introduction of a spark or naked light into the mine, the evidence before him did not enable him directly to determine how it was introduced. He held, however, that it was not proved that the accident arose out of the employment or was due to a cause incidental to it' and that this failure of proof was fatal to the respective claims of the respondents.

I agree with the judges of the First Division who reversed this decision that the arbitrator misdirected himself in law. The particular problem which was raised has been the subject of several decisions, of which the latest in this House is *Dover Navigation Co.* v. *Craig* (2). It is, of course, clear that the words of the Workmen's Compensation Act, 1925, s. 1, make it necessary for a claimant to establish personal injury by accident "arising out of and in the course of his employment." Both these material facts must be proved by him. The latter relates to the time of the accident which must fall within the period of employment, the former to causality understood in the very limited sense that there is such a connection between the accident and the employment of the workman that it is because of the employment that the accident affects the workman, whereas if he had not been so employed he would not have been injured. Thus not every injury by accident which befalls a workman during the period in which he is employed gives a claim under the Act ; it must further be shown that it "arose out of" the employment. These simple words have often been discussed and have been paraphrased by such expressions as "connected with", or "incidental to" or "inherent in" the employment and the like. These expressions help to emphasise that it is necessary to show the nexus between the injury and the employment, but I prefer the simple and untechnical words of the Act, "arising out of the employment." The claimant need not go beyond the superficial nexus. He need not show that the nature of the work he was doing caused the accident. Thus in *Thom's* case (6) the woman, engaged as a fish curer, was injured because the roof of the shed in which she was working fell upon her. The roof fell upon her because of something in itself extrinsic to her employment ; the collapse of the roof was caused because on the adjoining premises the owner was building a new wall. In *Brooker's* case (7) the workman was injured because his employment took him to a shop which collapsed upon him while he was there, because of the sudden shock of an earthquake. These two instances out of many reported cases show how remote may in one sense be the connection between the employment and the accident. It is enough that the exigencies of the employment brought the workman within the range of the particular danger and exposed him to its impact, whereas but for his employment he would not have been exposed. Thus the injury arose out of the employment. The danger affected him to a degree and in a manner beyond those who were exposed to such risks in the normal course of affairs. A striking application of the principle is to be found in the *Dover* case (2), where the injury by accident was due to the bites of malarious mosquitoes on the West Coast of Africa, which caused the death of the sailor. It was only his employment which took him to that dangerous region, of which he was not normally an inhabitant to whom such risks were endemic.

It would seem to follow from these instances that when the claimants here had sufficiently established that by an accidental explosion of firedamp in the mine in which they were working in the course of their employment they had suffered their injuries, they had proved their case. The explosion injured them because their employment brought them to the very place in or near which the explosion occurred. They were not required to show how or why the explosion took place. Their claim was not barred because the cause of the explosion was unexplained and unexplainable by them.

The arbitrator has not accepted this view. In order to examine what I take to be his view, it will be convenient to go back to sect. 1 of the Act. That section, having defined the two matters which the claimant has to establish, A goes on to provide that, if the workman's injury is attributable to his serious and wilful misconduct, his claim will be disallowed unless the injury results in serious and permanent disablement. If I understand correctly the view of the arbitrator, he is of opinion that the workmen have not given sufficient proof to satisfy sect. 1 because they have not sufficiently negatived any suspicion or suggestion or possibility that both or either of them may have caused the explosion by striking a match or some such action. This apparently they could B not do without showing precisely how the explosion occurred. They have not shown that it arose out of their employment, because they have not excluded the possibility that it may have arisen from their own misconduct. So to hold would, in my opinion, be to misconstrue the Act. The onus to prove serious and wilful misconduct rests on the employer. That issue only arises after the claimant has shown personal injury by accident arising out of and in the course of the employment. Until that primary and fundamental issue has been C decided in favour of the claimant the further issue, which only arises by way of defence, is irrelevant. In regard to that issue the onus is on the employer. It is clear that the issue was investigated before the arbitrator, who heard evidence and argument upon it. He might have drawn the inference that either or both of the men had struck a match, and found that as a fact. But he confesses his inability to draw such an inference. There was no evidence, D he says, to show that either had a match in his possession or exposed any flame or spark. The arbitrator's view seems to have been that, if the accident was unexplained, it could not be held to arise out of or be incidental to the employment of the claimants. I do not mean to say that a claimant is necessarily entitled, in a case like this, simply to say that he was employed in a colliery where there was an explosion of firedamp which injured him. He would have at least to show that it was his employment which brought him within the range E of the explosion. If he gave such evidence the employers would be able to cross-examine him and the arbitrator would require all the relevant facts to be elicited. But the claimant is not to be held to have failed to show that the accident arose out of his employment in a case like this merely becuase the cause of the explosion remains after elaborate investigation unascertainable. He has not to explain the causes of the explosion or how or why it happened. All he need show is that the accident arose out of his employment. That the F accident did so arise is sufficiently established if it is clear that the employment exposed him to the danger to which, but for the employment, he would not have been exposed.

In the present case, if the respondents, or either of them, had struck a match or created an open flame, they would have committed a criminal offence under the Coal Mines Acts. There is no evidence to justify a finding that they did; G indeed the evidence negatives such a finding, because the men were searched when they entered the mine and no matches or the like were found on them. I can appreciate the arbitrator's refusal to draw such an injurious inference against the men in the absence of convincing evidence. But the absence of such a finding is, in my judgment, fatal to his conclusion. It is a minor but not negligible consideration that it would have been necessary to bring the offence specifically home to one or, failing that, to show that they were joint H offenders. That again was not found or even suggested.

In my opinion the consolidated appeals should be dismissed.

Appeals dismissed with costs.

Solicitors: *Beveridge & Co.* agents for *W. & J. Burness*, Edinburgh, and *J. A. McAra*, Glasgow (for the appellants); *Kingsford, Dorman & Co.* agents for *Allan McDougall & Co.*, Edinburgh, and *R. Maguire, Cook & Co.*, Glasgow (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

RACECOURSE BETTING CONTROL BOARD *v.* SECRETARY OF STATE FOR AIR.

[Court of Appeal (Lord Greene, M.R., MacKinnon and Goddard, L.JJ.), **December 9, 10, 20, 1943.**]

Not applied by Singleton, L.J. *Distinguished* by Denning, L.J. *Doubted* by Morris, L.J. R. v. Northumberland Compensation Appeal Tribunal. [1952] 1 All E.R. 122.

Arbitration—General Claims Tribunal—Whether proceedings constitute arbitration —Compensation (*Defence*) *Act,* 1939 (c. 75), *s.* 7.

The appellants sought to have set aside a decision of the General Claims Tribunal established under the Compensation (Defence) Act, 1939, on the ground of alleged error of law on the face of the decision. It was objected on behalf of the respondent that the court had no jurisdiction to entertain the matter on the grounds that the General Claims Tribunal was an *ad hoc* tribunal, that the provisions of the Act which governed its powers and procedure were comprehensive and that the only powers exercisable by the High Court were those specifically conferred on the court by the Act itself. It was contended for the appellants (i) that, whether the tribunal was to be regarded as an arbitration tribunal or as a court of inferior jurisdiction, the High Court had the power and the duty to set aside the decision on the ground of error of law on its face, or (ii) alternatively, that the tribunal was an arbitration tribunal and that the jurisdiction of the court to set aside awards of arbitrators on that ground was exercisable accordingly :—

Held : the General Claims Tribunal was a special tribunal which fell outside the category of arbitration tribunals and it was governed exclusively by its own code. The objection to the jurisdiction, therefore, succeeded.

Decision of Uthwatt, J. ([1943] 1 All E.R. 672) *affirmed on other grounds.*

[**EDITORIAL NOTE.** In the lower court the judge took the view that the General Claims Tribunal was either an arbitration tribunal or a court. Upon an examination of the matter, it was clear that it was not a court and, therefore, it was held that the proceedings before it were an arbitration and an application might be made to set its award aside. The Court of Appeal have, however, differed from this view. In their opinion, there is a third class of tribunals which are neither arbitration tribunals nor courts. These are special tribunals governed entirely by the statutes creating them and in that case the only remedies of those dissatisfied with the finding of the tribunal, where it does not exceed its jurisdiction, are those, if any, which the statute provides.

As to Nature of Court, see HALSBURY, Hailsham Edn., Vol. 8, pp. 525, 526, para. 1166 ; and for Cases, see DIGEST, Vol. 16, pp. 98-100, Nos. 1-17.]

Cases referred to :

(1) *Hodgkinson* v. *Fernie* (1857), 3 C.B.N.S. 189 ; 2 Digest 527, *1645* ; 27 L.J.C.P. 66.

(2) *Re Jones & Carter's Arbitration,* [1922] 2 Ch. 599 ; Digest Supp. ; 91 L.J.Ch. 824 ; 127 L.T. 622.

*(3) *Hogge* v. *Burgess* (1858), 3 H. & N. 293 ; 2 Digest 529, *1658* ; 27 L.J.Ex. 318 ; 31 L.T.O.S. 119.

*(4) *Kent* v. *Elstob* (1802), 3 East 18 ; 2 Digest 522, *1601.*

(5) *Adams* v. *Great North of Scotland Ry. Co.* (1889), 18 R. (H.L.) 1 ; 7 Digest 433, case *c.*

(6) *Johannesburg Municipal Council* v. *Stewart* (*D.*) *& Co., Ltd.* [1909] S.C. 860 ; 46 Sc. L.R. 657 ; 2 Digest 332, *e.*

(7) *Law* v. *Garrett* (1878), 8 Ch.D. 26 ; 2 Digest 363, *324* ; 38 L.T. 3.

(8) *Austrian Lloyd S.S. Co.* v. *Gresham Life Assurance Society, Ltd.* [1903] 1 K.B. 249 ; 2 Digest 364, *329* ; 72 L.J.K.B. 211 ; 88 L.T. 6.

(9) *The Cap Blanco,* [1913] P. 130 ; 2 Digest 364, *331* ; 82 L.J.P. 23 ; 109 L.T. 672.

(10) *Anon.* (1698), 1 Salk. 71 ; 2 Digest 547, *1803.*

(11) *Brown* v. *Brown* (1683), 1 Vern. 157 ; 2 Digest 521, *1589* ; 2 Cas. in Ch. 140.

(12) *British Westinghouse Electric & Manufacturing Co.* v. *Underground Electric Rys. Co. of London,* [1912] A.C. 673 ; 2 Digest 459, *1059* ; L.J.K.B. 1132 ; 107 L.T. 325.

(13) *R.* v. *Electricity Comrs., Ex p. London Electricity Joint Committee Co.* (1920), *Ltd.,* [1924] 1 K.B. 171 ; 20 Digest 197, *1* ; 93 L.J.K.B. 390 ; 130 L.T. 164.

Appeal by the Racecourse Betting Control Board from an order of Uthwatt, J., dated Apr. 21, 1943, reported [1943] 1 All E.R. 672. The facts are fully set out in the judgment of Lord Greene, M.R.

A. S. Comyns Carr, K.C., and *Frederick Grant, K.C.* for the appellants.

The Attorney-General (*Right Hon. Sir Donald Somervell, K.C.*), *H. O. Danckwerts,* and *Hon. H. L. Parker* for the respondent.

LORD GREENE, M.R.: This is an appeal from an order of UTHWATT, J., dismissing an originating motion whereby the appellants sought to have set aside a decision of the General Claims Tribunal established under the Compensation (Defence) Act, 1939, on the ground of alleged error of law on its face. It was objected below on behalf of the respondent that the court had no jurisdiction to entertain the motion. This objection was overruled by UTHWATT, J., who, however, dismissed the motion on its merits. The same objection to the jurisdiction was taken before us and at the conclusion of the argument upon it we unanimously came to the conclusion that it was a valid objection and that, accordingly, we were not entitled to entertain the appeal on its merits. In view of the general importance of the question thus raised, we thought it desirable to give our reasons in writing.

The decision which the appellants ask to have set aside was made on their application to have determined the amount of compensation payable in respect of buildings belonging to them possession of which had been taken by the respondent on behalf of the Crown under the relevant emergency powers. The Compensation (Defence) Act, 1939, under which the application was made lays down certain rules for fixing the compensation to be paid by the Crown where possession has been taken on its behalf under emergency powers. Sect. 7 of the Act sets up a tribunal called the General Claims Tribunal to which is entrusted the task of fixing the amount of compensation to be paid in case of dispute. By its decision in the present case, dated Sept. 28, 1942, the tribunal set out three contentions stated to have been advanced before it on behalf of the appellants and rejected all three. It then proceeded to award compensation at the rate of £610 per annum. It may be noted that the decision is described on its face as an " award " although the more proper description would have been " decision," which is the word used in sect. 7 of the Act. The appellants were desirous of challenging the view taken by the tribunal upon the three contentions in question.

On the question of jurisdiction, it was contended on their behalf (i) that, whether the tribunal is to be regarded as an arbitration tribunal or as a court of inferior jurisdiction, the High Court has the power and the duty to set aside the decision on the ground of error of law on its face; (ii) alternatively, that the tribunal is an arbitration tribunal and that the jurisdiction of the court to set aside awards of arbitrators on that ground is exercisable accordingly. On behalf of the respondent it was argued that the General Claims Tribunal is an *ad hoc* tribunal of a special kind, that the provisions of the Act which govern its powers and procedure are comprehensive and that the only powers exercisable by the court are those specifically conferred on the court by the Act itself.

The first argument advanced on behalf of the appellants was of this nature. It was said that the jurisdiction to set aside the award of an arbitrator for error of law appearing on its face is one that exists at common law independently of the Arbitration Acts. It was also said that the jurisdiction is not confined to consensual arbitrations, but extends to arbitrations under statutes. Both these propositions are unquestionably correct: see as to the former *Hodgkinson* v. *Fernie* (1), and as to the latter *Re Jones & Carter's Arbitration* (2). The next and vital proposition is, however, one which, in my opinion, cannot be supported either on principle or on authority. It was that the jurisdiction is not confined to the case of awards of arbitrators, but extends to the decisions of every form of inferior tribunal; and, accordingly, when the legislature establishes a special tribunal, whether or not it can be described as an arbitration tribunal, the court can set aside a decision given by it if an error of law appears on its face. This jurisdiction was said to exist quite independently of the old procedure by way of writ of error.

No authority was quoted in support of this proposition and, in my opinion, it is wrong on principle. In the case of an inferior court, if it acts beyond its jurisdiction, the remedy is by *certiorari*. If, acting within its jurisdiction, it makes an error in law, the remedy is by appeal (if the decision is appealable) and that whether or not the error appears on the face of the decision. In the case of new tribunals set up under statute, no appeal will lie unless the right of appeal is conferred expressly or impliedly by statute, and accordingly where, as in the present case, no right of appeal is given, their decisions are not appealable. But it does not follow from this that there is some inherent jurisdiction in the court to set aside the decision of such a tribunal, not being an arbitration tribunal, for error of law on its face.

I can find no trace of any exercise of this particular jurisdiction elsewhere than in the case of awards of arbitrators either consensual or statutory ; and, in my opinion, it is confined to that case. Exactly how and why the jurisdiction came to be established in the case of arbitrations it is not pertinent to inquire. In *Hogge* v. *Burgess* (3), at p. 296, MARTIN, B., says that the old rule that the decision of an arbitrator both upon the law and facts was conclusive was first broken into by the Court of King's Bench in *Kent* v. *Elstob* (4). That was a case where the error appeared on the face of a document delivered with the award and the language used both in the argument and in the judgments suggests that the jurisdiction was already recognised in cases where the error appeared on the face of the award itself, the real controversy being as to whether it existed where the error appeared in a separate document. But, however this may be, the jurisdiction is treated by MARTIN, B., as an anomalous exception grafted on to the general rule relating to the conclusiveness of the awards of arbitrators. The same view had been expressed the year before by WILLIAMS, J., in *Hodgkinson* v. *Fernie* (1), at p. 202, where that judge refers to it as an exception which, though it was to be regretted, was then, he thought, firmly established. On the other hand, this jurisdiction may be the last relic of a power which, it appears, the courts used to claim the right to exercise, namely, a power to review the awards of arbitrators both on law and on fact : see *per* LORD HALSBURY, L.C., in *Adams* v. *Great North of Scotland Ry.* (5), at p. 4.

The second argument is alternative to the first and depends upon the proposition that the General Claims Tribunal is a statutory arbitration tribunal and that its decision can accordingly be challenged on the ground of error of law on its face. It was to this argument alone that the reasoning of UTHWATT, J., was addressed. He expressed the view that every tribunal must be either an arbitral tribunal or a court. He then examined the constitution and procedure of the General Claims Tribunal and held that it was not a court. Therefore, he said, it must be an arbitration tribunal. With all respect to UTHWATT, J., his approach to the problem was, in my opinion, an erroneous one. It is competent to the legislature to set up any kind of tribunal that it pleases. The questions to be determined in any particular case are : what is the true nature of the tribunal which the legislature has established and what are the powers, if any, which have been conferred upon the courts with regard to its decisions ? These questions must be decided by a consideration of the statute and the true interpretation of its provisions.

That the legislature can and often does set up a tribunal which is an arbitration tribunal in its nature is beyond dispute. It may make its intention clear by using the word "arbitration" or its intention may have to be collected from the language of the statute as a whole. If the statute does provide for arbitration, two consequences follow. First, the Arbitration Act, 1889, s. 24, and the Arbitration Act, 1934, s. 20, will, unless excluded, apply and the provisions of those Acts, in so far as they are not inconsistent with the statute, will be imported into the statutory arbitration. Secondly, the inherent power of the court (which, as I have said, it possesses quite apart from anything in the Arbitration Acts), to set an award aside on the ground of error of law on its face will be exercisable in respect of the awards of the tribunal. This power is a feature of English law relating to arbitration and once the legislature has shown its intention to place a statutory tribunal in that category the power arises as a matter of course. The question, therefore, in the present case is, has the legislature manifested an intention to place the General Claims Tribunal in the category of arbitration tribunals ? Or is the tribunal a special tribunal which falls outside that category and is governed exclusively by its own code ? In my opinion, the former question must be answered in the negative and the latter in the affirmative. My reasons may be summarised as follows.

The Compensation (Defence) Act, 1939, s. 7, provides that the decisions of the tribunal are to be final. This by itself might scarcely be enough. But it is qualified by a proviso giving power to the tribunal to state and the court to order a consultative case on a question of law. The collocation of the enactment as to finality with the qualification contained in the proviso shows, in my opinion, that final means final, as regards both fact and law, and that the proviso is intended to state the only case in which the court is to have jurisdiction with regard to any matter of merits falling within the competence of the tribunal. I am not, of course, dealing with a case where the tribunal exceeds or threatens to exceed its jurisdiction. To such a case quite different considerations apply.

It is to be noted further that the statute does not use the word "arbitration" or "arbitrators." This by itself would not be decisive. But when taken in conjunction with other indications it is, I think, important, particularly when the Arbitration Act, 1889, s. 24, and the Arbitration Act, 1934, s. 20, refer to arbitrations under statute and apply the provisions of the Acts, so far as not inconsistent, to such arbitrations. With those sections before it, the legislature would have been guilty of an unfortunate fault of draftsmanship in not using the word "arbitration" if its intention was that the provisions of these two sections should apply. I do not attach any weight to the word "referred" in sect. 7.

What appears to me to place the matter beyond all doubt is the fact that the provisions of sect. 7 are applicable both to England and to Scotland with the substitution of the Court of Session for the High Court in the case of Scotland. Now the Scots law of arbitration differs in many important respects from the English law on the same subject: *per* Lord President Dunedin in *Municipal Council of Johannesburg* v. *D. Stewart & Co.* (1902), Ltd. (6), at p. 876. The Arbitration Acts, 1889 and 1934, do not apply to Scotland. So far as I have been able to discover, the only recent statute relating to arbitration in Scotland is the Arbitration (Scotland) Act, 1894, which only deals with details of procedure. The Act of Regulations, 1695, is still in force. It seems to me to be the height of improbability that the legislature, when setting up one tribunal for both countries, should have intended to do so in such a way as to import two widely different systems of law, one for Scotland and one for England. The fact that one set of statutory provisions is to do duty in both jurisdictions appears to me to afford the strongest support to the view that the statutory code is intended to be exhaustive and that the powers of the High Court in England and the Court of Session in Scotland are to be those and only those which the statute in terms confers. But, quite apart from the general difference between the laws relating to arbitration in the two countries which appear to me to be sufficient to establish the point, there is, if my understanding is correct, a particular difference which is of immediate relevance to the present case. I can only speak with the utmost diffidence on a matter of Scots law. But I gather that in Scotland an arbitrator is still the final judge both of law and of fact and that there is no procedure in Scotland which corresponds in any way to the English rule that the court can set aside an award for an error of law appearing on its face: see the Act of Regulations, 1695, s. 25, Bell's Dictionary and Digest of the Law of Scotland, 7th Edn., p. 62, col. 1; Erskine's Principles of the Law of Scotland, 19th Edn., p. 600; *Adams* v. *Great North of Scotland Ry.* (5), at p. 8. If I am right in this, the result on the appellants' argument would be that a claimant in England would be in a much more favourable position than a claimant in Scotland. Decisions of the tribunal could be challenged in England which, if given in Scotland, would be unchallengeable, a result which cannot have been intended by the legislature.

These considerations appear to me to be conclusive. There are other matters which confirm this view, if confirmation be needed. If a reference to the tribunal is a statutory arbitration, then in England (but not in Scotland) the Arbitration Act, 1889, s. 24, and the Arbitration Act, 1934, s. 20, will apply. A few examples of the consequences which would follow are sufficient to bring out the point. First, the proviso to sect. 7 which gives power to state a consultative case would be unnecessary since this power is given by the Arbitration Act, 1934, s. 9 (1) (*a*). But there would also be imported the power to state an award in the form of a special case given by sect. 9 (1) (*b*). The fact that the legislature has expressly provided for the former power and has said nothing about the latter shows, in my opinion, that it was not intended that the latter should exist. Similar observations as to redundancy apply to sect. 9 of the Act.

Secondly, the power to remove an arbitrator for misconduct under sect. 11 of the Act of 1889 would apply. The fact that holders of high judicial office are to be members of the tribunal makes it unlikely, to say the least, that the legislature intended that they should be exposed to the possibility of proceedings being taken to remove them.

In the result the objection to the jurisdiction succeeds and the appeal must be dismissed with costs.

MACKINNON, L.J.: The General Claims Tribunal, established under the Compensation (Defence) Act, 1939, gave their decision upon the claim of the appellants by a document dated Sept. 28, 1942, signed by the president and three other members, and bearing the title "Award." The appellants by notice of motion dated Nov. 3, 1942, moved before UTHWATT, J., to set aside A this award on the ground that there was "an error of law on the face of the said ward." The Attorney-General, appearing for the respondent, took the objection that the court had no jurisdiction to entertain this motion, inasmuch as the document impugned was not an award of arbitrators, and therefore was not subject to the rule that such an award can be set aside on such a ground. UTHWATT, J., overruled this objection, heard the motion on its merits, and on that ground held that the motion failed. From his decision the claimants B appeal. The Attorney-General before us renewed his objection to the competence of the motion, and asked for the dismissal of the appeal on that ground.

The proposition that an award of an arbitrator can be set aside for error of law appearing on the face of it is, I think, a rule peculiar to arbitration. Counsel for the appellants sought to argue that it is only a particular application of a general principle, which he enunciated as being that a superior court will set C aside the decision of an inferior tribunal if such decision contains on the face of it an error of law. I do not think there is any such general principle. *Prima facie*, if parties have contracted to refer a dispute to an arbitrator, they are bound by their contract, and the award of the arbitrator is final and binding. It is significant that, if by their contract they have agreed to leave to him the decision of a question of law, they are bound by his decision, and any attempt to set it aside even on the ground of manifest error of law on his part will fail. This D suffices to show that there is no such general principle as is suggested. If, however, their contract does not expressly or by necessary inference refer questions of law as well as of fact to the arbitrator, then it may well be that there is an implied term in their contract that he shall decide the dispute by the proper application of the law involved. If it is apparent on the face of his award that he has failed to do so, either party may contend that by the contract he is not bound to submit to this award since he has not so agreed. This, I E believe, is probably the origin of the rule about setting aside an award for error of law on the face of it, though I confess I have been unable to discover as a matter of history the origin of it. It is, however, the only exception to the rule that an award by an arbitrator is final and binding for all purposes, and WILLIAMS, J., in his exposition of the matter in *Hodgkinson* v. *Fernie* (1) not only says it is the only exception, but adds that it is possibly an unfortunate one, though too well settled to be doubted. F

The Act of 1939, in sect. 7, says that the decision of the tribunal is to be final. If the appellants' motion can be entertained that can only be upon one ground, namely, that the members of the tribunal are, in the eye of the law, arbitrators, and that their decision, which they entitle "Award," is an award of arbitrators and subject to this special rule as to an award of arbitrators. To this proposition UTHWATT, J., acceded. As the tribunal was called a tribunal and was G not called a court, and as it was clearly not a court of record, he came to the conclusion that proceedings before it must be treated as arbitrations, and its members as arbitrators.

I cannot agree to this. There is nothing to prevent the legislature creating a tribunal of a special kind, expressly declared not to be a court of record, and expressly declared not to be subject to the incidents of arbitration. I think that, in this Act, the legislature has done this with sufficient clearness. In H addition to the express words used in sect. 7, I am particularly impressed by the fact that this tribunal is to have jurisdiction in Scotland as well as in England, and a Lord of Session is to be a member of it. It is most unlikely that Parliament should intend that a decision of the tribunal, possibly involving nice questions of Scots law, should be an arbitrator's award liable to be reviewed by the English King's Bench Division upon an allegation that it contained error of law on the face of it. UTHWATT, J., seems to have been a good deal influenced by *Law* v. *Garrett* (7), *Austrian Lloyd* v. *Gresham Co.* (8), and *The Cap*

Blanco (9). In each of those the contract of the parties provided for the decision of any dispute by a foreign court, in each one of the parties brought an action in breach of his agreement, and in each his action was stayed. It is, I think, rather unfortunate that the power and duty of the court to stay the action was said to be under the Arbitration Act, 1889, s. 4. In truth, that power and duty arose under a wider general principle, namely, that the court makes people abide by their contracts, and, therefore, will restrain a plaintiff from bringing an action which he is doing in breach of his agreement with the defendant that any dispute between them shall be otherwise determined. The Arbitration Act, 1889, s. 4, only applies this principle to one type of such an agreement. The three cases cited really apply it to another type, and it would have been, I think, more logical to say not that the plaintiff could be restrained under sect. 4 of the Act, but that he could be restrained under the principle of which that section is a particular example. But in any case it is manifest that, where there is an agreement to resort to a foreign court, and an action is started in breach of that, sect. 4 can be the only part of the Arbitration Act, 1889, that can have any application. The various other provisions as to the powers and duties of the court, as to special cases, removing an arbitrator, enforcing an award, and all such details, can have no application to proceedings in a foreign court. Manifestly the special rule of the law as to arbitrations, that an award can be set aside for error of law on the face of it, cannot possibly apply to the judgment of a foreign court.

For these reasons, I think that the judgment of Uthwatt, J., dismissing the appellants' motion, should be affirmed, but for reasons different from those underlying his judgment.

Goddard, L.J.: I agree with both judgments that have been delivered and will only add a few observations on the contention of counsel for the appellants which, as I understand it, was that, whatever the nature of an inferior tribunal might be, the court could and would always examine its findings, and, if an error of law appeared on their face, would correct them. This, in my opinion, is much too wide a statement. The King's Bench always possessed the power to examine by writ of error the proceedings of inferior courts of record, and this power was later also exercised by the Common Pleas. But this related only to inferior courts exercising jurisdiction at common law. Common instances would be the Mayor's Court, London, the Liverpool Court of Passage, the Stannaries Court and the various local courts of record, which exist in many cities and towns throughout the country. The King's Bench also issued a writ of false judgment in early days to courts not of record, the only one of importance being the ancient county court, which, again, exercised a common law jurisdiction. A precedent of such a writ will be found in Fitzherbert's Natura Brevium, but that writ became obsolete when litigants ceased to resort to that court, as they did comparatively early in legal history on account of its limited jurisdiction and cumbersome procedure. This writ also lay apparently to a court baron which, unlike the court leet, was not of record. But writs of error never lay, for instance, to the spiritual courts or to the Court of Admiralty, although they were regarded as inferior courts, and their jurisdiction was rigorously controlled by the King's Bench, which constantly issued prohibitions to them. They were not courts of common law.

When and how the courts at Westminster first began to examine awards and to set them aside for manifest error it is difficult to discover. They certainly did so in the 17th century, as appears from *Anon.* (10), in 1698, and it seems that the Court of Chancery would entertain bills to relieve against awards that contained apparent errors of law. In *Brown* v. *Brown* (11), the Lord Keeper, Sir Francis North, said that, where there appears a manifest error in the body of an award, then in some cases (he did not say in what cases) there may be relief against it in Chancery, but where the error does not appear without unravelling it, he thought it was not relievable. In *Kent* v. *Elstob* (4), in 1802, the court evidently had no doubt as to its powers to set aside an award for error on its face.

This power of setting aside awards of arbitrators for error appearing on the face of an award was said by Lord Haldane in *British Westinghouse Co.* v. *Underground Electric Rys.* (12) to be a well-established part of the law, but, in my opinion, it is none the less an exception to the general rule, that, not only is the arbitrator judge of law as well as of fact, but that, where a tribunal acts within its jurisdiction, the only remedy if its decision be wrong is by appeal, and appeal only lies if given by statute. But there are many bodies having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially, which are neither courts nor arbitrators. They are subject to the control of the King's Bench Division by means of the orders of prohibition and *certiorari* so as to keep them within the scope of their jurisdiction, but their decisions, if within their jurisdiction, are not reviewable by the courts. This matter was elaborately discussed and decided by this court in *R.* v. *Electricity Comrs.* (13), where many instances are given of the tribunals or bodies to which these writs may be addressed, though they are not courts and no appeal lies from their decisions, nor can they be otherwise reviewed. I have no doubt that both these writs would lie to the General Claims Tribunal if it exceeded its statutory powers, but this is no ground for saying that the court can review a decision given within its jurisdiction. I agree that the appeal should be dismissed on this ground.

Appeal dismissed with costs.

Solicitors: *Sharpe, Pritchard & Co.* (for the appellants); *Treasury Solicitor* (for the respondent). [*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

Re VISCOUNT FURNESS (*deceased*), WILSON *v.* KENMARE.

[CHANCERY DIVISION (Morton, J.), **July 23, 30, 1943.**]

Executors and Administrators—Administration by the court—Order for general administration—Representatives cannot exercise powers without sanction of court.

The plaintiff was the sole executor and trustee of the testator's will and obtained an order for the general administration of the estate of the deceased. The order directed certain accounts and inquiries to be made and concluded by ordering that the testator's property not specifically devised or bequeathed should be applied in payment of his debts and funeral and testamentary expenses and afterwards in the payment of the legacies and annuities given by his will in due course of administration, but that none of the stated accounts and inquiries, with the exception of the one as to the testator's debts, were to be prosecuted in chambers except with leave of the judge. The plaintiff took out a summons asking for directions (i) whether he was at liberty to dispose of and deal with the assets of the testator's estate in due course of administration without first obtaining the sanction of the court, and (ii) if he had no such powers, that he should be given such general powers. It was contended for the plaintiff that the later part of the order for general administration enabled him, where the court was only proceeding with the inquiry as to the deceased's debts, to deal with and dispose of the estate in due course of administration, as otherwise there would be a deadlock:—

HELD: (i) the order was an order for general administration, notwithstanding that only one account was to be proceeded with in the meantime.

(ii) where the court has made an order for the general administration of an estate, the powers of the deceased's representatives may not be exercised without the leave of the court, which will be granted in appropriate cases.

[**EDITORIAL NOTE.** There is some conflict of authority as to the powers of a personal representative after an order for general administration and the judgment herein confirms the general view that the personal representative cannot deal with the assets without the sanction of the court. In particular the decisions in *Berry* v. *Gibbons* (1) and *Re Mansel* (2) are considered and explained.

AS TO THE EFFECT OF ORDER FOR ADMINISTRATION BY THE COURT, see HALSBURY, Hailsham Edn., Vol. 14, pp. 448, 449, para. 857; and FOR CASES, see DIGEST, Vol. 24, pp. 800, 801, Nos. 8300-8311.]

*(1) *Berry* v. *Gibbons* (1873), 8 Ch. App. 747; 24 Digest 801, *8306*; 29 L.T. 88.

*(2) *Re Mansel, Rhodes* v. *Jenkin* (1885), 54 L.J.Ch. 833; 43 Digest 768, *2101*; 52 L.T. 806.

(3) *Bethell* v. *Abraham* (1873), L.R. 17 Eq. 24; 24 Digest 801, *8305*; 43 L.J.Ch. 180; 29 L.T. 715.

(4) *Re Hall, Hall* v. *Hall* (1885), 54 L.J.Ch. 527; 43 Digest 674, *1043*; 51 L.T. 901.

(5) *Re Cotter, Jennings* v. *Nye*, [1915] 1 Ch. 307; 43 Digest 678, *1089*; 84 L.J.Ch. 337; 112 L.T. 340.

Application by the sole executor and trustee of the will of the deceased for a direction that, notwithstanding an order for the general administration of the deceased's estate, he was at liberty to deal with and distribute the assets of the estate in due course of administration. The facts are fully set out in the judgment.

Raymond Jennings for the plaintiff.

E. M. Winterbotham for the testator's widow.

F. MacMullen for the testator's younger son.

Morton, J.: This is an application by the plaintiff in this action, who is the sole executor and trustee of the will of Viscount Furness. Viscount Furness died on Oct. 6, 1940, and his will, dated Feb. 3, 1936, with certain codicils thereto, was proved by the plaintiff on Dec. 18, 1940. The respondents are the defendants in these proceedings, who are the widow and younger son of the testator. The testator's elder son, Christopher Furness, was an officer in the Welsh Guards and was last heard of on May 24, 1940, when in action near Arras. On Apr. 7, 1941, leave was granted by the Probate, Divorce and Admiralty Division of the High Court of Justice to swear the death of Christopher Furness on or since May 24, 1940. No evidence is available of any person who saw Christopher Furness killed, but nothing has been heard of him since the action near Arras in which he was supposed to have lost his life. He was a bachelor.

Having regard to the doubt whether Christopher did or did not survive his father and certain other matters, the plaintiff applied to the court for an order for general administration. On Nov. 24, 1941, Bennett, J., made an order which, so far as material, is in the following terms:

> The judge doth declare that the trusts of the will and codicils of the testator ought to be performed and carried into execution and doth order the same accordingly. And the plaintiff by his counsel submitting to account It is ordered that the following accounts and inquiries be taken and made that is to say: (i) An account of the property (not specifically devised or bequeathed) of the testator come to the hands of the plaintiff the executor of his said will and codicils or to the hands of any other person or persons by the order or for the use of the plaintiff distinguishing between capital and income; (ii) An account of the testator's debts; (iii) An account of the testator's funeral and testamentary expenses; (iv) An account of the legacies and annuities given by the testator's will and codicils; (v) An inquiry what parts (if any) of the testator's property are outstanding or undisposed of and whether any part of such property so outstanding or undisposed of is subject to any and what incumbrances. And it is ordered that the testator's property (not specifically devised or bequeathed) be applied in payment of his debts and funeral and testamentary expenses and afterwards in payment of the legacies and annuities given by his said will in a due course of administration. But none of the above accounts and inquiries except that numbered (ii) is to be prosecuted in chambers except with the leave of the judge in person.

The plaintiff now, by summons dated June 10, 1943 (omitting para. 1 of the summons, which is immaterial), asks:

> 2. That directions may be given whether notwithstanding the order for general administration made herein on Nov. 27, 1941, that the plaintiff is at liberty to dispose of deal with (and distribute) the assets of the testator's estate (both real and personal) in a due course of administration without the sanction of the court having been first obtained. 3. If the plaintiff has no such power of disposing of or dealing with the assets of the estate that the plaintiff may be given such general powers of disposition as to the court may seem meet.

There is nothing unusual in the terms of the order which I have just read, and it appeared to me, when the case was opened before me, that the answer to question 2 must be "No." My attention was called, however, to certain statements in well-known text-books which seemed to support a contrary view, and I reserved my judgment on question 2 as it seemed most desirable that any doubts which exist on this important point should be removed. In the meantime, at the request of counsel for the plaintiff, I, without objection by counsel for the defendants, gave the plaintiff leave under para. 3 of the summons to sell certain assets of the estate and to apply the proceeds either in payment of duties or in the purchase of trustee investments.

On the question raised by para. 2 of the summons, there is a remarkable difference of opinion amongst the authors of well-known text-books. In Daniell, Chancery Practice, 8th Edn., 1914, Vol. 1, p. 916, I find the following statement in footnote (n):

> The ordinary judgment does not take away from the personal representative the

power of dealing with the assets, unless an injunction be granted to restrain such dealing or a receiver be appointed.

Berry v. *Gibbons* (1) is cited as the authority for this statement. In WILLIAMS ON EXECUTORS, 12th Edn., 1930, at p. 569, I find the following more guarded statement :

> After an order for administration has been made an executor cannot safely exercise any power without the sanction of the court, but it would seem that the power to mortgage the assets is not taken away by an order for administration where no receiver has been appointed and no injunction granted.

Certain cases, including *Berry* v. *Gibbons* (1), are cited. On p. 1278 of the same work it is said :

> An administration order does not prevent trustees from exercising a power of sale . . .

and reference is made to *Re Mansel* (2). LEWIN ON TRUSTS, 14th Edn., 1939, at p. 313, states the law as follows :

> The powers assigned in the preceding pages to trustees must be taken subject to the qualification that, if a suit has been instituted, and a decree made, for the execution of the trust, the powers of the trustees are thenceforth so far paralysed that the authority of the court must sanction every subsequent proceeding. Thus the trustees cannot commence or defend any action or suit, or interfere in any other legal proceeding, without first consulting the court as to the propriety of so doing; a trustee for sale cannot sell; the committee of a lunatic cannot make repairs; an executor cannot pay debts, or deal with the assets for the purpose of investment. Though an executor may be personally liable if he exercises a power after decree, he can, as regards a chattel not specifically the subject of the suit, give a good title to a *bona fide* purchaser not having actual notice of the *lis pendens*.

At that point there is a reference to *Berry* v. *Gibbons* (1) :

> . . . and it is presumed he can equally, where there is no receiver appointed, sign a valid receipt for any part of the testator's personal estate. Where an administration action has been heard on further consideration, and no subsequent further consideration has been reserved, but general liberty to apply has been given, trustees may exercise their power without obtaining the sanction of the court.

In *Bethell* v. *Abraham* (3), at p. 25, after a decree for administration two of the trustees of the testator's will took out a summons :

> . . . asking that they might be at liberty to sell certain of the testator's investments, and to invest the proceeds and also the moneys receivable on the testator's policies of insurance in certain specified securities, comprising United States Federal Funded £5 per cents., United States, Baltimore and Ohio Railway 6 per cent. Bonds, etc. This summons was adjourned into court, and was supported by the affidavits of the plaintiffs and of another of the trustees, who stated that they were desirous of exercising the discretion conferred on them by the will in manner proposed by the summons. It appeared that the testator had at the time of his death considerable sums invested in similar, though not precisely identical, securities.

At p. 27 SIR GEORGE JESSEL, M.R., said this :

> I am not satisfied that the trustees have the power they claim. It is not necessary for me at the present moment to say more than that. I have already indicated in the course of the argument why I am not satisfied on that point. [I pause there to say that the extent of the trustees' power depended upon the construction of certain passages in the testator's will]. But if they have the power they claim I am not satisfied that I ought to exercise the power (which I undoubtedly have) of controlling their exercise of discretion in the way which they desire, namely, by acceding to the request to make these investments which in the eye of this court are speculative. I do not say they are really such, for that I know nothing about ; but they are speculative so far as this court is concerned; so that even if I thought the construction of the will other than I do think it, I should not grant this application. However, I should like to say this, that (if I rightly understand the doctrines of the court) as long as an estate remains to be administered in this court, the court does not allow a purchase to be made, or a mortgage, or any other investment to be made, unless the court is satisfied of its safety.

Then he goes on to explain the reason for that. I am not aware of any case which throws doubt upon the correctness of the observations which I have just read.

In *Berry* v. *Gibbons* (1), the headnote says, at p. 747 :

> A decree was made in a creditors' suit for the administration of the personal estate of a testator, but no receiver was appointed nor any injunction granted to restrain the executrix from dealing with the assets. More than two years after the decree, and nearly three years after the death of the testator, his executrix, who was also his sole legatee, opened an account with a bank, headed "E.G. Executrix of B.G." In the following year, the account being overdrawn, she deposited with the bank a picture belonging to the testator's estate to secure the balance then due and further advances.

It appeared that the bankers did not know of the suit, and had no notice of any breach of duty on the part of the executrix.

At p. 750 JAMES, L.J., said this :

> It is quite clear to me that the appellants must have the value of the picture. Whether they will ever get anything more is a matter which must be determined hereafter, but I should not be disposed to give any encouragement to a claim for anything more. It appears that the account opened by this lady with the bank was opened as an executorship account, and the bank had no notice of any breach of trust. They afterwards obtained from her, she being both the executrix and universal legatee, the deposit of a picture as security for the balance of that account and for further advances. Further advances were made, and, in my judgment, the executrix had the legal right to make such a deposit ; and in order to deprive them of the benefit of it there must be evidence to show that they had notice of there being some breach of trust in the transaction. Now it appears to me that the bankers did nothing but what was in the usual course of business, and that there is nothing to fix them with any notice of a breach of trust. The doctrine of *lis pendens* has no bearing on the case, for a mere administration decree, no receiver having been appointed, nor any injunction granted to prevent the executrix from dealing with the assets, would not take away her legal powers so as to invalidate the title of persons claiming under a disposition made by her in exercise of those powers.

I think that the words " would not take away her legal powers " must be read in view of and in connection with the words which followed, " so as to invalidate the title," and so on. In my view, *Berry* v. *Gibbons* (1) merely decided that after an order for general administration an executrix can so deal with a specific chattel as to give a good title to a purchaser or lender who has no notice of the order. It does not decide that, in so acting, the executrix is not guilty of any breach of duty ; in fact I think the language of JAMES, L.J., ndicates the contrary view.

As to *Re Mansel* (2), it is not an authority for the proposition stated in WILLIAMS ON EXECUTORS at p. 1278 ; the effect of it is correctly summarised in the last sentence of the passage from LEWIN, which I have already quoted.

In the course of the argument *Re Hall* (4) and *Re Cotter* (5) were referred to. These are cases as to the appointment of new trustees and are not relevant for the purpose of question 2 of this summons.

It is contended by counsel for the plaintiff that whatever may be the effect of an order for general administration in the ordinary form, the executor is given power to deal with the assets in the present case by the joint effect of the words in the order of BENNETT, J., made on Nov. 24, 1941 :

> And it is ordered that the testator's property (not specifically devised or bequeathed) be applied in payment of his debts and funeral and testamentary expenses and afterwards in payment of the legacies and annuities given by his said will in a due course of administration . . .

coupled with the words :

> But none of the above accounts and inquiries except that numbered 2 is to be prosecuted in chambers except with the leave of the judge in person.

He contends, as I understand him, that the testator's property can only be so applied by the court when all the accounts and the inquiries have been taken and made, and that, if the court is only proceeding with the inquiry as to debts, it must have been intended that the trustee should proceed with the application of the testator's property in due course of administration, otherwise there would be a deadlock. I think there is a threefold answer to this argument. First, the order is an order for general administration, although only one account is to be proceeded with in the meantime, and the effect of such an order is that which I have already stated. Secondly, the words " and it is ordered," etc., are common form and confer no authority on the trustee. Thirdly, there is in fact no deadlock, the trustee can always apply for the sanction of the court to any particular transaction or type of transaction, and this he has done by para. 3 of the present summons. Further, he can apply to the court to proceed with the other accounts and inquiries if and when this becomes desirable. For these reasons I answer question 2 of the summons in the negative.

Declaration accordingly.

Solicitors : *Middleton, Lewis & Clarke,* agents for *Middleton & Co.,* Sunderland (for the plaintiff) ; *Theodore Goddard & Co.* (for the testator's widow) ; *Dollman & Pritchard* (for the testator's younger son).

[*Reported by* HUBERT B. FIGG, ESQ., *Barrister-at-Law*

Re JOHN PASCOE, A BANKRUPT, *Ex parte* THE TRUSTEE OF THE PROPERTY OF THE BANKRUPT AND NORTHUMBERLAND COUNTY COUNCIL.

[CHANCERY DIVISION (Morton and Cohen, JJ.), **December 13, 1943.**]

Bankruptcy—After-acquired property—Vesting in trustee—First bankruptcy—Order at criminal trial that bankrupt's after-acquired property be paid towards costs of prosecution—Second bankruptcy—Whether bankrupt's after-acquired property vested in trustee of first or second bankruptcy—Bankruptcy Act, 1914 (*c.* 59), *ss.* 18 (1), 38, 39 (1), (2), 47 (1)—*Bankruptcy (Amendment) Act,* 1926 (*c.* 9), *s.* 3.

J.P. was adjudicated bankrupt on Aug. 26, 1920, and at no time obtained his discharge. In Mar., 1942, J.P. handed to B. £2,000 with instructions that, if anything should happen to him, J.P., B. was to pay the money to J.P.'s wife. In Apr., 1942, B. handed what was remaining of the £2,000, namely, £1,981, to the police. On Aug. 26, 1942, J.P. was convicted of certain criminal offences at the Northumberland County Assizes, and the trial judge ordered that £1,581 out of the £1,981 should be paid to the respondents towards the costs of the prosecution. On Aug. 31, 1942, and before the money had been paid over to the respondents, the trustee appointed in the 1920 bankruptcy proceedings claimed the money on behalf of the general body of creditors. The money was, however, paid to the respondents. On Nov. 24, 1942, a second bankruptcy petition was presented against J.P. and the trustee in the second bankruptcy asked the court to order payment to him of the £1,581 on the ground that the sum was vested in him by virtue of the Bankruptcy Act, 1914, s. 39, as amended by Bankruptcy (Amendment) Act, 1926, s. 3. The respondents contended (i) that the trustee in the first bankruptcy had no property in the £1,581 until he claimed it on Aug. 31, 1942; and (ii) that the order of Aug. 26, 1942, divested J.P. of the ownership of the money and vested it in the respondents and that the order was an order of the High Court and had not been set aside or reversed on appeal and was therefore an answer to the claim:—

HELD: (i) when J.P. acquired the £1,581, it became vested in the trustee in the first bankruptcy by virtue of the Bankruptcy Act, 1914, s. 38. The disposition of the money by J.P. to B. and eventually to the police was not a transaction within the Bankruptcy Act, 1914, s. 47 (1), and, therefore, the property remained in the trustee.

(ii) since the trustee in the first bankruptcy was not a party to the criminal proceedings which culminated in the order of Aug. 26, 1942, and the order of the High Court was not a judgment *in rem* that order did not displace the ownership of the money.

(iii) the £1,581 was property acquired by the bankrupt after his first adjudication in bankruptcy and which had not been distributed amongst his creditors, and therefore, by virtue of the Bankruptcy Act, 1914, s. 39 (2) as amended by the Bankruptcy (Amendment) Act, 1926, s. 3, vested in the trustee in the second bankruptcy.

[**EDITORIAL NOTE.** It is often said that the after-acquired property of a bankrupt does not vest in the trustee in bankruptcy until he intervenes and claims it. It is here held, however, that this is a mistaken view and that after-acquired property vests automatically and at once in the trustee.

AS TO PROPERTY ACQUIRED BY BANKRUPT BEFORE DISCHARGE, see HALSBURY, Hailsham Edn., Vol. 2, pp. 219-222, paras. 290, 291; and FOR CASES, see DIGEST, Vol. 5, pp. 724-740, Nos. 6286-6391.]

Cases referred to:

*(1) *Hill* v. *Settle*, [1917] 1 Ch. 319; 5 Digest 737, *6372*; 86 L.J.Ch. 243; 116 L.T. 263.

*(2) *Dyster* v. *Randall & Sons*, [1926] Ch. 932; Digest Supp.; 95 L.J.Ch. 504; 135 L.T. 596.

(3) *Herbert* v. *Sayer* (1844), 5 Q.B. 965; 5 Digest 739, *6384*; 2 Dow & L. 49; 1 Dav. & Mer. 723; 13 L.J.Q.B. 209.

(4) *Re Clark, Ex p. Beardmore*, [1894] 2 Q.B. 393; 5 Digest 736, *6366*; 63 L.J.Q.B. 806; 70 L.T. 751.

*(5) *Hosack* v. *Robins* (No. 2), [1918] 2 Ch. 339; 5 Digest 731, *6334*; 87 L.J.Ch. 545; 119 L.T. 522.

(6) *Cohen* v. *Mitchell* (1890), 25 Q.B.D. 262; 5 Digest 729, *6324*; 59 L.J.Q.B. 409; 63 L.T. 206.

(7) *R.* v. *Roberts* (1873), L.R. 9 Q.B. 77; 5 Digest 638, *5738*; 43 L.J.M.C. 17; 29 L.T. 674.

APPEAL by the trustee in the second bankruptcy against a decision of the Newcastle-upon-Tyne County Court dismissing his application for a declaration that certain after-acquired property of the bankrupt vested in him, the trustee, A by virtue of the Bankruptcy Act, 1914, s. 39 (2) as amended by the Bankruptcy (Amendment) Act, 1926, s. 3. The facts are fully set out in the judgment of MORTON, J.

The Solicitor-General (*Sir David Maxwell Fyfe, K.C.*), and *V. R. Aronson* for the appellant.

Gilbert Beyfus, K.C., and *R. E. Manningham Buller* for the respondents.

B MORTON, J.: These proceedings were initiated by a notice of motion in the Newcastle-upon-Tyne County Court by Norman Dunn, the trustee in bankruptcy of one John Pascoe, as applicant. The Northumberland County Council were the respondents. By his notice of motion the applicant claimed a declaration that a sum of £1,581 received by the respondents from the Northumberland County Police, after the conviction of John Pascoe at the C Northumberland County Assizes held on June 8, 1942, was property acquired by Pascoe since he was adjudicated bankrupt on Aug. 26, 1920, which had not been distributed amongst his creditors, and was vested in the applicant (as the trustee in the second bankruptcy of the said Pascoe) by virtue of the Bankruptcy Act, 1914, s. 39, as amended by the Bankruptcy (Amendment) Act, 1926, s. 3. The applicant also claimed an order for payment of the said sum of £1,581 by the respondents to the applicant.

D The facts of the case are not in dispute, and are as follows: John Pascoe was adjudicated bankrupt on Aug. 26, 1920, the official receiver being the trustee in the bankruptcy, and it appears from the judgment of the county court judge that the gross liabilities were £694 9*s.* 2*d.*, and the deficiency was £595 9*s.* 2*d.* A first dividend of 1*s.* 8*d.* in the £ was paid on May 17, 1921, and a supplementary dividend of 4*d.* in the £ on Dec. 22, 1923. No further dividend has been paid, and Pascoe never obtained his discharge.

E It appears that Pascoe subsequently went into business on his own account, and by some means he had acquired a certain amount of cash by the month of March, 1942. In that month inquiries were started regarding his dealings with the Blyth Dry Docks and Shipbuilding Co., Ltd., and he was ultimately arrested. Before his arrest Pascoe handed some £2,000 in treasury notes to one Arthur Beaty and asked Beaty to hold this money in case anything happened to him F (Pascoe). Pascoe instructed Beaty to pay out of these moneys any of the Pascoe family's outstanding accounts, to pay a weekly allowance to Pascoe's wife, and to pay the school fees and travelling expenses of Pascoe's daughter. Beaty made some small payments out of the treasury notes, but on Apr. 15, 1942, he went to the police court at Blyth and in the course of proceedings in that court against Pascoe he heard that Pascoe was an undischarged bankrupt. Next day Beaty informed the police of the position, and subsequently Inspector G Patterson called and asked for the money. Beaty handed over the money to Inspector Patterson, who gave a receipt.

In the summer of 1942, £400 was paid out of this money to Pascoe's solicitors for the costs of his defence, with the leave of CASSELS, J. £1,581 remained in the hands of the police. Pascoe was tried at the assizes for the county of Northumberland and was convicted of certain criminal offences. At the conclusion of the trial CASSELS, J., made two orders dated Aug. 26, 1942. The first H of these orders is in the following terms:

> Whereas at the present session John Pascoe and others have been prosecuted and tried for the offence of larceny etc. and the prosecutor of the said charge and his witnesses have requested to be reimbursed their lawful expenses in that behalf Now it is hereby ordered that the treasurer of the said county of Northumberland do on sight hereof pay to them the sums of money hereunder set against their names respectively being sums which to the court appear reasonable and sufficient to reimburse them for their said expenses and loss of time in attending here and in otherwise carrying on the said prosecution in conformity with the rules and regulations in force in that behalf.

The sums of money set out amount in all to £4,445 0*s.* 4*d.*

That order was made under the Costs in Criminal Cases Act, 1908, s. 1. Subsect. (1) of that section is as follows, so far as material:

> The following courts, namely, (*a*) a court of assize or a court of quarter sessions before which any indictable offence is prosecuted or tried . . . may in such proceedings by order direct the payment of the costs of the prosecution or defence or both in accordance with the provisions of this Act out of the funds of the county or county borough out of which they are payable under this Act (in this Act referred to as local funds). A

Subsect. (2) defines what are the costs which may be so directed to be paid, and I need not read it at length.

The second order, so far as material, was as follows:

> It is thereupon ordered and adjudged by this court that the above named convict be kept in penal servitude . . . and ordered to pay a fine of £300 upon each bribery charge that is £2,100 in all and to pay forthwith to the County Council of Northumberland £2,500 towards the costs of the prosecution herein the sum of £1,581 in possession of the police to go towards the payment of the costs. B

The latter portion of that order was made under sect. 6 of the last-mentioned Act. Subsects. (1), (4) and (5) of that section, so far as material, are in the following terms:

> (1) The court by or before which any person is convicted of an indictable offence C may, if they think fit, in addition to any other lawful punishment, order the person convicted to pay the whole or any part of the costs incurred in or about the prosecution and conviction including any proceedings before the examining justices, as taxed by the proper officer of the court. (4) An order under this section for the payment of costs by the person convicted or by the prosecutor may be made in addition to an order directing payment of costs out of local funds, and where an order is made directing payment out of local funds, the costs shall primarily be payable out of local funds in accordance with this Act, but notice of any order under this section for the payment of D costs by the person convicted or by the prosecutor shall be sent to the council of the county or borough out of the funds of which they are so payable. (5) Any order under this section may be enforced . . . in the case of costs which a person convicted is ordered to pay, out of any money taken on his apprehension from the person convicted, so far as the court so directs.

Pursuant to those orders, £1,581 was paid by the police to the Northumberland E County Council, and the council has expended it in payment of the costs of the prosecution ordered to be paid by the council.

On Aug. 31, 1942, the Official Receiver wrote a letter to the chief constable, Northumberland County Constabulary, at Morpeth, in the following terms:

> *Re* John Pascoe, Sir, I have to inform you that a receiving order was made against the above named on Aug. 26, 1920, and that he has not applied for or obtained his discharge. During the recent proceedings at the Assize Court it came to my notice F that the bankrupt had a sum of about £2,000 deposited in the Northern Jewellers Association, and I claim, on behalf of the general body of creditors, this sum or the balance thereof as after-acquired property to be distributed amongst the creditors. I shall, therefore, be much obliged if you will take notice of my claim and let me know what sum of money has been handed over to you.

In reply the chief constable for the county of Northumberland wrote:

> G With reference to your letter of Aug. 31, regarding John Pascoe, who was sentenced to seven years' penal servitude at Northumberland Assizes on Aug. 26, 1942, CASSELS, J., on the application of counsel for the Crown made an order directing that the balance of the £1,981 deposited by Pascoe with Mr. Beaty, manager of the Northern Goldsmiths, Ltd., Newcastle Branch, namely, £1,581, be paid towards the costs of the prosecution. This amount is accordingly being paid over to the county treasurer, Northumberland County Council. The sum of £400, the difference between the amount taken possession of by the police from Mr. Beaty, and the amount, namely, £1,581, the subject of the H order, was paid to Pascoe's legal advisers during the proceedings, on the advice of the court, to assist in the preparation of his defence. This was the only money belonging to Pascoe which came into the possession of the police.

It appears, therefore, that the £1,581 was paid over to the respondents by the police after the police had notice of the claim by the Official Receiver.

On Nov. 24, 1942, the Northumberland County Council presented a bankruptcy petition against Pascoe. A receiving order was made on Dec. 16, 1942, and on Dec. 18, 1942, he was adjudicated bankrupt for the second time. On Jan. 6, 1943, the applicant, Dunn, was appointed the trustee in the second bankruptcy, and subsequently he began the present proceedings.

The county court judge refused the application of the trustee in bankruptcy, and gave the respondents their costs of the motion. He took the view that the trustee in the first bankruptcy had no property in the £1,581 until he claimed it, and that the order of CASSELS, J., " clearly divested Pascoe from the ownership of the money." He observed also that :

> A The learned judge had previously made an order that £400 should be paid out to Pascoe for the expenses of his defence, and I notice the applicant makes no claim to this money. I cannot see wherein is the distinction.

From that decision the trustee in bankruptcy appeals.

It is necessary to consider, first, in whom was the title to these £1,581 treasury notes vested at the time when CASSELS, J., made his order for payment of
B £1,581 to the respondent council ; secondly, what was the effect of that order of CASSELS, J., and, thirdly, what was the effect of Pascoe's second bankruptcy.

In seeking an answer to the first question, I turn first to the Bankruptcy Act, 1914, as amended by the Bankruptcy (Amendment) Act, 1926. Sect. 18 (1) of the 1914 Act, so far as material, is as follows :

> Where a receiving order is made against a debtor, then, if the creditors at the first
> C meeting or any adjournment thereof by ordinary resolution resolve that the debtor be adjudged bankrupt . . . the court shall adjudge the debtor bankrupt ; and thereupon the property of the bankrupt shall become divisible among his creditors and shall vest in a trustee.

That is a vesting section, and it is imperative—" the property of the bankrupt . . . shall vest in a trustee." The phrase, " the property of the bankrupt," is more particularly defined by sect. 38, which is as follows :

> D The property of the bankrupt divisible amongst his creditors, and in this Act referred to as the property of the bankrupt, shall not comprise the following particulars . . . but it shall comprise the following particulars : (*a*) all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge.

So far, it would seem that the £1,581 was vested at the material time not in the
E bankrupt, but in the trustee in the first bankruptcy. The provisions of sect. 47 (1) must, however, be considered :

> All transactions by a bankrupt with any person dealing with him *bona fide* and for value, in respect of property, whether real or personal, acquired by the bankrupt after the adjudication, shall, if completed before any intervention by the trustee, be valid against the trustee, and any estate or interest in such property which by virtue of this Act is vested in the trustee shall determine and pass in such manner and to such
> F extent as may be required for giving effect to any such transaction.

Then follow certain provisions which I need not read. It is plain that the passing of the £1,581 from Pascoe *via* Beaty to the police did not come within this section. The transaction between the bankrupt and Beaty was not a transaction " for value," and the transaction between Beaty and the police was not a transaction by the bankrupt.

G Considering the matter apart from authority, it seems to me clear from the wording of the Bankruptcy Act that the title to the £1,581 vested in the first trustee in bankruptcy when Pascoe acquired it, and that the passing of the money from Pascoe to Beaty and from Beaty to the police could not operate as a divesting.

Counsel for the respondents relied on certain cases and *dicta* as indicating that after-acquired property vested not in the trustee, but in the bankrupt,
H and he first drew our attention to certain passages in the judgments of the Court of Appeal in *Hill* v. *Settle* (1). To my mind, it is clear, if each of these judgments is read as a whole, that each member of the court took the view that after-acquired property vests in the trustee as soon as it is acquired by the bankrupt. They pointed out that until intervention the trustee's title is not " absolutely complete " (to quote LORD COZENS-HARDY, M.R., at p. 327), but I do not think any member of the court doubted that the property is vested in the trustee even before he intervenes, though his interest is liable to be divested prior to intervention by some transaction which falls within sect. 47.

In *Dyster* v. *Randall & Sons* (2), P. O. Lawrence, J. (as he then was), said, at p. 939 :

> It is well established that after-acquired property continues in the bankrupt until the trustee interferes to claim it . . .

but that observation, which is only part of a sentence, must be read with regard to its context. I do not think that P. O. Lawrence, J., intended to state that after-acquired property is vested in the bankrupt and not in the trustee. Any such statement would not be in accordance with the views expressed by the same judge in *Hill* v. *Settle* (1), and would, in my view, be directly contrary to the provisions of the Bankruptcy Act, 1914, ss. 18 and 39.

The position of an undischarged bankrupt in regard to after-acquired property is a curious one. In *Hill* v. *Settle* (1), Lord Cozens-Hardy, M.R., at p. 327, described him as being " something in the nature of an agent " who had power to deal, in transactions for value, with his after-acquired property before intervention by the trustee : see also *Herbert* v. *Sayer* (3), at p. 981. It is clear that the bankrupt is not an agent in the full sense of the word, nor did Lord Cozens-Hardy, M.R., suggest that he was ; for instance, the bankrupt cannot involve the trustee in any liability : see *Re Clark, ex parte Beardmore* (4), at p. 404. The bankrupt resembles an agent in this respect, that he is able to give a good title to property which does not belong to him in the case of transactions coming within sect. 47. Whatever language one may use to describe the position of the bankrupt in regard to after-acquired property, it is clear, in my judgment, that such property is not vested in him. If the question be asked : " To whom did the £1,581 belong immediately prior to the order of Cassels, J. ? " the answer is : " It belonged to the trustee in the first bankruptcy and was divisible among the creditors in the first bankruptcy."

The result is that, at the time when Cassels, J., made his order, the trustee in the first bankruptcy was the owner of the £1,581 in the hands of the police.

I now come to the second question : what was the effect of the order of Cassels, J. ? Counsel for the respondents, conceded that neither that order, nor the subsequent payment of the £1,581 to the respondents, came within the Bankruptcy Act, 1914, s. 47. This concession was rightly made in view of the decision of the Court of Appeal in *Hosack* v. *Robins* (5). The facts of that case are sufficiently stated, for the present purpose, in the head-note, which is as follows :

> In 1912 an undischarged bankrupt became entitled to certain shares in a limited company. On Apr. 25, 1913, the plaintiff recovered judgment against the bankrupt for £62 and costs, and on June 13, 1913, he obtained a charging order absolute under the Judgments Act, 1938, s. 14, on the bankrupt's interest in the shares, subject to any lien the company might have on them. In Feb., 1916, the official receiver, as trustee in the bankruptcy, intervened and seized and sold the shares, subject to all proper charges thereon. On an application by the plaintiff to enlarge his charging order against the holders of the shares and a subsequent encumbrancer : Held (reversing the decision of Astbury, J.) that the charging order was not equivalent to a transaction for value within the proposition stated by Lord Esher, M.R., in *Cohen* v. *Mitchell* (6), at p. 267, and was therefore invalid against the trustee, and that the plaintiff was therefore not entitled to enforce the charging order. Held also that, if the question had arisen under the Bankruptcy Act, 1914, the charging order could not have been sustained against the trustee in bankruptcy under sect. 47 of that Act, which embodied the proposition stated in *Cohen* v. *Mitchell* (6).

At pp. 345 and 346 Swinfen Eady, M.R., stated his reasons as follows :

> The question, then, is whether a transaction—or, rather, a process—of this sort was a dealing or transaction with the bankrupt for value. It is in reality a process *in invitum* ; and there was no dealing with the bankrupt at all, but merely a taking in execution by process of law of what the judgment creditor was able to seize. In my opinion, it was no more a dealing or transaction for value with the bankrupt than a garnishee order would be. There is no mutual transaction or mutual dealing for value between the parties, and I fail to see that the interest acquired by the plaintiff is in any way protected. If the same question were to arise under the present Bankruptcy Act, it would be quite clear that the interest would not be protected by sect. 47 of the Act of 1914. It would not be a transaction " by a bankrupt with any person dealing with him *bona fide* and for value, in respect of property . . . acquired by the bankrupt after the adjudication."

Counsel for the respondents contended, however, that Cassels, J., had jurisdiction to make the order, that the order is an order of the High Court which formed part of Pascoe's sentence and has not been set aside or reversed on appeal, and that the order affords a complete answer to the present claim. The money was paid over to the respondents for a particular purpose pursuant to that order, and has been expended for that purpose.

I am prepared to assume that money which has been handed over to Beaty before Pascoe's apprehension, and was handed by Beaty to the police some days after Pascoe's apprehension, was "money taken on his apprehension from the person convicted" within the Costs in Criminal Cases Act, 1908, s. 6 (5). I so assume, without expressing any opinion on the matter, because there are other reasons why this appeal must, in my judgment, succeed.

I am further prepared to assume, for the same reason, that sect. 6 (5) of the Act of 1908 gives the judge jurisdiction to make an order in regard to money taken on his apprehension from the person convicted, which in fact belongs to someone else. The wording of the statute seems wide enough to cover such a case, though the result is rather startling. For instance, on this construction of the statute, if Pascoe's aunt had handed him her life savings, amounting to £2,000 in treasury notes, and, if Pascoe had had those notes upon him at the time of his arrest, it would have been open to Cassels, J., to make a similar order in respect of that £2,000.

Making these assumptions in favour of the respondents, I am still of opinion that the order of Cassels, J., affords no answer to the present claim. The trustee in the first bankruptcy was not a party to the proceedings before Cassels, J. He had no opportunity of raising his claim to the money, and no opportunity of appealing from the order. In these circumstances, his case against the council could be put very simply as follows : "£1,581 belonging to me has been paid over to you ; pay me £1,581." If the council reply : "This money was paid over to us in pursuance of an order of a judge of the High Court for a particular purpose and we have expended it for that purpose," the answer is : "That may be very true, but it is *res inter alios acta* so far as I am concerned ; the order was not a judgment *in rem*, and does not displace my ownership of the money."

I cannot believe it to be the law that Cassels, J., had power permanently to deprive the trustee in the first bankruptcy in the present case, or Pascoe's aunt in the hypothetical case which I have put, of money belonging to them respectively ; yet this must be the law if the argument for the respondents in the present case is right. In my judgment, the short answer is that the trustee in the first bankruptcy cannot be deprived of money belonging to him by this order which was made in his absence, it being admitted that neither the order nor the subsequent payment to the respondents was a transaction protected by the Bankruptcy Act, 1914, s. 47. I do not think it matters whether the order in regard to the payment of the £1,581 did or did not form part of the sentence passed on Pascoe.

I think that the view which I have formed is supported by *R.* v. *Roberts* (7). The present case is the converse case, the bankruptcy preceding the apprehension, which the judges had in mind when they made these observations in *R.* v. *Roberts* (7). I do not propose to read the judgment at length.

On this part of the case the county court judge expressed himself as follows :

> It seems to me that the judge's order clearly divested Pascoe from the ownership of this money and that it thereafter no longer belonged to, or was vested in the bankrupt, and therefore could no longer be claimed by the trustee in the first bankruptcy. It surely follows that it cannot be claimed by the trustee in the second bankruptcy.

I think the answer is that this money was not vested in Pascoe but in the trustee at the time when the order was made. The county court judge goes on to point out that Cassels, J., made his order with knowledge of the first bankruptcy. This is true, but I think it not unlikely that in the course of a long criminal trial, throughout which his mind was directed to other matters, Cassels, J., may have omitted fully to consider the legal consequences flowing from that fact under the provisions of the law of bankruptcy. Certainly the point was not brought to his notice in the course of the argument which immediately preceded the making of the order. I do not think that Cassels, J., would have made the order, in the absence of the trustee in the first bankruptcy, if the legal point had been brought to his attention. We cannot, of course, overrule his order, but, in my judgment, we can say, and we ought to say, that his order could not operate as a bar to a claim by the trustee in the first bankruptcy for the return of this money.

I now come to the third point, which can be dealt with very briefly : What is the effect of the second bankruptcy ? The answer is to be found in the Bankruptcy Act, 1914, s. 39, as amended by the Bankruptcy (Amendment) Act, 1926, s. 3. So amended, subsects. (1) and (2) are as follows :

> (1) Where a second or subsequent receiving order is made against a bankrupt, or where an order is made for the administration in bankruptcy of the estate of a deceased bankrupt, then for the purposes of any proceedings consequent upon such order, the trustee in the last preceding bankruptcy shall be deemed to be a creditor in respect of any unsatisfied balance of the debts provable against the property of the bankrupt in that bankruptcy. (2) In the event of a second or subsequent receiving order made against a bankrupt being followed by an order adjudging him bankrupt . . . any property acquired by him since he was last adjudged bankrupt, which at the date when the subsequent petition was presented had not been distributed amongst the creditors in such last preceding bankruptcy, shall (subject to any disposition thereof made by the Official Receiver or trustee in that bankruptcy, without knowledge of the presentation of the subsequent petition, and subject to the provisions of sect. 47 of this Act) vest in the trustee in the subsequent bankruptcy or administration in bankruptcy, as the case may be.

The £1,581 was property acquired by Pascoe since he was last adjudged bankrupt. At the date when the subsequent petition was presented, it had not been " distributed amongst the creditors in such last preceding bankruptcy." No disposition thereof had been made by the trustee in the first bankruptcy, and there had been no dealing with the money which came within sect. 47. Therefore, the £1,581 is now vested in the trustee in the second bankruptcy.

It was suggested in the course of the argument that the rights of the trustee in the second bankruptcy might be even higher than those of the trustee in the first bankruptcy, but, in my view, it is unnecessary to consider that point. It is sufficient for the present purpose to say that the appellant's rights are no less than the rights previously possessed by the trustee in the first bankruptcy. No point was taken in regard to the fact that the deficiency in the first bankruptcy was less than £1,581, and, in my view, this fact cannot affect the result of this appeal. Under sect. 39 (1) of the Act, the trustee in the first bankruptcy is deemed to be a creditor in respect of the deficiency.

I think I ought to mention one further point to which the county court judge appears to have attached some importance. It seems to me that the payment of the £400 to Pascoe's solicitors, and its expenditure upon Pascoe's defence, may have been a transaction which is protected by the Bankruptcy Act, 1914, s. 47, and that may be the reason why no claim has so far been made in respect of it. However, that is not a matter on which we have to express any opinion.

The result is that, in my view, the appellant is entitled to succeed, and there should be a declaration that the sum of £1,581 in question is property acquired by the bankrupt since he was adjudicated bankrupt on Aug. 26, 1920, which has not been distributed amongst his creditors and is vested in the appellant as trustee in the second bankruptcy of the bankrupt by virtue of the Bankruptcy Act, 1914, s. 39, as amended by the Bankruptcy (Amendment) Act, 1926, s. 3. The respondents will be ordered to pay that sum to the appellant, and to pay the appellant's costs here and in the court below.

COHEN, J. : I agree, and have nothing to add.

Appeal allowed with costs. Leave to appeal granted.

Solicitors : *Solicitor to the Board of Trade* (for the appellant) ; *Sharpe, Pritchard & Co.*, agents for *C. Harold Carter*, clerk to the Northumberland County Council (for the respondents).

[*Reported by* R. L. ZIAR, ESQ., *Barrister-at-Law.*]

ASHER *v.* LONDON FILM PRODUCTIONS, LTD.

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and Goddard, L.JJ.), **December 7, 8, 1943.**]

Income Tax—Right to deduct tax at source—Compensation for loss of employment—Cancellation of service agreement—Income Tax Act, 1918 (*c.* 40), *Sched. D, case III, r.* 1—*All Schedules Rules, rr.* 19, 21.

On July 14, 1938, the appellant entered into a contract in writing with the respondents whereby they agreed to employ him as a production executive. By the contract the appellant was entitled, *inter alia,* to remuneration consisting of percentages in respect of motion pictures produced by the respondents. The contract was for 2 years' duration but on June 7, 1939, by a new contract the service contract of July 14, 1938, was cancelled and in consideration therefor the respondents agreed to pay the appellant certain lump sums and 60 per cent. of the moneys received in respect of the motion pictures in excess of £110,000. In making these percentage payments the respondents deducted income tax. The appellant claimed to be carrying on a profession or vocation and contended that he was entitled to direct assessment:—

HELD: (i) the appellant was not carrying on a profession or vocation.

(ii) as the payments were annual payments, the matter fell under Sched. D, case III, r. 1, and the respondents were entitled to deduct income tax.

[**EDITORIAL NOTE.** The contentions here are that the appellant was carrying on a profession or vocation or was assessable under Sched. E. The first contention would bring the matter within Sched. D, case II, and in either case the appellant would be entitled to direct assessment. The Court of Appeal have decided that neither contention is right and that the payments under the contract are annual payments within Sched. D, case III, r. 1. Thus, being annual payments, the respondents are entitled to deduct the tax at source.

AS TO CASES WITHIN SCHED. D, CASE III, R. 1, see HALSBURY, Hailsham Edn., Vol. 17, pp. 178-183, paras. 372-380; and FOR CASES, see DIGEST, Vol. 28, pp. 62-73, Nos. 316-391.]

Cases referred to:

*(1) *Davies* v. *Braithwaite,* [1931] 2 K.B. 628; Digest Supp.; 100 L.J.K.B. 619; 145 L.T. 693; 18 Tax Cas. 198.

(2) *Re Hanbury* (1939), 20 Annotated Tax Cases 333.

APPEAL by the plaintiff from a judgment of ATKINSON, J., dated June 9, 1943. The facts are fully set out in the judgment of LORD GREENE, M.R.

J. Millard Tucker, K.C., and *N. E. Mustoe* for the appellant.

J. S. Scrimgeour for the respondents.

LORD GREENE, M.R.: This appeal arises out of a friendly controversy between the respondents, London Film Productions, Ltd., and the appellant, Asher, with whom they have certain contractual relations. Under the relevant contract sums have fallen to be paid to Asher and will in future fall to be paid by the respondents. The controversy is whether the respondents, in making those payments, are entitled to deduct tax under All Schedules Rules, r. 21. Asher contends that, if these receipts be of an income nature, he is only liable to direct assessment. If that contention were correct, there would be no legal right in the respondents to deduct the tax.

The way in which the question is staged is by an action brought by Asher to recover from the respondents the amount of the deduction. I have often thought that, in cases of this kind, it is extremely inconvenient that the Crown (which is vitally interested) cannot, under the existing procedure, be made a party or otherwise appear. The result is that the Crown is technically not bound by any decision which may be pronounced in its absence. It may well be that the practice of the Inland Revenue is to accept the decision in cases of this kind, which is merely a decision as between two subjects. Cases might very well arise, however, where the Crown was unwilling to accept that decision and might itself embark upon litigation, possibly with new facts. The result would be highly inconvenient; and I venture to suggest that the Inland Revenue authorities might usefully consider whether it might not be worth while approaching the Rule Committee with a view to obtaining enactment of a rule under which they could receive notice of litigation of this kind and should be given a right to attend and put forward any argument or facts they thought right. The corollary would be that they would be bound by the decision, and the whole matter would be cleared up between everybody concerned. However, under the present practice, all we can do is to decide the matter as an issue between two subjects on the evidence that is put before us.

Asher, on July 14, 1938, entered into a contract with the respondents whereby they agreed to employ and engage him " as a production executive, to render his exclusive services to the company for and during the period of this agreement in and about its business of producing motion pictures," as there described. He was entitled to a number of benefits under the contract including, in particular, under cl. 15, remuneration consisting of certain percentages in respect of motion pictures which the respondents produced. The contract was to last for two years from May 23, 1938. On June 7, 1939, the parties entered into a contract, which I will call the cancellation contract. It recites the original contract, which it describes as a service agreement; and it recites that Asher had been engaged under that service agreement upon the making and production of two motion pictures entitled " Q. Planes " and " The Spy in Black." Those two motion pictures are referred to later as " the said motion pictures." It recites the mutual agreement that the service agreement should be determined and the parties released from their liabilities thereunder. Cl. 1 provides that the service agreement shall, in all respects, be cancelled as from Feb. 28, 1939. Under cl. 2, Asher released the company from any obligation or liability to pay him any of the amounts or percentages of whatever character mentioned in cl. 15 of the service agreement or to pay to him any salary, remuneration or other allowance in respect of any period subsequent to Feb. 28, 1939, and from all other obligations on the part of the company. Then he acknowledges, in cl. 3, that he has received all his salary and remuneration down to Feb. 28, 1939. Cl. 5, which is the important clause, provides as follows, so far as it is relevant, and I will condense its provisions:

> In consideration of the premises and of the termination of the service agreement as aforesaid, the company shall pay to Asher in full settlement and satisfaction the following amounts.

Then there is provision for the payment of a sum of £1,000 down and of a sum of £1,452 13*s*. 6*d*. on Sept. 30, 1939. Then sub-para. 3 provides:

> . . . and a sum equal to 60 per cent. of all moneys (if any) in excess of £110,000 which are actually received by the company or its subsidiary, Harefield Productions, Ltd., in respect of the said motion pictures under either of the following two heads: (*a*) From Columbia Pictures Corporation, Ltd. on account of the cost of production of the said motion pictures; (*b*) From the distributors for the time being of the said motion pictures in respect of the company's or Harefield Production's respective shares of the revenues to be derived from the world-wide exploitation thereof.

We were informed that the sum of £110,000 represented an estimate of the cost of production of these two pictures incurred by the respondents. Therefore, on that basis, those percentages were treated for the purposes of the contract as being percentages of the amount of profits which the respondents would receive by the exploitation of the films. That is the general nature and intent of that percentage agreement. Sums had been paid from time to time under that agreement as set out in the pleadings in respect of those percentages.

When the case was heard before Atkinson, J., the main, if not the only, argument presented to him on the part of Asher appears to have been that the sums receivable under the cancellation contract were in the hands of Asher not income but capital. Atkinson, J., refused to accept that argument. It has not been put before us; and, in my opinion, the view of Atkinson, J., on that subject was right. But, of course, that does not end the matter. It gets the case as far as this. These sums are income in their nature, and as such fall within the income tax net. The question still remains (with which Atkinson, J., in view of the argument presented to him, did not deal) whether, in falling into that net, they come within the category of income which is subject to deduction by the payer or whether they fall within the category of income in respect of which direct assessment should be made. That is the real controversy, which is not decided merely by saying that these sums have an income quality.

The case was presented to us by counsel for the appellant with admirable clearness and was rested on several alternative arguments. First of all, it was said the receipts under this contract are receipts which would fall into calculation for the purposes of assessment under case II of Sched. D, which deals with "tax in respect of any profession, employment or vocation not contained in any other Schedule." The word "employment" there must now be read subject to the Finance Act, 1922, s. 18, which transfers certain employments to Sched. E. The argument here was that Asher was carrying on a profession or vocation which was said to be the profession or vocation of a film producer. It was said that in respect of that he would be assessable under case II and the receipts that he would receive under the cancellation agreement would be elements in his professional or vocational receipts and would have to be dealt with as such on a direct assessment. It was said that, on the basis that he was carrying on a profession or vocation, the receipts which come to him under a cancellation agreement are just as much professional or vocational receipts as receipts which come under the performance of an agreement made in the course of carrying on the profession or vocation. Cases are not unfamiliar where it has been held in the case of trading operations, which are assessable under case I, that receipts from the cancellation of an ordinary trade agreement made in the day to day course of the trade are regarded, for tax purposes, as receipts of the trade just as much as the receipts received under the carrying out of an ordinary trade agreement. But whether that principle applies or does not apply to professions or vocations may be another question altogether, the answer to which may depend on the facts of individual cases.

In the present case there is no need, in my opinion, to go into that controversy, because I will assume that the argument is right, and that, if Asher is assessable under case II, these receipts would be receipts in respect of his profession or vocation, and would not be receipts under a personal debt or obligation by virtue of a contract under case III, r. 1 (*a*). But I am entirely unconvinced by the argument that Asher is carrying on, or does carry on or was carrying on, any "profession or vocation" at all according to the true meaning of those words. All that we know about him is to be found in the statement of claim, para. 1, and in the terms of the original service agreement. The first paragraph of the statement of claim says: "The plaintiff is a producer of cinematograph films." That is a very jejune statement. What the precise nature of that occupation is we are not told.

It was argued that we ought to regard that particular occupation in the same light as that of a professional artiste who makes his income by entering into contracts periodically with managers for whom he performs. An example of that was the well-known Miss Lilian Braithwaite's case (1), where that question was discussed; and it was held that an actress was carrying on a profession none the less because the manner of carrying it on was by entering into contracts for giving her services.

The other reference to the nature of Asher's occupation is to be found in cl. 1 of the service agreement by which he is employed and engaged as "a production executive." That phrase is one which does not convey any very clear impression to my mind because it is a phrase which I rather believe has come from the other side of the Atlantic; and what it may mean over here we are not informed.

We are asked to find on that evidence alone that the occupation of Asher is a "profession or vocation." I find it quite impossible to accept that view. I should have thought from that information that his occupation was more the occupation of a manager, or person of that kind, who is engaged under a service contract to manage a business, or some particular branch of a business. I have yet to learn that a manager or a managing director is carrying on "a profession or vocation." Contracts of that kind are, I should have thought, mere contracts of employment and nothing else. In any event, no facts are put before the court which, in my opinion, would justify placing Asher's occupation in either of the categories which it has been suggested are its proper home. Therefore, I come to the conclusion that Asher fails in his contention that he is assessable under case II.

Before I come to look at the other cases in Sched. D, I must turn to the argument that was put forward that the case falls under Sched. E. It is not necessary to discuss what the position would or might have been under the original service agreement had that agreement remained in force. What we have to consider is whether or not the receipts under the cancellation agreement are taxable under Sched. E, in which case they would be taxable by direct assessment; and the taxpayer there would be entitled to such deductions as are provided for in the rules applicable to Sched. E, r. 9. It is said that, if the receipts do not come under case II of Sched. D, they come under Sched. E. The first argument was that these receipts are a pension. In my opinion, they cannot A be regarded as anything of the kind. They are, and are expressed to be, compensation for the cancellation of a contract. Anything less like a pension I find it difficult to think of. Then it was said, even if they are not a pension they are profits from an employment and profits in the sense that they are referable to the services performed under the service agreement and must be regarded as remuneration for services so rendered in the past. ATKINSON, J., in the concluding paragraph of his judgment, appears to have favoured that B view. But, in my opinion, that view cannot be sustained, having regard to the clear language of the agreement itself, which sets out beyond possibility of doubt what the precise consideration is for these payments. It seems to me impossible to say that the parties agreed that Asher should be remunerated for his past services. He gave up expressly in the cancellation contract any claim to any remuneration in respect of what he had done in the past. This is merely a C method (and a method which, no doubt, was convenient to the respondents) of paying him compensation for giving up his rights under that agreement. That method obviously might have been much more convenient to them than the method of paying him a lump sum down. I cannot regard those payments as in any sense remuneration which is to be related to his contract of employment. Therefore, in my opinion, Sched. E is not the proper schedule under which Asher would fall to be assessed in respect of these receipts. D

Before examining the other relevant cases of Sched. D, I must say a word about All Schedules Rules, rr. 19, 21. In the present case r. 21 would be applicable because the respondent company is not in a position to say that these payments were made "out of profits or gains brought into charge." Therefore, the tax they would deduct, if they were entitled to deduct it, they would have to hand over to the Revenue. In *Re Hanbury* (2), I endeavoured, in the course of a judgment, in which the other two members of the court agreed, to E set out what appeared to me to be the proper scope of rr. 19 and 21. I do not propose to examine that judgment, but merely to extract from it a phrase which I think is a convenient one for the purpose of distinguishing the class of income taxable by deduction from the class of income which merely becomes an element in the computation of profits and gains. The phrase I used was "pure income profits." I pointed out that rr. 19 and 21 were concerned with F pure income profit and anything that was not pure income profit did not fall within their scope.

Turning back to Sched. D, the case for the respondents is that these payments fall under case III, the language of which is as follows:

> Tax in respect of profits of an uncertain value and of other income described in the rules applicable to this case.

The relevant rule is r. 1, which says: G

> The tax shall extend to (*a*) any interest of money, whether yearly or otherwise, or any annuity, or other annual payment, whether such payment is payable within or out of the United Kingdom, either as a charge on any property of the person paying the same by virtue of any deed or will or otherwise, or as a reservation thereout, or as a personal debt or obligation by virtue of any contract, or whether the same is received and payable half-yearly or at any shorter or more distant periods.

It seems to me that, once case II is excluded and once Sched. E is excluded, the H language of that rule covers the present case. These payments are payable as a "debt or obligation" by virtue of this contract which, as counsel for the respondents rightly points out, is the source of the income. The contract, and nothing else but the contract, is the source of the income. Therefore, it seems to me that the language falls precisely within the language of case III, r. 1. The payments are annual payments in the sense that they have that necessary recurrent quality which is the distinguishing mark differentiating an income payment and a capital payment for these purposes from any other payment.

You can have an annual payment under this rule, even though it happens by some accident or other to fall due in one year only. The question is, has it the necessary periodical or recurrent quality ?

If that view is right, the next argument of counsel for the appellant necessarily falls to the ground, because he says, as his last point, that the case falls within case VI. Case VI provides for :

> Tax in respect of any annual profits or gains not falling under any of the foregoing A cases, and not charged by virtue of any other Schedule.

If I am right in thinking that the case does fall under case III, it is automatically excluded from case VI. Having regard to the view which I have formed, it is unnecessary to consider what is precisely the scope and application of case VI, and particularly the question whether case VI cases are always examples or necessarily examples of direct assessment. It may or may not be so.

I may say for the sake of caution that that question, whether there might B be cases under case VI to which rr. 19 and 21 would apply, was not a question which was discussed in *Re Hanbury* (2), or was irrelevant to the point then before us. It may or may not be the fact that, in some cases under case VI, rr. 19 and 21 would apply, because a curious miscellaneous collection of receipts has, by statute, been brought under case VI. I express no opinion upon that point whatsoever. What I am saying is merely a word of caution to the effect that C that particular point was not before the court in *Re Hanbury* (2) and was not considered ; and my observations, accordingly, must be read in that light. There may be nothing in the point, but I wish to refer to it by way of precaution.

If the views which I have expressed are correct, that is an end of the case. The result is that the decision of ATKINSON, J., is right ; but the reasons which he gave, although, in my opinion, correct as far as they went, did not sufficiently cover the ground.

D The result is that the appeal must be dismissed with costs.

MACKINNON, L.J. : I agree with the judgment of LORD GREENE, M.R. In view of the appalling complexity of the statutes involved here, I may be forgiven for saying that his conclusion is not one arrived at with ease, though he has overcome the difficulties of the case so lucidly. But there was one passage in his judgment (with which I am in complete agreement) which is very easily reached on numerous manifest grounds—I mean the passage in which E LORD GREENE, M.R., pointed out that where a question arises between two subjects as to the duty of one of them to act under r. 19 or under r. 21, it is a misfortune that legal machinery does not exist whereby the Commissioners of Inland Revenue can be represented in such cases as parties to the argument and be bound by the decision. I agree that the appeal fails.

GODDARD, L.J. : I agree.

F *Appeal dismissed with costs.*

Solicitors : *Kenneth Brown, Baker, Baker* (for the appellant) ; *Linklaters and Paines* (for the respondents).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

G

Re GROSVENOR, PEACEY *v.* GROSVENOR.

[COURT OF APPEAL (Lord Greene, M.R., Luxmoore and Goddard, L.JJ.), **November 23, December 15, 1943.**]

Executors and Administrators—Commorientes—Statutory presumption—Contemporaneous deaths—Five persons killed in same house by bomb—No evidence as to moment of deaths—Presumption inapplicable—Law of Property Act, H 1925 (*c.* 20), *s.* 184.

On Sept. 14, 1940, a bomb fell upon a house and exploded in the basement. There were 5 people sheltering in an air-raid shelter in the basement and they were all killed. They were (*a*) the occupier of the house, (*b*) her daughter, (*c*) the housekeeper of two brothers who are the two testators next referred to, (*d*) R. L. G., aged 73, the first testator, and (*e*) his brother, E. M. G., aged 66, the second testator. The first testator, *inter alia*, left a legacy to the housekeeper and he left the residue equally among his brothers " surviving at the date of my decease." The second testator left

£100 to each of his executors of whom the first testator was one, pecuniary legacies to the first testator, to the occupier of the house and to the housekeeper, and the residue equally to 3 named legatees of whom the first testator was one. The appellant, the only surviving brother of the two testators, claimed as one of the residuary legatees under the will of the first testator and as next of kin of the second testator. He claimed that on the true construction of the Law of Property Act, 1925, s. 184, and in the events which had happened, all the dispositions in the wills of the two testators in favour of one another and of the occupier of the house and of the housekeeper ought to be treated as having failed. There was no dispute as to the legacy left by the second testator to the first testator as his executor as that necessarily failed. It was contended (i) that s. 184 only applied to questions of title strictly so called, and (ii) alternatively, that the section did not apply to the case of simultaneous deaths and that in the present case all the persons concerned ought to be held to have died simultaneously :—

Held : (i) on the true construction of the Law of Property Act, 1925, s. 184, the presumption as to the order of death arises "for all purposes affecting the title to property" and is not restricted to cases of joint tenancies.

(ii) the section has no application to simultaneous deaths.

(iii) (Luxmoore, L.J., *dissenting*) : on the facts the proper inference to draw was that all the persons concerned died simultaneously and in consequence the presumption afforded by the section did not arise.

[**EDITORIAL NOTE.** The Court of Appeal here consider for the first time the proper construction of the Law of Property Act, 1925, s. 184, dealing with *commorientes*. There is first a minor point that the words "affecting the title to property" refer only to joint tenancies. This is quickly rejected. The main point is whether the section deals with simultaneous deaths. On this the general view has been that the section was intended to resolve all cases of deaths in the same disaster, but, upon close inspection, it is seen that the section does not deal with simultaneous deaths. There are thus three cases (*a*) simultaneous death, (*b*) consecutive deaths in which the order of decease is proved—both of these are outside the section—and (*c*) the only case dealt with by the section of consecutive deaths in which the order of decease is uncertain. The difference in opinion is confined to the question whether the evidence established the fact that the deaths were simultaneous. At one time it was thought that the happening of simultaneous deaths was so improbable that it could be stated that it was an event which could not happen. It is held, however, that that event is quite probable in modern conditions. There are a number of valuable *dicta* in the judgments as to the meaning of the words "subject to an order of the court" in sect. 184. It was, however, quite unnecessary in this case to come to a final decision on this point.

As to Commorientes, see HALSBURY, Hailsham Edn., Vol. 14, p. 212, para. 354 ; and for Cases, see DIGEST, Vol. 23, pp. 88, 89, Nos. 790-801.]

Cases referred to :

*(1) *Wing* v. *Angrave* (1860), 8 H.L. Cas. 183 : 23 Digest 89, *794* : 30 L.J.Ch. 65 : *affg.* S.C. *sub nom. Underwood* v. *Wing* (1855), 4 De G.M. & G. 633.
*(2) *Re Lindop, Lee-Barber* v. *Reynolds*, [1942] 1 Ch. 377 ; [1942] 2 All E.R. 46.
(3) *Mason* v. *Mason* (1816), 1 Mer. 308 ; 44 Digest 222, *469*.
(4) *Cooper* v. *Slade* (1858), 6 H.L. Cas. 746 ; 20 Digest 66, *464* ; 27 L.J.Q.B. 449 ; 31 L.T.O.S. 334.
(5) *Newis* v. *Lark* (1571), 2 Plowd. 403 ; 44 Digest 435, *2621*.
(6) *R.* v. *Carr-Braint*, [1943] 1 K.B. 607 ; [1943] 2 All E.R. 156.

Appeal by the defendant R. P. Grosvenor from an order of Cohen, J., dated June 9, 1943. The facts are fully set out in the judgment of Lord Greene, M.R.

Lindsay M. Jopling for the appellant.

J. Pennycuick for the residuary legatees.

C. L. Fawell for the personal representatives of the pecuniary legatees.

M. J. L. Beebee for the personal representatives of the first testator and the personal representative of the second testator.

Lord Greene, M.R. : This appeal raises a difficult and important question as to the meaning and effect of sect. 184 of the Law of Property Act, 1925. That section is as follows :

> In all cases where, after the commencement of this Act, two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such deaths shall (subject to any order of the court), for all purposes affecting

> the title to property, be presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder.

The section was obviously intended to deal with circumstances which in the past had given rise to practical difficulties. I do not think that it was designed so much to provide a method of dealing with those difficulties which would produce a just result as to lay down a general rule for resolving them.

On Sept. 14, 1940, the house, No. 5, Upper Cheyne Row, Chelsea, was struck by a high explosive bomb which exploded in the basement. At the time there were sheltering in an air-raid shelter in the basement five persons, three females and two males. It is clear from the evidence that these persons were (1) Mrs. Mabel Edith Price Jones, aged 52, the occupier of the house, (2) her daughter, (3) Elizabeth Sarah Parke, aged 70, the housekeeper to the two male persons, (4) Randolph Lea Grosvenor, aged 73 (hereinafter called "the first testator"), (5) his brother Edward Moberley Grosvenor, aged 66 (hereinafter called "the second testator"). All of them were killed; and, if it be assumed that they died at different moments of time, it would be quite uncertain which survived which. On that assumption the section would unquestionably apply and they would be presumed to have died in order of seniority, namely (1) the first testator, (2) Elizabeth Sarah Parke, (3) the second testator, (4) Mrs. Price Jones. We are not concerned with the daughter of Mrs. Price Jones.

The difficulty arises in this way. The first testator had made a will under which, subject to certain legacies (including a legacy of £10 to Elizabeth Sarah Parke), he left his property equally among his brothers "surviving at the date of my decease." The second testator had made a will under which he gave a legacy of £100 to each of his executors (of whom the first testator was one), his share in a property known as "Harlings," and its contents and a sum of £500 to the first testator, a legacy of £200 to Mrs. Price Jones (these legacies with others to be doubled if, as was the fact, the value of his estate should exceed £15,000), a legacy of £50 to Elizabeth Sarah Parke and one-third of the residue to the first testator, one-third to his cousin Rowena Hickman and one-third to the Union Castle Widows and Orphans Fund Association.

The appellant, Robert Pershall Grosvenor, is the only surviving brother of the two testators and claims as one of the residuary legatees under the will of the first testator and as next of kin of the second testator. He asserts that, on the true construction of sect. 184 and in the events which have happened, all the dispositions contained in the wills of the two testators in favour of one another and of Mrs. Price Jones and Sarah Elizabeth Parke ought to be treated as having failed. There is no dispute as to the legacy bequeathed by the second testator to the first testator as his executor which has necessarily failed.

It cannot be disputed that, if these events had taken place before the section came into effect, the appellant's contention would have prevailed. It was (and, apart from cases where the section applies, still is) essential that a person claiming through a legatee named in the will of a deceased person must prove that the legatee survived the deceased, whether or not a condition of survivorship was expressly inserted in the will. Conversely, if a gift to one person was made conditional upon another person predeceasing the testator, the first named person must (apart from the section) prove that the second named person predeceased the testator. It followed that, where a legacy was given to A and, if he predeceased the testator, to B, and it was uncertain whether A or the testator died first, neither the representatives of A nor B could claim the legacy, the former because they could not show that A survived, the latter because he could not show that A predeceased, the testator. This proposition is established by the decision of the House of Lords in *Wing* v. *Angrave* (1). Another example of the difficulties which arose where there was uncertainty as to the order of death was the case of joint tenants.

In the present case it was argued (i) that the section only applies to what was described as questions of title strictly so called (such as the case of joint tenants) as distinct from questions of an express or implied requirement of survivorship in a will; (ii) alternatively, that the section does not apply to the case of simultaneous deaths and that, on the evidence in the case, all the persons concerned ought to be held to have died simultaneously.

The first of these arguments is, in my opinion, clearly inadmissible. I can find no justification for the suggested distinction. The presumption as to the order of death arises "for all purposes affecting the title to property." These words are very wide and, in my opinion, clearly cover the claim by or through a legatee or devisee to the subject matter of the legacy or devise. I agree, moreover, with the view of COHEN, J., that the presence of the word "surviving" in the will of the first testator makes no difference in this respect.

There is one point which I should mention before I deal with the second of the two arguments above stated. I agree with the views of COHEN, J., and of BENNETT, J., in the earlier case of *Re Lindop* (2), that the bracketed words in A the section "subject to any order of the court" do not give the court a discretion to depart from the presumption in cases where the section says that it is to arise. It was faintly argued before us that this view was wrong, but it appears to me to be unassailable. I doubt, however, whether the construction placed by BENNETT, J., upon these words is correct. He interpreted them as referring to the case where the presumption is rebutted by evidence as to the order in which the parties in fact died. Grammatically, this construction seems to me, B as at present advised, very difficult if not impossible to support. The section says that the presumption is to arise where it is uncertain which person was the survivor: and the construction favoured by BENNETT, J., with the adherence of COHEN, J., makes the section read in effect as follows: "where two or more persons have died in circumstances rendering it uncertain which of them survived the other or others such deaths shall, unless it is proved to the court that it was C not uncertain . . . be presumed to have occurred in order of seniority." I agree that it is difficult to find a sensible meaning for the words. I suggest, however, that they may refer to subsequent orders of the court in the event of fresh evidence becoming available. The question does not, however, arise on this appeal and I must not be taken as expressing any concluded opinion as to the meaning of these words except that they do not confer a discretion on the court to depart from the presumption. D

I now come to the second argument. The first question that arises here is whether as a matter of law it is possible for two persons to die simultaneously. It was argued against the contention of the appellant that the possibility of simultaneous death is not recognised by the law upon the ground that, as time is infinitely divisible, it must always be certain that one of two persons in fact died before the other, although it may, and in most cases of what would popularly be described as simultaneous death it will necessarily, be impossible to prove E which in fact died first. The statement that time is infinitely divisible was said to be a scientific fact. I should prefer to call it a metaphysical conception. No doubt when a bevy of angels is performing saltatory exercises on the point of a needle it is always possible to find room for one more. But propositions of this character appear to me to be ill suited for adoption by the law of this country which proceeds on principles of practical common sense. I must, however, F examine the state of judicial opinion on the subject. In *Wing* v. *Angrave* (1), the following *dicta* are to be found, and they are no more than *dicta*. LORD CAMPBELL, L.C., said, at p. 199, in reference to a suggestion that, where it is doubtful which of two individuals died first, there is a presumption of law that they died at the same point of time:

> I will not say that this is impossible, although time, like matter, is said to be infinitely divisible, but such a presumption is not warranted by decision, by *dictum*, or by analogy. G

LORD CRANWORTH, at p. 209, said that a certain rule of construction (not relied upon before us) might have been contended to be applicable:

> . . . if the fact had been, and had been ascertained to be, that Mr. and Mrs. Underwood both died at the same instant of time, if that could be possible.

LORD WENSLEYDALE said, at p. 215:

> No one can suppose that she really meant not to give the property to Wing, if her H husband and herself should happen to die at the same moment. No one doubts, that, had she thought of such a possibility at the time she made her will, she would have provided for it by express words.

At p. 216 he said:

> If the words were read in their ordinary sense, there would be an intestacy in the possible event of the contemporaneous death of the testatrix and her husband.

Lastly, LORD CHELMSFORD said, at p. 222:

> If both of them had been asked what should become of the property in the event of

their simultaneous death, or a total inability to establish the survivorship of either, it may be taken for granted that their answers would have been in favour of the appellant.

Wing v. *Angrave* (1) was a case in which the deceased persons had been swept overboard by a wave and it was held on the facts to be impossible to say which was the survivor. The possibility that they died simultaneously could not be entertained for obvious reasons. In the same case, *sub nom. Underwood* v. *Wing* (1), at p. 661, Lord Cranworth, L.C., had said:

> It cannot be assumed to be proved, or probable, or possible, that two human beings should cease to breathe at the same moment of time, for that is hardly within the range of imagination . . .

If Lord Cranworth, L.C., had foreseen the march of civilisation and had been able to visualise the possibility of a high explosive bomb bursting in a basement and blowing a number of persons to pieces, I cannot help thinking that he would have used different language. In the year 1855 the sort of calamity in which two persons might lose their lives, such as fire or shipwreck, was in its nature such as to leave a reasonable probability that one survived the other—or, to put it another way, such as to exclude the probability that they died simultaneously. We have progressed far since those days. To speak of the infinite divisibility of time in relation to a modern high explosive bomb bursting in a basement shelter among the persons taking refuge there appears to me, with all respect to those who think otherwise, to ignore the realities of the case. In *Re Lindop* (2), Bennett, J., cited the observations of Lord Cranworth, L.C., without, however, accepting the view that simultaneous death was a legal impossibility. He agreed that such a thing was " so highly improbable that the evidence relied upon to prove it must be looked upon closely and critically." I do not regard the improbability as being nowadays so strong as Bennett, J., and Cohen, J., (who followed his decision), appear to have thought. To complete the reference I should add that Sir William Grant, M.R., in *Mason* v. *Mason* (3), spoke of simultaneous deaths as being within the bounds of legal possibility. I find nothing in authority which compels me to take the contrary view.

During the course of the argument I suggested that the section, upon its true construction, might cover the case of simultaneous deaths. On consideration, I do not think that this suggestion can be supported. The words " uncertain which of them survived the other or others " appear to me to be applicable only to the case where the proper inference from the facts is that the persons in question died consecutively and this will not be the case if the court comes to the conclusion on the evidence that they died simultaneously. The legislature has not thought fit to lay down a presumption as to the order of death in such a case, but has left the existing law to take its course.

This brings me to a consideration of the manner in which the question of simultaneous deaths, regarded as a pure question of fact, ought to be approached. A person claiming the benefit of the presumption under the section can, as it seems to me, only succeed if the court is satisfied as to two things, one that the proper inference from the circumstances is that the deaths took place consecutively, the other that the circumstances leave the court in uncertainty as to which death took place first. Each of these matters is a question of fact to be decided in accordance with the usual method of dealing with questions of fact. If the evidence merely shows that two persons were swept overboard by a wave, no court, I venture to think, would draw any inference except that they died one after the other. The possibility of simultaneous death in such a case is obviously so remote that it must be left out of account. Now let me suppose that a witness saw one of the two swimming in the sea and saw the other disappear below the water. On this evidence the court would surely hold that the former survived the latter and would not take into account the possibility that the swimmer was seized with cramp and sank and that the other rose to the surface and survived him. In other words, the court would draw the more probable inference that the swimmer survived. Uncertainty as to the order of death would not arise since it would be found as a fact what the order was and the section would not apply.

How does the matter stand on the issue whether two persons died simultaneously or consecutively? I do not see why any different principle should apply. It is true that simultaneous deaths can only occur in special circumstances. But, if the weight of evidence points to the conclusion that the deaths were simultaneous, I do not see why it should be said that the court ought not to draw that conclusion because of the existence of a remote possibility that it would be incorrect. In the present case, the only possibility suggested is that one or other of the persons concerned may have been struck and killed by the falling bomb a fraction of a second before it exploded. Anything is possible. But is it to be said that a scintilla of a possibility of this sort is to prevent the court from drawing the obvious inference as to what in fact happened ? I do not think so. The question whether two persons died simultaneously or consecutively is just as much a question of fact as the question which of two persons who died consecutively died first and both questions must be dealt with on the same principles. If two persons were to be executed by the blade of a single guillotine, it is possible that one of them might die of fright the moment before the blade descended : but such a possibility ought not, in my opinion, to be taken into account.

I do not propose to examine the evidence in detail. In my opinion, the only proper inference to draw is that all the persons concerned died simultaneously. If this inference cannot be drawn in this case, I cannot imagine any case in which it could be drawn. It must not, however, be taken that, in every case in which two persons are killed by the same bomb the same inference ought to be drawn. Each case must depend on its own facts and where, for example, two persons killed by blast were some distance away from one another, the court might well decline to draw the inference, particularly if it had before it evidence as to the capricious nature of the effects of blast. If one was considerably nearer the point of explosion than the other, the proper inference might well be that the former died before the latter. Again, if the deaths were caused by shrapnel and not by blast, the possibility that both deaths were simultaneous might well be too remote to take into consideration. I should add that I pay no attention to the fact that no witness in the present case expresses the opinion that the deaths were simultaneous. Such evidence would, in my view, have been both useless and superfluous, having regard to the facts which were proved.

I would allow the appeal.

LUXMOORE, L.J. : Two questions fall to be determined on this appeal (i) what is the true construction of sect. 184 of the Law of Property Act, 1925, and (ii) what is the proper inference to be drawn from such facts as have been proved in evidence in this case. I propose to deal first with the question of construction. I need not read the section again, for it has already been read by LORD GREENE, M.R., in the judgment he has just delivered, which I have had the privilege of reading and considering. I agree that the object of the section was to solve the difficulty caused in cases where the disposition or devolution of property depended on one person surviving or predeceasing another. In all these cases unless the claimant could prove affirmatively that the person, on whose survivorship of or death before another his title depended, in fact survived or predeceased that other, his claim failed. If authority be needed for this statement of the law, it will suffice to refer to the leading case of *Wing* v. *Angrave* (1), but there are many cases to the same effect to be found in the books. I also agree that the object of the section was not to provide a solution which would in all cases produce an equitable result, but to cut the Gordian knot and arrive at a solution which would usually bring about a result in accordance with the expectation that, in the ordinary course of nature, a younger person will survive an elder. The section only purports to deal with cases where the circumstances under which two or more persons have died render it uncertain which of them survived the other or others. It seems reasonably plain that the section has not and was not intended to have any application where the element of uncertainty is absent. That element may be absent because the evidence establishes beyond doubt that A survived B or vice versa, or that neither survived the other because both died at precisely the same moment of time, if this be a fact capable of proof. For cases of uncertainty the section lays down a presumption of universal application. The section contains two phrases which are said to create difficulty in ascertaining what is its true meaning, namely, " subject to any order of the court " and " for all purposes affecting the title to property." It was argued that the first phrase gives the court a discretion whether it will or will not apply the presumption if, in its opinion, a more equitable result can be obtained by the non-application. I find myself in agreement with LORD GREENE, M.R., and the judgment of COHEN, J., in this case, and of BENNETT, J., in *Re Lindop* (2) on this point. What, then, is the meaning to be put on these words ? Both BENNETT, J., and COHEN, J., are of opinion that the words were inserted in order to call attention to the fact that the presumption laid down by the section is not irrebuttable. It is true that, if this be the meaning and object of the phrase, it is redundant because the opening words of the section show clearly that the presumption is only to apply to cases of uncertainty—but I am unable to find any other meaning for the phrase and there is no presumption against tautology even in an Act of Parliament. With all respect to LORD GREENE, M.R., the meaning adopted by BENNETT, J., and COHEN, J., seems to me to be preferable to the suggestion that the phrase is intended to reserve to the court power to reconsider the case after it has once been decided, if fresh evidence should become available. I accordingly agree with the views expressed by BENNETT, J., and COHEN, J., on this point.

With regard to the other phrase "for all purposes affecting the title to property," it was argued that it applied only to questions of devolution of legal title as in the case of a joint tenancy and had no application to benefits depending on survivorship conferred by a will or settlement. Like LORD GREENE, M.R., I can find no justification for any such distinction. The words are of the widest import and are apt to cover all such benefits as those to which I have referred.

In my judgment, the section is confined to cases where there is uncertainty as to the survivorship between two or more persons. In the case of two persons there are three alternatives to be considered (i) did A survive B, (ii) did B survive A, or (iii) did both of them die at precisely the same moment of time ? If one of these alternatives can be answered in the affirmative, then the element of uncertainty disappears and the section has no application to that case ; but, if to each of those questions the correct answer be "It is impossible on the evidence to answer yea or nay," then the uncertainty is established and the presumption laid down by the section must be applied. The most difficult of the three questions to answer is obviously the third, did both A and B die at precisely the same time ? It is true that in the past judges of great eminence have commented on the great difficulty and even the improbability of proving that two persons should die at the same moment of time. Indeed, LORD CRANWORTH, L.C., in *Underwood* v. *Wing* (1), at p. 661, said :

> It cannot be assumed to be proved, or probable, or possible, that two human beings should cease to breathe at the same moment of time, for that is hardly within the range of imagination.

I might add that the difficulty of proof does not lessen as the number of beings to be considered increases. There are many *dicta* to the same effect ; some of them have been referred to by LORD GREENE, M.R., and will be referred to in the judgment of GODDARD, L.J., which I have also had the privilege of reading. I agree with them that there is no decision which goes so far as to lay it down in precise terms that such an event is legally incapable of proof.

Both COHEN, J., in the present case, and BENNETT, J., in *Re Lindop* (2), refused to hold as a matter of inference on the facts before them that it was certain that the deaths under consideration by them respectively occurred at the same moment of time. In *Re Lindop* (2), as in the present case, the deaths were occasioned by direct hits from bombs dropped by enemy action and there appears to me to be no distinction for practical purposes between the available evidence in the two cases.

What is the available evidence in the present case ? Again I need not repeat the facts for they have been set out by LORD GREENE, M.R., and by GODDARD, L.J. In considering them it is necessary to bear in mind the fact that time is infinitely divisible, but I do not think that this alone is decisive of the case. It may well be (and I have certainly seen reports in the Press to that effect) that, in cases where small houses and shelters in which a number of people have been assembled have been demolished by direct hits by bombs, some of those people have been found alive in the debris though the rest have perished. The vagaries of bomb burst and bomb blast are notorious. The fact that one person is blown to pieces while another has one or more of his limbs torn off would not, I think, justify a finding of death at the same moment. In such a case I should have thought it not improbable that the latter in fact lived some time longer than the former. Personally, I should require the assistance and experience of a well qualified expert on the effects of bomb blast and bomb burst and their result in actual cases before I should feel justified in coming to the definite conclusion that two or more persons died at precisely the same moment. In my judgment the onus of proving affirmatively that both or all died at the same moment is still as heavy as it was in Lord Cranworth's time and I should have felt it would be improper to interfere with the conclusion on this point arrived at by Cohen, J., in the present case and Bennett, J., in *Re Lindop* (2), even if I had come to a different conclusion myself, but I find myself in agreement with them. For these reasons, I am unable to agree with the conclusion arrived at by Lord Greene, M.R., and Goddard, L.J. I would dismiss the appeal.

Goddard, L.J.: The first question that arises on this appeal relates to the true construction of the Law of Property Act, 1925, s. 184. In *Wing* v. *Angrave* (1), a case which for another reason has an important bearing on the present, Lord Wensleydale laid down a canon of construction which is often quoted. He was dealing with a will, but his words are equally applicable to an Act of Parliament, and adapting them to that context, what he said, at p. 215, was, "The statute is to be read in the ordinary and grammatical sense of the words used, unless that is contrary to or inconsistent with the declared intention of the legislature, to be extracted from the whole Act, or unless it involves any absurdity; in which case it may be modified, extended, or abridged, so as to avoid such inconvenience, but no further." As sect. 184 deals with a separate and distinct matter, it is unnecessary to consider any other part of the Act, but it is material to bear in mind another rule of construction which applies specially to Acts which effect changes or amendments in the law. It is that you must have regard to what was intended to be remedied as well as to the remedy provided. Now, the matter to be remedied was, in my opinion, the law laid down in the above case, that there was no presumption arising from age or sex as to survivorship among two or more persons. If title depended on one surviving another that fact had to be proved, and that it might be impossible to establish it did not entitle the court to presume, which really means to guess, either that the elder or the stronger survived the younger or weaker, or that they died at the same time. This rule applied in all cases, not only when the deaths were occasioned by one and the same cause; it applied where two persons on the same ship were swept off by the same wave and drowned, and also to the case instanced by one of their Lordships of a wife dying in this country after her husband had sailed on a ship which was never heard of again. In some cases no doubt it could be proved that one survived the other, if only for a very short space of time; in others it could not. Accordingly, this section was passed and it does not seem to me that, construing it according to the ordinary sense of the words used, it results in an inconsistency with the presumed intention of Parliament, or an absurdity. It may be that a literal construction omits some case for which another construction would provide, but that is not, in my opinion, a good reason for modifying or extending the plain words of the section. It leaves that case where it was before the Act. It would have been easy to draft the section so as to make the presumption apply to the case of simultaneous deaths, but I do not think it has done so. That the courts have visualised the possibility of two persons dying at the same moment of time is, I think, beyond doubt; in *Mason* v. *Mason* (3), it was stated as a possibility by Sir William Grant, M.R., and in *Wing* v. *Angrave* (1), Lord Campbell, L.C., would not say that it was impossible for two persons to die at the same moment of time. Lord Cranworth, L.C., in *Underwood* v. *Wing* (1), a case arising out of the same disaster, did appear to think that it was impossible to visualise two persons dying at precisely the same moment, but it surely must be in each case a question of fact, and the science of destruction, both of life and property, has advanced, if that be the right word to use, a good deal since 1854. The presumption which is established by the section only operates if it is uncertain which of two or more persons survived the other or others. Accordingly, it does not arise if it is certain that some did survive, or if it is certain that none survived the others. The question then being one of fact, I should be loth to come to a different conclusion from that of Cohen, J., except for two main reasons: first, as the case was tried on affidavit evidence we have exactly the same materials and opportunities of forming an opinion as had Cohen, J., and, secondly, I think Cohen, J., felt obliged to follow the view of Bennett, J., in *Re Lindop* (2). The latter seems to me to have thought, founding himself mainly on Lord Cranworth's *dictum,* that it is impossible in law to hold that two persons died at the same moment of time, but I confess I cannot see why it is, though ordinarily it may be very difficult to prove. Bennett, J., refers to the infinite divisibility of time, but that is a metaphysical conception, and, for my part, I do not think metaphysics ought to have any bearing on questions of proof in a court of law. It is true that Lord Campbell made a passing reference to the same conception, but what he said at p. 199 was:

> I will not say that this [*i.e.*, simultaneous death] is impossible, although time, like matter, is said to be infinitely divisible . . .

He did not say that it was.

If, then, there is no law which says that simultaneous death must be regarded as incapable of proof, we must consider the evidence in the particular case. Now I pause here to say that it is undoubted law that in civil proceedings a finding can and may be rested on the probabilities of the case. There is a well-known and classic passage to that effect in the opinion of Willes, J., given to the House of Lords in *Cooper* v. *Slade* (4), at p. 772, where he spoke of "the elementary proposition that, in civil cases the preponderance of probability may constitute sufficient ground for a verdict," citing Dyer, C.J., in *Newis* v. *Lark* (5). Both these judgments were referred to recently by the Court of Criminal Appeal in *R.* v. *Carr-Braint* (6). Now the evidence here is that the bodies of five persons were found in the ruins of a house, 5, Upper Cheyne Row, and two of them were subsequently identified as those of the two brothers with whose estates we are concerned. They were in the habit of going to this house, which was adjacent to their own in Oakley Street, for shelter during the raids which were taking place in Sept., 1940, as there was a reinforced and sandbagged shelter room in the basement. On Sept. 14, the raid started at about 6 p.m., and the house received a direct hit about 6.35 p.m. That all five people were then actually in the shelter room is so highly probable that, to my mind, it amounts to a certainty that they were. Any one familiar with Chelsea knows that Upper Cheyne Row consists of moderate sized houses, and a basement room there can be fairly described as small, or at least not large. The site of the house is there to be seen. The bodies were so mutilated as to be unrecognisable and identity had to be established by what was found on the bodies. In some of the five cases there was actual dismemberment. The bomb was a high explosive one and penetrated to the basement. In these circumstances, that all five were killed at the same time seems to me to be a matter of certainty. I would go as far as to say that the probabilities are so overwhelming that to feel doubt on the matter is really to speculate on improbable possibilities. Even in a criminal case it is not every conceivable possibility that must be excluded before a jury can be satisfied of guilt beyond reasonable doubt; the emphasis is on reasonable. It may be said that to decide this is all very well as a matter of common sense, but the law requires something more. Provided there is evidence on which a fact can be found or from which an inference may be drawn, the law, I venture to say, does not require anything more. This is a question that might well have to come before a jury, who are always directed to use their common sense, nor do I know what else they can use. With all respect to Cohen, J., to consider such matters as that, though the fraction of time cannot be measured, the blast must tend to reach one point slightly before it reaches another, when one is dealing with an explosion in a small room, is to introduce metaphysical and not practical considerations.

I think both Bennett, J., in the case cited above, and Cohen, J., in the present case read the section in the same way that I do. If that construction is wrong, and it ought to be read as applying the presumption to a case where the court finds that the deaths were simultaneous as well as to where it is left in doubt which of two or more persons died first, the judgment under appeal would stand. But on the construction that I have given to it I think it ought, on the evidence, to be found that the deaths were simultaneous, and in consequence the presumption afforded by the section does not arise. I agree with what Lord Greene, M.R., and Luxmoore, L.J., have said with regard to the words "subject to any order of the court."

I would, therefore, allow the appeal.

Appeal allowed. Leave to appeal to House of Lords.

Solicitors: *W. R. J. Hickman & Randall* (for the appellant and for the personal representatives of the testators); *Parker, Garrett & Co.* (for the residuary legatees); *Coe & Calder Woods* (for the personal representatives of the pecuniary legatees). [*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

A

EASTERBROOK *v.* EASTERBROOK (OTHERWISE JERVIS).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Hodson, J.), **November 15, 1943.**]

Conflict of Laws—Jurisdiction of court—Nullity—Non-consummation—Petitioner domiciled in Canada—Both parties resident in England—Ceremony in England—No appearance by respondent.

B

The petitioner, who was asking for a decree of nullity on the ground of the wilful refusal of the respondent to consummate the marriage, was domiciled in Canada and the respondent was domiciled in England. At all material times both the parties were resident in England and the marriage ceremony was performed in England. No appearance was entered by the respondent to the petition. On the question whether the court had jurisdiction to entertain the petition:— C

HELD: the court had jurisdiction to pronounce a decree of nullity on the ground set out in the petition.

[**EDITORIAL NOTE.** The jurisdiction in nullity cases has been in question in a few authorities and this case adds non-consummation to the classes of nullity cases which can be entertained where the parties are only resident in England at the material time.

AS TO JURISDICTION IN NULLITY CASES, see HALSBURY, Hailsham Edn., Vol. 6, p. 303, para. 357; and FOR CASES, see DIGEST, Vol. 11, p. 428, Nos. 924-926.] D

Cases referred to:

(1) *Salvesen (or von Lorang)* v. *Austrian Property Administrator*, [1927] A.C. 641; Digest Supp.; 96 L.J.P.C. 105; 137 L.T. 571.

(2) *Inverclyde (otherwise Tripp)* v. *Inverclyde*, [1931] P. 29; Digest Supp.; 100 L.J.P.C. 16; 144 L.T. 212.

*(3) *White (otherwise Bennett)* v. *White*, [1937] P. 111; [1937] 1 All E.R. 708; Digest Supp.; 106 L.J.P. 49; 156 L.T. 422.

E

UNDEFENDED PETITION for a decree of nullity of marriage on the ground of the wilful refusal of the respondent to consummate the marriage. The facts are sufficiently stated in the judgment.

William Latey for the petitioner.

The respondent did not appear.

HODSON, J.: In this case the petitioner is domiciled in Canada and the respondent is domiciled in England. Both parties at all material times were resident in England, and the ceremony of marriage, which is not called into question, was celebrated in England. No appearance has been entered by the respondent to the petition, the petition being a petition for nullity on the ground of the wilful refusal of the respondent to consummate the marriage. F

This is an undefended case in which I have only heard argument on behalf of the petitioner. My attention has been drawn to a number of authorities dealing with the difficult question of jurisdiction. I have, in particular, been referred to *Salvesen (or von Lorang)* v. *Austrian Property Administrator* (1) and *Inverclyde (otherwise Tripp)* v. *Inverclyde* (2), and the recent case, *White (otherwise Bennett)* v. *White* (3) which was decided, after argument, by BUCKNILL, J. As in *White's* case (3), so in this case, there had been no appearance and no protest to the jurisdiction, and I myself am unable, with all respect to BATESON, J., to see the distinction, for the purpose of jurisdiction, which appears to have been drawn in the *Inverclyde* case (2), between voidable and void marriages. There is in my judgment, on the facts which I have stated, jurisdiction in this case, as in *White's* case (3), to pronounce a decree of nullity, on the grounds set out in the petition. There will be a decree *nisi*. G H

Decree nisi granted.

Solicitor: *E. E. Spicer* (for the petitioner).

[*Reported by* D. ARMSTEAD FAIRWEATHER, ESQ., *Barrister-at-Law.*]

BONITTO *v.* FUERST BROS. AND CO., LTD.

[HOUSE OF LORDS (Viscount Simon, L.C., Lord Thankerton, Lord Russell of Killowen, Lord Macmillan and Lord Wright), **October 26, 28, 29, November 1, December 15, 1943.**]

Practice—Payment into court—Admission of liability in notice inconsistent with pleadings—Defendant not precluded from disputing liability—Duty of parties to regularise proceedings—R.S.C., Ord. 22.

In their defence the respondents denied liability and at the same time they paid a sum into court with an admission of liability. The appellant contended that the respondents were precluded from disputing their liability to him :—

HELD : (i) Since an action is tried upon the pleadings, the respondents were entitled to contest the question of their liability.

(ii) pleadings and a notice of payment into court should be consistent. Where a discrepancy occurs it is the duty of the parties to regularise the proceedings on an interlocutory application.

(iii) where a judge or jury fix damages at a figure which is less than an amount paid in with an admission of liability, the damages to be awarded remain the figure already fixed and the admission of liability is only relevant to the question of costs of the trial.

[**EDITORIAL NOTE.** It has been suggested on one or two occasions that a payment in with admission of liability binds both the party paying in and the court so that judgment cannot be given for less than the amount paid in. If this were so, it would be very inconvenient. At the trial the fact that a sum of money has been paid into court is not disclosed even to the judge, and it might well be that judgment would be given for a smaller amount. If the law was that the party was entitled to the full amount paid, then the judgment already given would have to be ignored and judgment given for the amount paid in. The House had decided that this is an impossible position and that the fact that payment in has been made even of a greater sum than that recovered, has no relevance other than on the question of costs.

AS TO PAYMENT INTO COURT, see HALSBURY, Hailsham Edn., Vol. 26, pp. 62-64, paras. 100-107 ; and FOR CASES, see DIGEST, Practice, pp. 479-484, Nos. 1591-1637. See also YEARLY PRACTICE OF THE SUPREME COURT, pp. 369-377.]

Cases referred to :

*(1) *Davies* v. *Rustproof Metal Window Co.*, [1943] 1 K.B. 299 ; [1943] 1 All E.R. 248.

*(2) *Cumper* v. *Pothecary*, [1941] 2 K.B. 58 ; [1941] 2 All E.R. 516 ; Digest Supp. ; 110 L.J.K.B. 577 ; 165 L.T. 243.

(3) *Williams* v. *Boag*, [1941] 1 K.B. 1 ; [1940] 4 All E.R. 246 ; Digest Supp. ; 109 L.J.K.B. 913.

(4) *Critchell* v. *London & South Western Ry.*, [1907] 1 K.B. 860 ; Digest, Practice, 87, *736* ; 76 L.J.K.B. 423 ; 96 L.T. 603.

*(5) *Harrison* v. *Liverpool Corpn.*, [1943] 2 All E.R. 449 ;

APPEAL by the plaintiff on the question whether an admission of liability made with payment into court which was inconsistent with the defence precluded the defendants from disputing their liability towards the plaintiff. The facts are fully set out in the opinion of VISCOUNT SIMON, L.C.

M. Turner-Samuels for the appellant.

Gilbert J. Paull, K.C., and *Hon. H. L. Parker* for the respondents.

VISCOUNT SIMON, L.C. : My Lords, pleadings are intended to clarify and concentrate the issues in an action. Unfortunately, the present litigation has become complicated by paragraphs which have produced a good deal of unnecessary confusion.

The respondents are merchants in the city of London and employed the appellant as manager of their cocoa department. The terms of the appellant's engagement were contained in a written agreement dated Jan. 17, 1940. The remuneration of the appellant was agreed to be certain percentages of net profits, and the agreement contained a clause that, in case of any dispute or difference between the parties to the agreement or as to the construction thereof, such dispute or difference should be referred to arbitration.

In addition to buying and selling cocoa on behalf of the respondents, the appellant was also concerned, on their behalf, in the purchase of very large numbers of bags and quantities of twine for use in shipping cocoa, and in selling a large portion of these on behalf of the respondents. The appellant contended that the work which he did in connection with these bags and twine was part of his work as manager of the cocoa department, and that under the agreement he was entitled to remuneration at the agreed percentage on profits made out of bags and twine as well as on the profits in dealings in cocoa itself. This was disputed by the respondents, and the appellant accordingly issued his writ. In paras. 1-17 of his statement of claim he put forward the contentions above described. In the following paras. 18-20 he set up an alternative case, on the assumption that his work in connection with the bags and twine was not covered by the agreement of Jan. 17, 1940, to be paid a reasonable commission on a *quantum meruit* in respect of this work. In view of the arbitration clause in the agreement, proceedings under paras. 1-17 of the statement of claim were stayed in order that the matter might be decided by arbitration, and, pending the award of the arbitrator, further proceedings under paras. 18-20 were also stayed. The arbitrator awarded that the appellant was not entitled to be paid any part of the profit earned by the respondents from the sale of bags and twine—taking the view, apparently, that the percentages were to be calculated only on "dealings in cocoa." Whether this is the correct interpretation of the agreement or not is not a matter in issue; there was no request to the arbitrator to state a case and his conclusion is binding both in fact and in law. The award having been made, the stay was now removed for the hearing of the alternative case under paras. 18-20.

Para. 18 stated the alternative claim in a variety of phrases, separated from one another by the repeated use of the bastard conjunction "and/or" which has, I fear, become the Commercial Court's contribution to Basic English. The whole claim under this paragraph was simply a claim for a *quantum meruit*. To this claim, the defendants pleaded as follows:—

> 6. The defendants admit that the plaintiff is entitled to reasonable remuneration for any work in fact done by him on their behalf other than as manager of their cocoa department, in connection with the said dealings in bags and twine, such reasonable remuneration being based on the brokerage payable to the trade.

Although this paragraph professes to be an admission, it is really saying nothing more than that, if the appellant had done any work in respect of bags and twine on the respondents' behalf outside the scope of his employment under the written agreement (which is not admitted), they were willing to pay him for it, adding the contention that the reasonable payment would be a brokerage payment of, I suppose, ½ per cent. The paragraph is not an admission of liability. The misunderstanding which seems to have arisen in the appellant's mind from this paragraph was greatly aggravated by the fact that at the same time the respondents gave notice to him, under R.S.C. Ord. 22, that they had paid into court £250:

> . . . to satisfy the plaintiff's claim under paras. 18-20 and admit liability therefor.

I cannot entertain any doubt that the admission of liability "therefor" means an admission of liability for the plaintiff's claim under paras. 18-20, *i.e.*, an admission of liability on the *quantum meruit*. The appellant in his reply, however, insisted that his work in connection with the bags and twine was done by him as manager of the department, and not otherwise, and at the trial he called evidence to support this view. In view of the fact that the arbitrator had already decided that, if the work fell within the written agreement, remuneration for it was covered by a percentage on the profits of cocoa alone, and that the appellant's only chance was to establish that the bags and twine fell outside of his employment under the agreement, this may seem a strange line to take; but I think the explanation is that the appellant wished to repudiate the suggestion that he would be adequately paid by brokerage rates and that he was contending that the proper remuneration on a *quantum meruit* would be in accordance with the contractual percentages of profit.

However that may be, the case came before ATKINSON, J., in the Commercial Court in the confused and complicated form which I have described. He appears to have construed the arbitrator's award as meaning that anything which the appellant did in buying and selling bags and twine must be outside the written agreement, whereas, as I have pointed out above, the arbitrator's decision must be understood to decide (whether rightly or wrongly) that, though transactions in bags and twine were within the agreement, payment under the agreement was a percentage calculated on the profits on cocoa alone. The judge's judgment contains a paragraph which shows that he was conscious of the ambiguity created by para. 6 of the defence. Of course he did not at that stage know anything of the payment into court and the admission of liability. After a lengthy and careful analysis of the position as he saw it, Atkinson, J., awarded to the appellant 25 per cent. of the profits on commodities other than cocoa as fair remuneration.

The respondents appealed, and the Court of Appeal (MacKinnon, L.J., Lord Clauson and Lewis, J.) unanimously allowed the appeal. In the leading judgment, MacKinnon, L.J., points out that, as I have indicated above, the dispute before the arbitrator was whether the present appellant was entitled under the written agreement to be paid a percentage of profits earned by dealing in bags and twine as well as a percentage upon dealings in cocoa itself, and that the respondents were contending that under the terms of the agreement the appellant was entitled only to profit on dealings in cocoa. MacKinnon, L.J., further pointed out that the arbitrator's decision in favour of the respondents' contention (whether right or wrong) was final, and that the only thing that remained to be decided was whether a *quantum meruit* claim could be made out. The conclusion inevitably followed (especially in view of the present appellant's insistence that bags and cocoa are necessarily combined in the work of the manager of the cocoa department) that the appellant must be treated as having agreed to do transactions in both kinds under his written contract and that he had expressly agreed that his remuneration for doing the whole of these duties would be measured by reference to profits on cocoa alone. The Court of Appeal therefore reversed the decision of Atkinson, J., and entered judgment for the respondents.

The Court of Appeal refused to give leave to carry the matter further, but when the attention of the Appeal Committee of this House was called to the admission of liability in the notice paying money into court (of which very little had been heard in the Court of Appeal) leave was given to the appellant to present an appeal to this House :

> . . . limited to the issue whether the payment into court with an admission of liability precludes the defendants in the circumstances from disputing their liability to the plaintiff.

This, then, is the sole matter with which your Lordships are concerned, though it has been necessary to give an account of the earlier stages of the litigation in order to make plain what is the question now before us to decide.

On the only question on which leave to appeal was given, it is first to be observed that the judge who conducts the trial is necessarily concerned to decide the issues disclosed in the pleadings. Until those issues are decided, he has not before him, and he ought not to be informed of, the fact of any payment into court, or of the terms of the notice of such payment.

In the present case, therefore, in the course of a long trial in the Commercial Court, Atkinson, J., was dealing with an action in which the defendants denied liability, for that, as I have already pointed out, is the real effect of para. 6 of the defence. The respondents' notice paying £250 into court, on the other hand, contained an express admission of liability and was, therefore, inconsistent with the defence. Goddard, L.J., said on behalf of the Court of Appeal in *Davies* v. *Rustproof Metal Window Co.* (1), at p. 391, ([1943] 1 All E.R., at p. 249), that R.S.C., Ord. 22 contemplates that the notice should follow the pleading. To be precisely accurate, one should say that the order contemplates that the notice and the defence should not contradict one another, for notice of payment in may be given before the defence is delivered. In the present case the two documents bear the same date. The necessity of laying down that this is the correct practice is well illustrated by the present case, for it cannot be tolerated that the trial judge is required to occupy three days with the trial of an issue of liability, with all the expense involved to parties and witnesses, only to be told at the end of it that, in a document which he has not previously been permitted to see, the defendants have admitted liability before the trial began.

In *Davies*' case (1), following *Cumper* v. *Pothecary* (2), the Court of Appeal applied the above principle by saying that a defendant is not permitted to admit liability in his defence and deny it in his notice of payment into court. The present is the reverse situation, and the proper rule of practice equally is that it is irregular for a defendant to deny liability in his defence but to admit it in his notice of payment in.

The question remains, however, as to how this irregularity should be corrected, when it occurs, and as to what should be the result when, as in the present case, nothing has been done by either side to correct it at all. The appropriate course would be to proceed by means of an interlocutory application. In the Commercial Court, such a summons often comes before the judge who ultimately tries the case, but that is no reason why the application should not be made to him. As GODDARD, L.J., pointed out in *Williams* v. *Boag* (3), at p. 3, R.S.C., Ord. 22, r. 6 only prohibits communication of the fact as to payment in "at the trial." On an interlocutory application a master or a judge can have both documents before him and can make an order which will secure that they do not contradict one another. It would have saved much time, expense and paper if this common-sense procedure had been followed in the present case.

Which party should make such an application? In *Davies*' case (1) it was the plaintiff who took out a summons asking that the notice of payment into court should be set aside as being inconsistent with the defence, and embarrassing and the Court of Appeal made the order, very much as under the old rules it did in *Critchell* v. *London & South Western Ry.* (4).

I think that this would have been the proper course in the present instance, for the plaintiff cannot be permitted to fight the issue of liability on the pleadings, keeping in reserve the defendants' admission contained in another document which is not now part of the pleadings but which will come to the knowledge of the judge only after "all questions of liability and amount of debt or damage have been decided." But I do not exclude the possibility of there being cases in which the duty of getting the two documents reconciled rests on the defendant and where he must accept the responsibility of the consequences, if he does not take steps to remove the contradiction which he has brought about.

Applying these considerations to the present case the conclusion is as follows. ATKINSON, J., necessarily dealt with the issues raised on the pleadings and nothing else. Nothing in the notice of payment in could have any bearing at that stage, for the notice is no part of the pleadings, and the judge, under the rules, was not allowed to know of it. Before the Court of Appeal the issues were the same. I do not find in the judgment of the Lords Justices any reference to the notice of payment in, and should not expect to do so in view of the issues at the trial, though of course there is nothing in R.S.C., Ord. 22 to prevent an appellate court knowing of it.

In this House the question has by leave been specially raised whether the admission of liability in the notice entitles the appellant, after all, to succeed on the issue of liability, and the answer is that it does not: the inconsistency is irregular, and should have been corrected at a much earlier stage, but, as matters are, liability was disputed in the defence, that issue has been elaborately litigated, and the decision of the Court of Appeal must stand.

My Lords, as we have had occasion in the course of this appeal to consider the rules of R.S.C., Ord. 22 somewhat minutely, I think it would be proper and useful to point out that it is a mistake to suppose (as was suggested in the judgment of the Court of Appeal in the *Davies*' case (1) and repeated in *Harrison* v. *Liverpool Corpn.* (5)), that, if money is paid in with an admission of liability:

> . . . it follows that liability is admitted for the amount paid in and judgment cannot be given for less.

That was, no doubt, the effect of the previous rules before they were displaced in 1933, but, under R.S.C., Ord. 22, r. 6, as it now stands, the notice of payment into court is not communicated to the judge until not only all questions of liability but all questions of the "amount of debt or damages have been decided." If, therefore, the judge or jury, in ignorance of any amount paid in, fix a figure of damages which is less than the amount paid in with an admission of liability, the damages to be awarded remain at the figure already fixed. The circumstance that the defendant was willing to pay a larger sum with an admission of liability is only relevant (unless the plaintiff within seven days has exercised his right to take the money out and end the proceedings) on the question of costs of the trial.

I move that this appeal be dismissed with costs.

Lord Thankerton: My Lords, I concur.

Lord Russell of Killowen: My Lords, the only issues in this action which remained for trial after the arbitrator's award were those which were raised by the claim for remuneration under para. 18 of the statement of claim. That was, as I read it, a claim by the plaintiff, outside the agreement of Jan. 17, 1940, to be remunerated for the rendering of services which were beyond the scope of his duties as manager under that agreement. The answer to that claim A is contained in para. 6 of the defence, which I construe as a contingent admission of liability to pay remuneration on a brokerage basis, the contingency being the proof by the plaintiff that he had in fact rendered any such services. By para. 7 of his reply, the plaintiff would seem to admit that the services rendered were within the scope of his duties as manager under the agreement, but counsel in your Lordships' House disclaimed any intention to make such admission, B and the argument proceeded on the footing that the plaintiff was contending that the services in question were not part of those duties.

The notice of payment into court, bearing the same date as the defence, admits liability for £250 in respect of the claim in para. 18 of the statement of claim. There is nothing contingent about this admission. In that respect it differs from para. 6 of the defence. But it forms no part of the pleadings, or of the materials available to the judge during the trial. He can only be made C aware of the fact of payment into court after he has tried and decided the question of liability and the amount thereof. The fact of payment of a sum into court is then only relevant on the question of costs (R.S.C., Ord. 22, r. 6).

The plaintiff could have accepted the money under r. 2 of that order in satisfaction of his claim. He elected, however, to proceed with his action. If he felt in any way embarrassed by the discrepancy between the defence and the notice, it was for him to apply to have the two documents brought into line. He took D no such step, and the action accordingly proceeded to trial on the issues disclosed by the pleadings.

The evidence at the trial was all one way. It was called by the plaintiff and it established conclusively that the services for which remuneration was claimed by the plaintiff fell within the duties which he had to discharge under the agreement, and which were covered by his remuneration thereunder. In E these circumstances the Court of Appeal entered judgment for the defendants.

The only question for our consideration is whether, notwithstanding that the plaintiff failed to establish that he had rendered any services for which he could claim remuneration beyond the remuneration fixed by the agreement, the defendants are precluded by their notice of payment into court, with an admission of liability, from disputing their liability to the plaintiff in this behalf.

It would indeed be strange if they were bound to pay the plaintiff for services F which on the evidence he never rendered, or (to put it in another way) to pay twice over for services rendered as part of his duties as manager under the agreement.

But in my opinion, since the plaintiff did not avail himself of his right to accept the £250 in satisfaction of his claim, but preferred to proceed with his action up to trial and judgment, the notice of payment into court with an admission of liability became irrelevant for any purpose in the action, except for the pur- G pose of assisting the trial judge (after he had decided the question of liability and amount) in the exercise of his discretion as to costs. It did not therefore preclude the defendants from disputing their liability to the plaintiff.

I would accordingly dismiss this appeal. I desire only to add that I agree with the view of Viscount Simon, L.C., that the trial judge is not bound to give judgment for at least the amount which is paid into court. If he has on the evidence already " decided " that a smaller sum is sufficient to satisfy H the liability, I see no reason why he is bound, or indeed entitled, to alter his judgment arrived at on the evidence. The contrary view appears to me inconsistent with R.S.C., Ord. 22, r. 6, which contemplates that the notice shall only be operative on the question of costs. Nor is there any hardship on a plaintiff who refuses to accept the sum paid in because he hopes to get more, and then only succeeds in proving liability for a smaller sum.

Lord Macmillan: My Lords, I concur.

Lord Wright: My Lords, I have considered in print the opinion which has been delivered by my noble and learned friend VISCOUNT SIMON, L.C. I agree with it and merely add a few words on the curious question of practice on which leave to appeal to this House was given. The leave was limited to the question whether the payment into court with an admission of liability precludes the defendants in the circumstances from disputing their liability to the plaintiff.

As GODDARD, L.J., observed in the Court of Appeal in *Cumper* v. *Pothecary* (2), at p. 65 :

> Payment into court is, and always has been, a matter depending entirely on statute or rules of court, which have the force of statute.

He adds that the provisions and rules have changed from time to time but the present practice in this respect depends on R.S.C., Ord. 22 in the form which it has existed since 1933 with a slight amendment in 1934.

That order made a change in the practice. Some critics had objected that under the earlier practice a judge might have his mind distracted if he knew from the pleadings that the defendant had paid money into court and how much he had paid in. It was, it seems, proposed by the Rules Committee to meet this objection by providing that the judge should decide the case without being aware that there had been payment into court. The pleadings were not to contain any reference to the payment in nor was the fact of payment in to be communicated to the judge at the trial. Necessary exceptions were those of a defence of tender before action, which was a defence in the strict sense of the word going to the whole cause of action, and those of pleas under the Libel Acts, 1842 and 1843, where payment into court was an integral part of the defence.

Subject to these exceptions, the judge at the trial was under R.S.C., Ord. 22 to proceed in ignorance of the payment into court. But however desirable that rule might be (though many may feel that judges can be trusted to keep their minds impartial and independent) experience seems to show that the remedy was worse than the disease. The purpose of the pleadings is to determine for the judge what issues he has to try. Payment into court (except in the cases mentioned above) is not a defence or an integral part of a defence. But a payment into court may be made after admitting or denying liability in accordance with the prescribed Form 3 of Appendix 13. The payment in appears only in the notice. But suppose the notice of payment in admits liability for a certain cause of action or to a specific amount, but there is no corresponding admission in the defence, or perhaps actually a denial, how does the matter stand ? How is the conflict between the notice and the pleadings to be resolved if they contradict each other ? The only possible answer is that the defence must prevail. It is a pleading and is part of the record, whereas the notice is not. On any other view, the judge might after a long trial find for a defendant on a defence denying liability and then be faced by a notice of payment in admitting liability. Or a judge who has assessed the damages in favour of a plaintiff at a certain amount may be faced by a notice admitting liability for a greater sum. Or the judge after an elaborate trial may give judgment for the defendant and then be faced by a notice paying in money with admission of liability. Is the judge to tear up his judgment and then give judgment in the terms of the notice of payment into court ? Indeed it is suggested in the present case that this should be done with the careful and elaborate judgment of the Court of Appeal based on a defence which did not admit liability.

I think that the only answer possible is that the notice of payment in with an admission of liability does not preclude the respondents from disputing their liability and availing themselves of the success they have achieved in the Court of Appeal by means of the judgment from which on the merits this House refused to give leave to appeal. The judge and the Court of Appeal were bound to decide the case on the record, that is on the pleadings. The new procedure under the new R.S.C., Ord. 22, cannot be taken to abrogate as by a side wind and inferentially this ancient and fundamental rule of procedure.

It is to be regretted that the House has not the benefit of the opinion of the Court of Appeal in this matter in the present case. But the Court of Appeal have examined R.S.C., Ord. 22 in other cases, and in particular in *Cumper* v. *Pothecary* (2), the Court of Appeal in a judgment delivered by GODDARD, L.J., carefully pointed out some of the changes made by the new rule. The question there was whether the defendant should be allowed to amend his notice of payment in and reduce the amount of the payment, the plaintiff not having within the prescribed 7 days taken the amount originally paid in, so that the plaintiff could not get the money out without an order. The court observed that an amendment of the notice of payment in could not be allowed if it produced a want of conformity between the defence and the notice. The notice in that case had denied the damage which had been admitted in the defence. In *Davies* v. *Rustproof Metal Window Co.*, (1), GODDARD, L.J., delivering the judgment of the Court of Appeal, stated that the order contemplates that the notice should follow the pleading, and that it does not permit a defendant to admit liability in his defence and deny it in his notice of payment into court; he ought also to have added that a defendant cannot deny liability in the defence and admit it in the notice of payment into court. There may, however, be a possible ambiguity in the words "follow the pleadings." These words do not refer to a temporal sequence, because the payment in may be made before defence. The Lord Justice, I think, means that the notice and the defence should accord with, and not contradict, each other in regard to admission or denial of liability. In *Harrison* v. *Liverpool Corpn.* (5), £50 had been paid into court with an admission of liability. The trial judge decided for the plaintiff and gave judgment for him for £45 10*s.* The Court of Appeal held that the judge's award of damages was inadequate and entered judgment for £150; but they added that at least the judge should have awarded £50, because that amount had been admitted in the notice. This observation was not material to the decision. But with the greatest respect I do not think it is correct in principle nor indeed does it agree with what I understand was the meaning of GODDARD, L.J. The judge must try the case on the record. Any discrepancy between the defence and the notice of payment in must be embarrassing. The two should be made to agree; but, if the discrepancy is not corrected before the trial, the record must prevail, because that is what determines the issues for the judge, on which he must try the case.

In my opinion there is nothing in this case to preclude the respondents from disputing their liability to the appellant.

Appeal dismissed with costs.

Solicitors: *H. C. Morris, Woolsey, Morris & Kennedy* (for the appellant); *Coward, Chance & Co.* (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

INGALL *v.* MORAN.

[COURT OF APPEAL (Scott, Luxmoore and Goddard, L.JJ.), **October 26, 27, 28, December 10, 1943.**]

Executors and Administrators—Administrator—Relation back—Writ issued before grant of letters of administration—Whether writ properly constituted.

An action was brought by the respondent as administrator of his deceased son's estate for damages recoverable under the Law Reform (Miscellaneous Provisions) Act, 1934, for loss of expectation of life and expenses occasioned by an accident which occurred on Sept. 19, 1941, by reason of the defendant's negligence in driving a lorry whilst in pursuance of a public duty. The respondent's son died intestate. The writ, in which the respondent was described as an administrator, was issued on Sept. 17, 1942, although letters of administration were not granted to the respondent until Nov. 13, 1942. The statement of claim was delivered on Nov. 18, 1942, and the action was heard on Apr. 20, 1943. The appellant contended (i) that the action was not properly constituted at any time inasmuch as the writ was issued when the respondent was not an administrator; and (ii) alternatively, that, even if the action became well constituted by the grant of letters of administration on Nov. 13, 1942, it was out of time by reason of the Public Authorities Protection Act, 1893, s. 1 (*a*), as amended by the Limitation Act, 1939, s. 21. The respondent contended that by reason of the doctrine of relation back an action commenced by him as administrator before the grant of letters of administration was properly constituted provided that letters of administration were granted to him before the hearing of the action :—

Held : (i) an administrator as such has no cause of action vested in him before he had obtained letters of administration.

(ii) the doctrine of relation back of an administrator's title to his intestate's property to the date of the intestate's death when the grant of letters of administration has been obtained has no application to an action commenced by the administrator as such before the grant is made.

(iii) the respondent had no cause of action vested in him at the date of the issue of the writ and the action failed and ought to be dismissed.

[**EDITORIAL NOTE**. The title of an executor to act in the administration of a testator's estate is derived from the will and a grant of probate is merely a convenient form of proof of his title. An administrator on the other hand derives his title solely from the grant. For the purposes of administration it is necessary that his title to the property of the deceased shall relate back to the date of death, but it is here held that this doctrine does not enable a person subsequently appointed administrator to bring an action before he has obtained a grant.

As to the Doctrine of Relation Back, see HALSBURY, Hailsham Edn., Vol. 14, pp. 176, 177, paras. 277-281 ; and for Cases, see DIGEST, Vol. 23, pp. 67-70, Nos. 513-535.]

Cases referred to :

(1) *Mabro* v. *Eagle, Star & British Dominions Insurance Co., Ltd.*, [1932] 1 K.B. 485 ; Digest Supp. ; 101 L.J.K.B. 205 ; 146 L.T. 433.
(2) *Meyappa Chetty* v. *Supramanian Chetty*, [1916] 1 A.C. 603 ; 23 Digest 84, *721* ; L.R. 43 Ind. App. 113 ; 114 L.T. 1002.
*(3) *Tattersall* v. *Ashworth* (1903) unreported, cited Annual Practice, 1943, p. 181 ; Yearly Practice of the Supreme Court, 1940, p. 14.
(4) *Tarn* v. *Commercial Bank of Sydney* (1884), 12 Q.B.D. 294 ; 23 Digest 64, *463* ; 50 L.T. 365.
(5) *Thompson* v. *Reynolds* (1827), 3 C. & P. 123 ; 23 Digest 64, *452*.
(6) *Woolley* v. *Clark* (1822), 5 B. & Ald. 744 ; 23 Digest 60, *399*.
(7) *Fell* v. *Lutwidge* (1740), 2 Atk. 120 ; 23 Digest 66, *496*.
(8) *Humphreys* v. *Humphreys* (1734), 3 P.Wms. 349 ; 23 Digest 64, *459*.
(9) *Horner* v. *Horner* (1853), 23 L.J.Ch. 10 ; 23 Digest 67, *509* ; 22 L.T.O.S. 115.
(10) *Evans* v. *Bagshaw* (1870), 5 Ch.App. 340 ; 36 Digest 305, *30* ; 39 L.J.Ch. 145.
(11) *A.-G.* v. *Avon Corpn.* (1863), 3 De G.J. & Sm. 637 ; 1 Digest 20, *156* ; 33 L.J.Ch. 172 ; 2 New Rep. 564 ; 9 L.T. 187.

Appeal by the defendant from a decision of His Honour Judge Sir Gerald Hurst, K.C. The facts are fully set out in the judgment of Scott, L.J.

C. R. Havers, K.C., and *C. Mansell Reece* for the appellant.

H. B. Samuels, K.C., and *John H. Bassett* for the respondent.

Scott, L.J. : This remitted action was brought by a father suing in the representative capacity of administrator to his son's estate for damages recoverable under the Law Reform (Miscellaneous Provisions) Act, 1934, in respect of the death of his son, aged 20, in a motor accident on Sept. 19, 1941, by reason of the defendant's negligence. His Honour Judge Sir Gerald Hurst, K.C., gave judgment for the plaintiff for £494 8*s*. 6*d*. ; as to £450 for general damages for loss of expectation of life, and for the balance as special damages. Before us there was no appeal on the issue of death through the defendant's negligence, but the defence raised two pleas which were fully argued ; (i) that the action was never properly constituted, in that whilst it purported to be a representative action by the plaintiff as administrator by writ issued on Sept. 17, 1942, in fact letters of administration were not granted until Nov. 13, following ; and (ii) alternatively, that, even if it ever became well constituted by the grant in Nov., that was too late as it was not " commenced " within the statutory period of 12 months from the accrual of the cause of action as required by the Public Authorities Protection Act, 1893, as amended by the Limitation Act, 1939, s. 21. The plaintiff sought to answer both pleas by the contention that the plaintiff's title " related back " to the death.

Many cases were cited to us in argument, and I have read and agree with the review of them by Goddard, L.J. ; but I think a preliminary analysis of the legal questions arising for our determination may help in defining the precise relevance of those cases. The cause of action arose, and was vested in the deceased lad at the moment when he was injured ; and the measure of his damages included fair compensation for such loss of expectation of life as was caused to him by the defendant's tort. That chose in action was his. To it the common law maxim *actio personalis moritur cum persona* would have applied on his death, but for the Act of 1934 which caused it to survive. If he had left a will, it would at the moment of his death have automatically vested in his executor. As he died intestate, it vested in the President of the Probate, Divorce and Admiralty Division, and remained in him until letters of administration were issued. Then—and not before—it would automatically pass from the President to the administrator. As the writ was issued on Sept. 17, 1942, and there was no grant till Nov. 13, it follows necessarily that at the time of writ issued the father had no shadow of title to his son's surviving chose in action, in respect of which he purported to issue a writ, falsely (although no doubt quite innocently) alleging that he issued it as administrator. It purported to launch a representative action under Ord. III, r. 4, an action, in which he confessed, first, that he was not suing in his own right; and secondly, that he had no right in that action to prosecute any claim except in his representative capacity. The defendant could have demanded production of the non-existent letters of administration, and on the plaintiff's failure to produce them the action would, on the defendant's application, automatically have been struck out. Such an action was, in my opinion, incapable of conversion by amendment into a valid action—just as much so, as if he had issued a personal writ claiming to be lawfully possessed of the estate of the deceased and had subsequently asked leave to amend by substituting a representative claim. It is true that, when he got his title by the grant of administration, he *prima facie* became entitled to sue, and could then have issued a new writ; but that was all. An application by him to treat the original writ of Sept. 17 as retrospectively valid from that date would have been refused by the court, not only because it might prejudice existing rights of defence, but because it would not be permissible under the Rules of the Supreme Court or the Judicature Acts. The old writ was in truth incurably a nullity; it was born dead, and could not be revived.

If that conclusion is right it follows equally that the statement of claim was not delivered in any action recognised by the Rules of the Supreme Court; and all subsequent proceedings in the supposed action, including the judgment of the trial judge, were likewise nugatory; for, if the action and the pleadings were bad, there was no valid action before the trial judge to try and it is our duty to say so.

The plea of a statutory limitation of 12 months is really an alternative plea. If the action was never a valid action, there was and could be no valid judgment in favour of the plaintiff, and the plea of the statute was superfluous. It is only if possession by the plaintiff of representative capacity at the time of delivery of the statement of claim is sufficient to satisfy the statute, that the second plea calls for decision. On both pleas the plaintiff had to rely, by way of replication, on the doctrine of "relation back," which it was contended cured the invalidity which affected the plaintiff's right of action when he issued his writ, as from the moment when he became administrator, and then gave validity even to the writ; or, alternatively, if it did not cure the defect in the writ, gave validity to the action as from the date of the grant, and entitled the plaintiff to say that his action was "commenced" at latest when he delivered the statement of claim on Nov. 18, five days after the grant of administration. I assume for this purpose that the act of negligence which caused the death was one within the category defined in the Public Authorities Protection Act, 1893, s. 1 and of the Limitation Act, 1939, s. 21 (1), so that by the combined effect of the two the action would be barred if not "commenced before the expiration of one year from the date when the cause of action accrued"; i.e., before Sept. 20, 1942. Whether it is open to the plaintiff as respondent in this court to contend that the Public Authorities Protection Act has on the facts in evidence no application, I will consider presently.

There is one small difference of language in those two statutes which should perhaps be mentioned. Whilst the Act of 1893 speaks of "any action, prosecution or other proceeding," the Act of 1939 speaks only of an "action." I do not think the words "any other proceeding" can have any relevance to this appeal; we are only concerned with the barring of a right of action. The point to which I refer depends on the meaning of the word "action." The respondent contends that the invalidity of the writ is not fatal, as the grant of letters on Nov. 13 saved the statement of claim from being defective as a statement of claim; but that hypothesis does not make the action valid; for, so far as the present appeal is concerned, by the definition of the Judicature Act, 1925, s. 225, the word "action" means a civil proceeding commenced by writ. It is, therefore, just as impossible for the plaintiff to contend that he "commenced" his action when he delivered his statement of claim, as it is for him to contend that he commenced his action by a valid and effective writ. It follows that on the issue raised by each plea he is driven to the same replication, viz., the doctrine of relation back. But in my opinion that doctrine does not help him on either plea. If the writ was bad when issued, the action was never commenced. The trial judge was in error in speaking of the issue of the writ as being a question of fact and not law; and no doctrine of relation back could give reality to a statement of claim not preceded by a duly issued writ. Finally, once Sept. 19 had passed without a writ duly issued by a duly qualified administrator, the cause of action was barred and could not be resurrected. The words of SCRUTTON, L.J., in *Mabro* v. *Eagle etc., Co.* (1), at p. 487, are directly in point:

> In my experience the court has always refused to allow a party or a cause of action to be added where, if it were allowed, the defence of the statute of limitations would be defeated. The court has never treated it as just to deprive a defendant of a legal defence. If the facts show either that the particular plaintiff or the new cause of action sought to be added are barred, I am unable to understand how it is possible for the court to disregard the statute.

The plaintiff there in answer to a plea of the Statute of Limitations sought to add an administrator as plaintiff after the statutory time had run out.

On the doctrine of relation back and its origin in equity I have nothing to add to the judgment of LUXMOORE, L.J., which explains the true position with such admirable clearness. It follows that the doctrine has no application in the present appeal.

A faint attempt was made before us on behalf of the respondent plaintiff to raise a contention which had been expressly disclaimed in the court below: it was that the Act had no application because the driver of the lorry which caused the death was in the employ of the Canadian Government, and that government was not a "public authority" within the Act. It would be wrong to allow such a point to be taken for the first time in the Court of Appeal, especially after it had been expressly conceded below that the Act did apply: and I express no opinion on the point.

The appeal must be allowed with costs here and below.

LUXMOORE, L.J.: This appeal arises out of an action brought in the High Court to recover damages under the Law Reform (Miscellaneous Provisions) Act, 1934, for loss sustained, expenses incurred, and damages for loss of expectation of life caused by a fatal accident suffered by one Alfred Kenneth Ingall, an infant, by reason of the negligence of the defendant. The writ in the action was issued on Sept. 17, 1934, two days before the expiration of the period of one year from the date of the accident which occurred on Sept. 19, 1941. The plaintiff is father of the deceased and is described in the writ as the administrator of the deceased's estate. It is admitted that this description was wrong at the date when the writ was issued because letters of administration were not granted to the plaintiff until Nov. 13, 1942, nearly two months after the issue of the writ. The action was in due course remitted to the Croydon County Court and was tried by His Honour JUDGE SIR GERALD HURST, K.C., on Apr. 20, 1943. His Honour JUDGE SIR GERALD HURST, K.C., reserved judgment. By his judgment he found that the defendant had been guilty of negligence and assessed the damages at the total sum of £494 8*s.* 6*d.* Apart from the denial of negligence the defendant alleged that the plaintiff's claim was barred under the Public Authorities Protection Act, 1893, s. 1 (*a*), as amended by the Limitation Act, 1939, s. 21. At the trial it was conceded on behalf of the plaintiff that the sections referred to applied because the defendant was driving his lorry in pursuance of a public duty. There was no argument on this point either in the court below or in this court and I, therefore, proceed on the footing that the concession was rightly made. The effect of the statutory provisions referred to, so far as they affect the present case, is that no action can lie "unless it is commenced" within 12 months next after Sept. 19, 1941, i.e., before Sept. 20, 1942. On behalf of the plaintiff it was urged that, although he was not in fact the administrator of the deceased's estate when the writ was issued, the subsequent grant perfected the plaintiff's title and related back to the death of the deceased. The trial judge accepted this argument and upheld the plaintiff's claim and consequently rejected the defendant's contention that the action was incompetent and the claim statute-barred.

The defendant has appealed to this court and the only question arising in the appeal is whether the doctrine of relation back, which is well established in respect of an administrator's title to a deceased's estate, has any application to the status of a plaintiff, who can only sue in a representative capacity, in an action started before the grant of letters of administration. It is, I think, well established that an executor can institute an action before probate of his testator's will is granted and that, so long as probate is granted before the hearing of the action, the action is well constituted although it may in some cases be stayed until the plaintiff has obtained his grant. The reason is plain. The executor derives his legal title to sue from his testator's will; the grant of probate before the hearing is necessary only because it is the only method recognised by the rules of court by which the executor can prove the fact that he is the executor. If any authority for this is required it is to be found in the judgment of Lord Parker in *Chetty* v. *Chetty* (2). An administrator is, of course, in a different position for his title to sue depends solely on the grant of administration. It is true that when a grant of administration is made the intestate's estate including all choses in action vests in the person to whom the grant is made, and the title thereto then relates back to the date of the intestate's death, but there is no doubt that both at common law and in equity in order to maintain an action the plaintiff must have a cause of action vested in him at the date of the issue of the writ. Lord Parker, in the case to which I have already referred, states this to be the law in the plainest terms. The defendant in the court below referred to an unreported case, *Tattersall* v. *Ashworth* (3), heard by Phillimore, J., in King's Bench Chambers, which is cited in the Annual Practice, 1943, at p. 181, and also in the Yearly Practice of the Supreme Court for 1940, at p. 14. The relevant passage in the Annual Practice is as follows:

> An executor is entitled to sue in the High Court before obtaining probate, he being named in the will as executor, and the grant of probate being only a completion of his title. But an administrator is not entitled to sue in King's Bench Division until administration is granted, for until such grant there is no certainty that there is an intestacy, nor that if there is an intestacy any particular person will be administrator. On this ground judgment under Ord. 14 on a writ issued by a person suing as administrator before grant of letters of administration, was set aside with costs, and unconditional leave to defend given; although between the issue of the writ and the order for judgment the plaintiff had obtained the grant of administration (*Tattersall* v. *Ashworth* (3) (unreported), Phillimore, J., in Chambers, July 2, 1903). . . . In Chancery Division an administrator may sue before grant of administration, provided that letters of administration are produced at the hearing.

A statement to the same effect appears in the Yearly Practice, but there a doubt is raised whether an administrator is not now entitled to sue before grant even in the King's Bench Division since the abolition of *profert* and *oyer*.

In my judgment these statements are incorrect. It is true that a person who ultimately becomes an administrator may start proceedings in the Chancery Division for the protection of an intestate's estate and can obtain in a proper case interim relief by the appointment of a receiver *pendente* grant, but in all such cases the person who institutes such proceedings has a beneficial interest in the intestate's estate for he would not obtain a grant unless he had such an interest either as heir at law or as one of the next of kin or as a creditor. In such cases the well recognised practice in the Chancery Division is to indorse the writ in the first instance for the only relief then obtainable, namely the appointment of a receiver *pendente* grant, and to apply to amend the writ after the grant has been obtained, if further relief is required, by adding a claim for administration of the estate with or without specific directions with regard to any special relief required. A study of the cases referred to in the argument and relied on in support of the supposed difference between the common law and chancery practice makes this position clear. I need not refer to them in detail because Goddard, L.J., has dealt with them in the judgment he is about to deliver which I have had the opportunity of reading and with which I am in entire agreement. I have no doubt that the plaintiff's action was incompetent at the date when the writ was issued and that the doctrine of the relation back of an administrator's title to his intestate's property to the date of the intestate's death when the grant has been obtained, cannot be invoked so as to render an action competent which was incompetent when the writ was issued. In my judgment the trial judge was wrong in coming to the contrary conclusion. It follows that no proper action was commenced before the statutory period of limitation expired. That period expired before any grant of administration was obtained and the right of action was lost to the intestate's estate. Although I cannot help feeling some regret, I have no doubt but that the appeal must be allowed and the action dismissed. The appellant should be allowed his costs here and in the court below.

GODDARD, L.J.: This action was brought under the Law Reform (Miscellaneous Provisions) Act, 1934, to recover damages for the loss of expectation of life of one Alfred Kenneth Ingall deceased, and for funeral expenses and damage to his motor cycle. The plaintiff in the writ described himself as the administrator of the estate of the deceased, though in fact he had not at the time the writ was issued obtained letters of administration, though he had done so by the time the statement of claim was delivered. The question is whether he was entitled to sue when he did; if he was not, it follows that the action is bad as being brought by a person who had no title to sue, and no other question will arise. There is no doubt that, where a deceased person leaves a will and therein names an executor, the latter can institute actions before obtaining probate, though the action may be stayed until the probate is granted: *Tarn* v. *Commercial Banking Co.* (4). The reason for this is, no doubt, that the executor's title is derived from the will, which operates from the death of the testator, and all he has to do is to prove the will, that is, to prove that the will which names him as executor is the last will of the deceased. He has a title to sue but the court requires him to perfect his title and will not allow the action to proceed till this has been done. The action will be stayed, but not dismissed. An administrator is in a different position. An intestate's property, including choses in action, formerly vested on death in the Ordinary, and now, by virtue of the Administration of Estates Act, 1925, which in this respect re-enacts earlier statutes, vests in the President of the Probate Division till he grants letters of administration to someone. The difference in the position of an executor and administrator in this respect was authoritatively stated by LORD PARKER in delivering the advice of the Judicial Committee in *Meyappa Chetty* v. *Supramanian Chetty* (2). He said at p. 608:

> It is quite clear that an executor derives his title and authority from the will of his testator and not from any grant of probate. The personal property of the testator, including all rights of actions, vests in him upon the testator's death, and the consequence is that he can institute an action in the character of executor before he proves the will. He cannot, it is true, obtain a decree before probate, but this is not because his title depends on probate, but because the production of probate is the only way in which, by the rules of the court, he is allowed to prove his title. An administrator, on the other hand, derives title solely under his grant, and cannot, therefore, institute an action as administrator before he gets his grant. The law on the point is well settled: see COMYN'S DIGEST, "Administration," B. 9 and 10; *Thompson* v. *Reynolds* (5); *Woolley* v. *Clark* (6).

The other members of the Board were EARL LOREBURN, LORD ATKINSON and LORD SUMNER, and though not technically binding on this court it is impossible to treat a pronouncement of such high authority as otherwise than conclusive of the point. This case was not cited to the county court judge, who, in a careful and well-reasoned judgment, came to the conclusion that, though an administrator could not sue at law before a grant of letters he could do so in equity, and that, if there were a conflict between law and equity, the latter must prevail. The only authority cited to him was *Tattersall* v. *Ashworth* (3), where it is stated that PHILLIMORE, J., in chambers set aside a judgment obtained at the suit of a person suing as administrator to whom letters had not been granted at the date of the writ, but who had obtained a grant before judgment. There it is stated that in the Chancery Division an administrator may sue before grant of administration provided that the letters are produced at the hearing, and reference is made to DANIELL, CHANCERY PRACTICE, p. 352. To the same effect is the note

in the YEARLY PRACTICE OF THE SUPREME COURT FOR 1940, which considers *Tattersall* v. *Ashworth* (3) to be of doubtful authority. In my opinion the decision of PHILLIMORE, J., was right, but the statement as to what may be done in the Chancery Division is too wide. It is enough to refer to the cases which are cited in DANIELL, CHANCERY PRACTICE as authority for the proposition stated: *Fell* v. *Lutwidge* (7); *Humphreys* v. *Humphreys* (8); and *Horner* v. *Horner* (9). All these cases were administration suits or suits relating to
A the administration of estates. They show that actions brought by persons who would be beneficiaries in the administration are not defeated, either where the person entitled to obtain letters is plaintiff or where such person is made a defendant, because a grant has not been made at the date of the writ. The action is brought to protect the estate. The modern practice would be to issue a writ asking for the appointment of a receiver pending a grant of letters and, if brought by a person who would be a beneficiary in the administration, there
B would be no objection on the ground that a grant had not been issued, because the person entitled to take out letters is and must be made a defendant. It is true that in *Fell* v. *Litwidge* (7), LORD HARDWICKE, then Lord Chancellor, but who had also been Lord Chief Justice of the King's Bench, gave as a reason for an action at law not being maintainable by a person who was merely entitled to administration that he would have to make *profert* of
C the letters and that was not required in a court of equity, but I do not think he meant to lay down that in any chancery suit it was open to a person to file a bill as administrator before he obtained a grant, and, if he did, it is contrary to the later authorities. *Evans* v. *Bagshaw* (10); *A.-G.* v. *Avon* (11), both suits in equity, are directly in point. But it is unnecessary to go through the many cases cited in argument because in my opinion it is the plain duty of this court to follow *Chetty* v. *Chetty* (2), and that is conclusive on this point. The cases
D mentioned in DANIELL, CHANCERY PRACTICE are no exception to this rule of law; they are cases in which letters were not necessary for a plaintiff to establish his title to sue, or in which the absence of letters did not afford a defence to a defendant. Nor is it necessary to consider the many cases which show that, once letters are granted, the title of the administrator relates back to the death. They have no application to this question. All they show is that, once letters have been obtained, the title relates back so that the administrator may sue in
E respect of matters which have arisen between the date of the death and the date of the grant, just as he may sue in respect of a cause of action that had accrued to the intestate before his death, provided the cause of action survived. The result is that this action was and always remained incompetent, and judgment ought to have been entered for the defendant. I desire to say that it was, in my opinion, entirely wrong to have described the plaintiff in the writ as the
F administrator. Whether it misled the defendant I do not know, though I gather from the fact that in the defence all that is said is that the grant of the administration is not admitted, that it may well be that it was not till a later stage that it came to their knowledge that the plaintiff was not an administrator. Such a description cannot be justified on the ground that the plaintiff hoped and expected and had every reason to believe that he would become the administrator. Had the writ described him as the person entitled to letters of adminis-
G tration the question might have been raised at a very early stage by an application to dismiss the action and a good deal of expense might have been saved. On the other hand, if the proper description had been given and the defendant had taken no action in respect of it till the trial, his failure to do so might well have influenced the question of costs, as he lost on the issue of negligence. The appeal should, in my opinion, be allowed with costs and judgment entered for the defendant in the court below with costs.

H *Appeal allowed with costs.*

Solicitors: *L. Bingham & Co.* (for the appellant); *William Charles Crocker* (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

ASSESSMENT COMMITTEE FOR CITY OF WESTMINSTER *v.* CONSERVATIVE CLUB.

[House of Lords (Viscount Simon, L.C., Lord Thankerton, Lord Russell of Killowen, Lord Macmillan and Lord Wright), **November 29, 30, December 15, 1943.**]

Rates and Rating—Metropolis—Assessment—Provisional list—Alteration in value—Reduction in value of club premises due to war conditions—" General alteration in the values of all classes of hereditaments "—Rating and Valuation (*Postponement of Valuations*) *Act,* 1940 (*c.* 12), *s.* 1 (2) (*b*).

By a quinquennial valuation made in April, 1936, the gross and rateable value of the Conservative Club's premises in the rating area of Westminster were taxed at £8,500 and £7,080 respectively. After the outbreak of hostilities the club made a request to be inserted in a provisional valuation list at reduced values. The appellants inserted the premises in a provisional list at the existing values and the premises were not included in the supplemental valuation list deposited by the rating authority under the Rating and Valuation (Postponement of Valuations) Act, 1940. The club claimed that they were entitled to have the assessment of the premises reduced to £5,000 gross value with corresponding rateable value by reason of the provisions of the Rating and Valuation (Postponement of Valuations) Act, 1940, s. 1. It was not disputed that the annual value of the club was reduced from £8,500 to £5,000 gross value by reason of circumstances arising out of the present emergency, but the appellants contended that only part of this fall in value was due to special depreciation justifying a lowering of the assessment and that the remaining reduction in value of this and other clubs of a comparable character by reason of the existence of the emergency merely reflected a general alteration in the values of all classes, or substantially all classes, of hereditaments in the area within the meaning of sect. 1 (2) (*b*) of the Act :—

Held : the meaning of " classes " in sect. 1 (2) (*b*) is to be gathered from the words " other hereditaments of a comparable character." By a class of hereditaments is meant a group of premises which for the purposes of rating valuation may be regarded as possessing comparable features. Since it had been found as a fact that the reduction in value which affected the Conservative Club was not a reduction which was generally applicable to all hereditaments or substantially all hereditaments in Westminster, the reduction claimed must be allowed.

Decision of the Court of Appeal ([1943] 1 All E.R. 104) *affirmed.*

[**EDITORIAL NOTE.** The question here is the construction of the Rating and Valuation (Postponement of Valuations) Act, 1940, s. 1 (2). The wording of this section is adapted from the well-known statement by Lord Parker in *London County Council* v. *Islington Assessment Committee* [1915] A.C. 762, at p. 772. While the alteration in value need not be restricted to one property, it must not be an alteration affecting all hereditaments in the area. The word " all " here does not mean every hereditament without exception and a reasonable number of exceptional cases must be allowed for. The alteration will generally affect a " class " of hereditaments and here a " class " means hereditaments of comparable rating features.

As to Alterations in Provisional List, see HALSBURY, Hailsham Edn., Vol. 27, pp. 551, 552, para. 1011 ; and for Cases, see DIGEST, Vol. 38, pp. 642, 643, Nos. 1598-1612.

For the Rating and Valuation (Postponement of Valuations) Act, 1940, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 33, p. 361.]

Cases referred to :

*(1) *R.* v. *Westminster Assessment Committee, Ex p. Junior Carlton Club* (*Trustees*), [1940] 3 All E.R. 155 ; Digest Supp.

(2) *R.* v. *Westminster Assessment Committee, Ex p. St. James' Court Estate, Ltd.* (1940), Derating and Rating Appeals, Vol. XI, 118.

Appeal by the Assessment Committee for City of Westminster from a decision of the Court of Appeal reported [1943] 1 All E.R. 104. The facts are fully stated in the opinion of Viscount Simon, L.C.

R. M. Montgomery, K.C., and *D. G. Squibb* for the appellants.

A. S. Comyns Carr, K.C., and *Frederick Grant, K.C.* for the respondents.

Viscount Simon, L.C. : My Lords, this is an appeal from an order of the Court of Appeal (Lord Greene, M.R., Scott and MacKinnon, L.JJ.), affirming the decision of the King's Bench Division (LORD CALDECOTE, L.C.J., HUMPHREYS and ASQUITH, JJ.), in favour of the present respondents, upon a case stated by the court of quarter sessions for the county of London, which court had also decided in favour of the respondents. The procedure which has been followed is not in all respects regular, as before the Court of Appeal the parties, at the invitation of the court, agreed not only to formulate in quite different terms one of the findings in the case stated, but added a further question (as to whether there was evidence to support certain contentions which the court of quarter sessions accepted) to the question which was propounded at the end of the case for the opinion of the High Court. The House is, I understand, prepared to overlook these irregularities in this instance, in order to decide the real issue between the parties.

That issue is as follows. Under the Valuation (Metropolis) Act, 1869, a fresh quinquennial valuation for London was due in 1941, but, in view of the emergency resulting from the war, Parliament in March, 1940, passed the Rating and Valuation (Postponement of Valuations) Act of that year. The effect of this latter Act was twofold. In the first place, it prolonged the period for which the then operative quinquennial valuation lists would remain in force (and thus in effect postponed any new valuation list) until Apr. 5 in the "prescribed year," *i.e.*, a year to be appointed by order in council which might be not later than the second year after that in which the present emergency ended. In the second place, it laid down, in sect. 1 (2), a statutory rule by which to determine whether and how far an increase or reduction in value attributable to the present emergency, during the currency of the existing valuation lists, was to be deemed to be an alteration to be shown in a supplemental list of the Valuation (Metropolis) Act, 1869, s. 46, or to be such an increase or reduction in value as is referred to in s. 47 of that Act, which relates to provisional lists. In interpreting an Act of Parliament it is legitimate to take note of earlier judicial decisions which may throw light upon, and help to explain, the terms of the enactment, and it is instructive to observe that, after the outbreak of war and before the Act of 1940 was passed, there had been two attempts by London ratepayers to rely upon war conditions leading to a falling off in receipts as a "cause" reducing the value of a hereditament and thus entitling them to take advantage of the Act of 1869, s. 47, and to get a reduced assessment. *R.* v. *Westminster Assessment Committee, Ex p. Junior Carlton Club Trustees* (1); *R.* v. *Westminster Assessment Committee, Ex p. St. James' Court Estate, Ltd.* (2). These attempts failed, because it was held that the operation of the "cause" was not a special feature of the particular hereditament in question, but was one that applied generally, and that the fall in receipts was "due to the general consequences of the war" (*per* LORD HEWART, L.C.J. in the *Carlton Club* case (1) at p. 157). It is not difficult, therefore, to understand why Parliament thought it well to include in the Act of 1940 some specific provision on the subject. The provision is as follows:

> Sect. 1 (2) While the said valuation lists remain in force, any increase or reduction in value attributable directly or indirectly to the present emergency, to the extent that the increase or reduction (*a*) is peculiar to a particular hereditament; or (*b*) affects a particular hereditament and also other hereditaments of a comparable character in the rating area in question but does not represent a general alteration in the values of all classes, or substantially all classes, of hereditaments in that area, shall, in relation to that hereditament, be deemed to be an alteration in the matters stated in the valuation list within the meaning of para. (1) of sect. 46 of the said Act (which relates to supplemental lists) and to be such an increase or reduction in value as is referred to in sect. 47 of the said Act (which relates to provisional lists).

In the present case, the Conservative Club (who are the respondents before this House), occupying premises in St. James Street, appealed to quarter sessions for the county of London against a decision of the Westminster Assessment Committee fixing the assessment of the club at £6,800 gross value with corresponding rateable value in place of an assessment of £8,500 in the quinquennial valuation list. The contention of the respondents was, and is, that the assessment should be reduced to £5,000 gross value, with corresponding rateable value, and these are the figures fixed by quarter sessions subject to the case stated. It was not disputed that the annual value of the club was reduced from £8,500 to £5,000 gross value by reason of circumstances arising out of the present emergency, including the lighting restrictions, but the appellants contended that only part of this fall in value—viz., from £8,500 to £6,800—was due to special depreciation justifying a lowering of the assessment, and that the remaining reduction in value, caused to this and other clubs of a comparable character in Westminster by the influence of the emergency, merely reflected "a general alteration in the values of all classes, or substantially all classes, of hereditaments in the area." Whether this is so or not is a question of fact to be decided by quarter sessions on the evidence before it. On behalf of the club, the present respondents called Mr. Faraday, whose evidence was accepted by A quarter sessions and is annexed to the case stated. Mr. Faraday stated that the majority of hereditaments in the City of Westminster were reduced in value, but in varying degrees, by reason of circumstances arising out of the present emergency, but that a substantial number of hereditaments and classes of hereditaments in Westminster were not affected in value by this course and that a smaller number of hereditaments, including some of important value, were actually increased in value by reason of factors and circumstances arising B out of the present emergency. Mr. Faraday further gave evidence that there was no general reduction in value of all, or substantially all, hereditaments or classes of hereditaments in the City of Westminster by reason of such factors or circumstances, and that such reduction as took place in the value of certain hereditaments was not uniform but varied greatly in amount and degree.

Counsel for the appellants analysed Mr. Faraday's evidence with a view to C showing that the witness had dealt with various "classes" of hereditaments in the area, attributing reduction in value to some classes and no reduction in value to other classes, but that this grouping into "classes" was faulty and that this alleged fault had led to an unwarranted conclusion. He also claimed to detect in Mr. Faraday's evidence a confusion between two possible meanings of the statutory phrase "a general alteration in values" and contended that "general" in this connection did not mean "universal," so that a general D alteration could exist even though there were some exceptions. On the second argument, I agree with counsel for the appellants, but I do not find in the case any indication that quarter sessions reached its conclusion by assuming that an occasional exception would necessarily prevent an alteration from being "general." Neither do I think that Mr. Faraday's evidence implied this.

As to the first argument, it seems to me to be a mistake to suppose that hereditaments can be divided up with scientific precision into a defined number E of classes, as though they were a fixed number of species included within the genus. The meaning of "classes" in sect. 1 (2) (*b*), is to be gathered from the opening words, which associate with a particular hereditament "other hereditaments of a comparable character," and all that is meant by a class of hereditaments is a list or group of premises which for the purposes of rating valuation may be regarded as possessing comparable features. Quarter sessions found as a fact that the reduction in value which affected the Conservative Club was not a F reduction which was generally applicable to all hereditaments or substantially all hereditaments in the City of Westminster. There was evidence before the court which would support this conclusion, and there is no sufficient ground for holding that, in reaching it, the court misdirected itself as to the meaning and application of the section. The appeal, therefore, fails.

A further question was raised between the parties as to whether the Con- G servative Club could make good its claim, without invoking the Act of 1940, by relying upon the finding of quarter sessions that the war and the conditions arising out of it as affecting the value of the club premises were a "cause" of reduction in value within the meaning of the Act of 1869, s. 47. In view of the conclusion at which I have arrived under the Act of 1940, this further question becomes immaterial.

I move that the appeal be dismissed with costs. H

LORD THANKERTON: My Lords, I concur.

LORD RUSSELL OF KILLOWEN: My Lords, I agree.

LORD MACMILLAN: My Lords, I also agree.

LORD WRIGHT: My Lords, I also agree.

Appeal dismissed with costs.

Solicitors: *Allen & Son* (for the appellants); *Richardson, Sadler & Co.* (for the respondents). [*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

EGHAM & STAINES ELECTRICITY CO., LTD. *v.* EGHAM URBAN DISTRICT COUNCIL.

[HOUSE OF LORDS (Viscount Sankey, Lord Thankerton, Lord Russell of Killowen, Lord Macmillan and Lord Wright), **November 22, December 15, 1943.**]

Contract—Impossibility of performance—Supply of electricity for public lighting—Black-out—Contract containing composite provision for supply of current and other services—Provision for abatement in certain events, and "from any other unavoidable cause over which the company has no control."

Under three contracts, the appellant company agreed to supply electricity to the respondent council for street lighting purposes and to undertake various duties in connection with the street lighting system. The appellant company was paid for these services quarterly at a fixed rate. The contracts provided that in the event of a failure of supply due to any "unavoidable cause" over which the appellant company had no control, the payments were to abate in the same proportion as the supply was curtailed. By the Lighting (Restrictions) Order, 1939, the display of lights in the streets was made unlawful from Sept. 1, 1939, and the respondent council thereupon ceased to consume the greater proportion of the current hitherto supplied by the appellant company. The appellant company continued to perform its duties under the contracts as respects the maintenance of the lighting system and was ready to put it into full operation at short notice. In the action, the appellant company sought to recover the quarterly payments due under the contracts, but the respondent council contended that the terms of the contract entitled them to an abatement in the price :—

HELD : the inability of the company to light the lamps was due to an unavoidable cause within the meaning of the *force majeure* clause in the contract and the liability of the council to pay was suspended.

Decision of the Court of Appeal ([1942] 2 All E.R. 154) *affirmed.*

[**EDITORIAL NOTE.** The House of Lords in this case has affirmed the decision of the Court of Appeal upon practically the same grounds. The main point is that the contract was to supply lighting and not to supply current to the lamps. It was contended that the company fulfilled its contract by supplying current to the lamps even though that current could not be used for lighting the lamps, but it is held that this was a contract to illumine the lamps and an order which prevented them from being lighted brought into effect the *force majeure* clause in the contract.

AS TO PUBLIC UTILITY CONTRACTS AND IMPOSSIBILITY OF PERFORMANCE, see HALSBURY, Hailsham Edn., Vol. 7, pp. 218, 219, para. 297 ; and FOR CASES, see DIGEST, Vol. 12, p. 403, Nos. 3251, 3252.]

APPEAL by the Egham and Staines Electricity Co., Ltd. from a decision of the Court of Appeal given on June 17, 1942, and reported [1942] 2 All E.R. 154, reversing a decision of CASSELS, J., given on Feb. 25, 1942, and reported [1942] 1 All E.R. 674. The facts are fully set out in the opinion of LORD RUSSELL OF KILLOWEN.

H. J. Wallington, K.C., and *H. Malone* for the appellant company.

C. R. Havers, K.C., and *Robert Fortune* for the respondent council.

LORD THANKERTON : My Lords, my noble and learned friend VISCOUNT SANKEY has asked me to state that he has had an opportunity of considering the opinion about to be delivered by my noble and learned friend LORD RUSSELL OF KILLOWEN, and that he agrees with it. I also have had the same opportunity and I agree with it.

LORD RUSSELL OF KILLOWEN : My Lords, this case turns upon the true construction of a *force majeure* clause which is to be found in three agreements made between the appellant company and the respondent council and dated respectively Nov. 17, 1933, July 15, 1935, and Feb. 16, 1937. The object of the three agreements was to secure the lighting of the streets and roads in and about Egham. It is unnecessary to set out the agreements in detail. It will be sufficient to refer to the relevant provisions of the agreement of Nov. 17, 1933, which though expressed to be limited to a term of five years from Oct. 1, 1933, was still current and binding between the parties at the relevant dates. By that document, after a recital that the council was desirous of obtaining an electricity supply for the purpose of lighting its district and that the company had agreed to supply the same on the terms and conditions thereinafter appearing, it was provided by cl. 1 as follows :

> Subject to the company's provisional orders and the Electricity (Supply) Acts, 1882 to 1928, or any Act amending or in substitution for those Acts the company agree to supply and maintain and the council agrees to take for five years from the 1st day of October, 1933, an efficient and adequate supply of electrical energy for the lighting of the danger sign and the several lamps during such hours and at such charges as A
> appear in the schedules hereto and such additional lamps as may be included as hereinafter provided.

By other clauses the company were bound to replace and repair damaged lamps, lamp standards and other named articles, to make a nightly inspection of the lamps, to paint lamp standards, to replace all broken lamps, and to keep and maintain all the lamps in a continuous and efficient state of repair and function. The charges payable by the council were set forth in the second and third B
schedules and were reducible rateably with a reduction of the general district lighting flat rate. Cll. 13 and 15 ran thus :

> 13. The company shall pay to the council on demand the sum of 2*s*. 6*d*. per lamp in respect of lamps in Parts I, II and III and 6*d*. per lamp in respect of lamps in Parts IV, V and VI of the first schedule for any evening during which or part of which such lamps shall not be alight during the hours provided for by this agreement and the certificate of the council's clerk or surveyor that any lamp has not been alight on any C
> evening shall be conclusive. Provided that such failure of light shall not be caused by or attributable to any of the happenings provided against in cl. 15 hereof.
>
> 15. Lastly it is hereby agreed that no default by the company under this agreement shall render the company liable in damages if and so far as such default shall arise or be occasioned by reason of fire frost accident strikes lock-outs or combination of workmen or cessation or restriction of work by workmen or from any other unavoidable cause over which the company has no control. Provided always that all payments D
> under this agreement by the council shall abate in the same proportion as the supply shall be curtailed by reason of any event provided for in this clause.

This is the clause in question on this appeal. It appears in each of the three agreements. One other obligation of the company must be referred to. It is not expressed in the first agreement although it is found in the third agreement ; but it is common ground that the company were bound under all three agreements to turn the lights on and off. In other words, the company had to see to E
it that the electricity reached the lamps and was cut off from them at the proper times. This obligation was carried out by means of time switches, supplied, maintained and wound up from time to time by the company. The express provision to this effect which was contained in the third agreement was in these terms :

> The company shall light and extinguish the lamps at as nearly as practicable the respective times specified in the second schedule hereto. F

So far as we know all went smoothly until Sept., 1939 ; but on the outbreak of war the Lighting (Restrictions) Order, 1939, the Lighting (Restrictions) (No. 2) Order, 1939, and the Lighting (Restrictions) Order, 1940, made the display of lights in streets unlawful from Sept. 1, 1939. The company accordingly ceased to light any of the lamps under the three agreements. In fact they took steps which prevented any possibility of the lamps being lit. They made G
the lamps inoperative by the removal of either time switches or fuses.

The present question then arose, namely, whether the supply being curtailed *in toto* by reason of the before-mentioned Orders, it had been curtailed by reason of an event provided for in the *force majeure* clauses. The council contended that it had been curtailed by such an event, namely, a cause over which the company had no control, to wit, the said Orders, and that the curtailment being total in respect of the lighting, the abatement of the payments for the H
supply for that purpose was total also. The company contested this view and on May 27, 1941, issued a writ claiming the amount due under the said agreements in respect of lamps. The amount so due, if the company's claim is well founded, is agreed at a sum of £3,590 5*s*. CASSELS, J., who tried the case, gave judgment for the company. In his opinion, the *force majeure* clauses afforded no defence to the action and did not cover the circumstances. The lighting restrictions did not prevent the company performing their contract and they had performed it.

On appeal this judgment was set aside and judgment was entered for the council. The Court of Appeal (MACKINNON, L.J., LORD CLAUSON and GODDARD, L.J.), were of opinion that the company had not performed their contract, namely, " to illumine the lamps every night, to switch on the current and so cause it to be displayed in the lamps." They had not fulfilled their contract because it became illegal to do so and by the Orders they were prevented from so doing. They were further of opinion that the proviso in the *force majeure* clauses applied, that the supply had been curtailed and entirely extinguished by reason of an event provided for by those clauses, and that, as a result, the obligation of the council to make payments had come to an end.

I agree with the opinion and decision of the Court of Appeal. On appeal to this House, it was contended by counsel for the company (i) that the supply had not been in fact curtailed, because the current had in fact been supplied up to the point of its entry into the lamps, and that was the supply which was contracted for and which was referred to in the *force majeure* clauses ; and (ii) that, even if the supply had been in fact curtailed, the proviso in those clauses could only operate in favour of the council if there had been a default by the company within the meaning of those clauses, and that no such default had occurred. This second contention rested on the view that the words " any event " in the proviso referred not to fire, frost, accident, strikes and other happenings mentioned in the clauses, but only to any default by the company arising or occasioned by reason of one of those happenings.

My Lords, I am unable to accept either contention. As regards the first, the contract was not merely to supply current up to a particular point short of the lamps and leave it there, but to bring it there and at stated times to cause it to proceed to light the lamps. The contract was for a supply for lighting the lamps ; it was not a contract to supply merely electrical energy, but a contract to supply electric lighting. There was, in my opinion, a curtailment of the supply within the meaning of the proviso in the clauses.

As regards the second point, the proviso is not in the strict sense a proviso to the first part of the clauses. It does not purport to qualify or control in any way what has gone before. The first part operates to the benefit of the company. The second part is a separate and independent provision which operates to the benefit of the council. The only link between the two parts is that the events (one of which must happen before either part comes into operative effect) are common to both. That may well be the reason why the two provisions are combined in the one clause. To what, then, do the words " any event provided for in this clause " refer ? To this question there can, in my opinion, be only one answer. They refer to the events which are enumerated, namely, fire, frost, accident and other examples of unavoidable causes over which the company have no control. The words repeat in a somewhat different form what appears in the before-mentioned cl. 13, namely, " any of the happenings provided against in cl. 15." The curtailment of the supply has taken place by reason of the lighting restriction orders, an unavoidable cause over which the company had no control. The proviso, therefore, came into force, and since the curtailment was such that the supply ceased *in toto*, the proportionate abatement must result in the complete exoneration of the council from liability to pay until the supply is renewed.

I would dismiss this appeal with costs.

LORD MACMILLAN : My Lords, I agree with the interpretation which has just been placed by my noble and learned friend, LORD RUSSELL OF KILLOWEN, upon the agreement which is before this House. I agree with him also in the opinion which he has expressed as to its application to the facts which have arisen.

LORD WRIGHT : My Lords, I also agree in the same way and to the same extent as my noble and learned friend, LORD MACMILLAN.

Appeal dismissed with costs.

Solicitors : *Torr & Co.*, agents for *Pound & Pound*, Egham (for the appellant company) ; *Burton, Yeates & Hart*, agents for *Horne, Engall & Freeman*, Staines (for the respondent council).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

RICHARDSON *v.* REDPATH BROWN & CO., LTD.

[HOUSE OF LORDS (Viscount Simon, L.C., Lord Thankerton, Lord Russell of Killowen, Lord Macmillan and Lord Wright), **November 4, 8, 9, 11, December 15, 1943.**]

Workmen's Compensation—Incapacity—Refusal of workman to undergo operation—Reasonableness of refusal—Question of fact—Private examination and report by medical assessor—Functions of medical assessor sitting with arbitrator.

In April, 1937, the appellant workman met with an accident arising out of and in the course of his employment with the respondent company and he received compensation on the basis of total incapacity. In June, 1937, the workman underwent an operation for the purpose of removing the disability. The operation was not wholly successful and an application made by the respondents in 1938 for a review or termination of the compensation on the ground that the workman had partially recovered and was able to resume work was dismissed. In Dec., 1941, the respondents made a fresh application for a review on the ground that the workman's continuing incapacity was due to his unreasonable refusal to submit to suitable medical treatment, namely, a further surgical operation. The application was heard by the arbitrator sitting with a medical assessor. Three medical practitioners gave evidence that in their opinion the operation was advisable, two other medical practitioners expressed the view that the first operation had induced neurosis in the appellant and that a second operation would aggravate this condition. With the permission of the arbitrator the medical assessor interviewed and examined the appellant in private and submitted a private opinion to the arbitrator :—

HELD : (i) it is no part of the functions of a medical assessor sitting with an arbitrator under the Workmen's Compensation Acts to conduct a personal examination of the workman, or to report to the arbitrator the effect of the examination and his deductions therefrom.

(ii) whether the workman is acting unreasonably in refusing to submit to medical treatment is a question of fact.

(iii) there was insufficient evidence to support the finding of the arbitrator that the workman was acting unreasonably in refusing to undergo a second surgical operation.

[**EDITORIAL NOTE.** This case confirms the recent decisions as to the reasonableness of a workman in refusing to undergo an operation, but is more important because it discusses the proper functions of a medical assessor and, in effect, overrules the present practice of many county courts. The medical assessor is not a witness who may give unsworn evidence and who cannot be cross-examined. His functions are to advise the arbitrator on difficult medical questions arising upon the medical evidence such as the meaning of technical terms and expressions, but he will not, in the ordinary way, medically examine the workman. If he is required to do so, the procedure under Sched. I, para. 11 will be followed.

AS TO REFUSAL TO UNDERGO A SURGICAL OPERATION, see HALSBURY, Hailsham Edn., Vol. 34, pp. 921, 922, para. 1264 ; and FOR CASES, see DIGEST, Vol. 34, pp. 349, 350, Nos. 2807-2820. See also WILLIS'S WORKMEN'S COMPENSATION, 33rd Edn., pp. 273-276.

AS TO FUNCTIONS OF JUDGE AND ASSESSOR, see HALSBURY, Hailsham Edn., Vol. 34, pp. 1012-1014, para. 1402 ; and FOR CASES, see DIGEST, Vol. 34, pp. 389, 390, Nos. 3159-3168.]

Cases referred to :

*(1) *Steele* v. *Robert George & Co.* (1937), *Ltd.*, [1942] A.C. 497 ; [1942] 1 All E.R. 447. ; 35 B.W.C.C. 38.

(2) *Dowds* v. *Bennie & Son.* (Scot.) (1903), 5 F. (Ct. of Sess.) 268 ; 34 Digest 351, *2823v.*

(3) *Johnstone* v. *Cochran & Co.* (1904), 6 F.. (Ct of Sess.) 854 ; 34 Digest 376, *3053v.*

*(4) *Hall* v. *British Oil & Cake Mills* (1930), Digest Supp. ; 23 B.W.C.C. 529 .

*(5) *Woods* v. *Wilson, Sons & Co., Ltd.* (1915), 8 B.W.C.C. 288 ; 34 Digest 274, *2323* ; 84 L.J.K.B. 1067 ; 113 L.T. 243.

(6) *Smith* v. *Foster* (1913), 34 Digest 389, *3160* ; 6 B.W.C.C. 498.

(7) *Lane* v. *Leitch & Son* (*Ir.*) (1921), 55 I.L.T. 161 ; 34 Digest 476, *d.*

APPEAL by a workman against the decision of the Court of Appeal confirming the decision of His Honour JUDGE SIR GERALD HURST, K.C., of the Westminster County Court, dated Feb. 27, 1942. The facts are fully set out in the opinion of VISCOUNT SIMON, L.C.

Gilbert Paull, K.C., and *J. H. Goldie* for the appellant.
G. J. Lynskey, K.C., and *W. H. Duckworth* for the respondents.

VISCOUNT SIMON, L.C.: My Lords, in April, 1937, the appellant, Simeon Richardson (whom I will call the workman) met with an accident arising out of and in the course of his employment as a steel erector by the respondents (whom I will call the employers), which resulted in a rupture, in consequence
A of which he received, by agreement with his employers, weekly payments on the basis of total incapacity. This agreement was recorded in the ordinary way in the county court. In June, 1937, the workman was operated upon for the hernia, but this operation did not effect a complete cure and when, in May, 1938, the employers applied for a review or termination of the weekly payments, alleging the workman's partial recovery and ability to resume work, the application failed. In December, 1941, the employers again applied for a review of
B the weekly payment, and the material ground of this claim was that the workman's continuing incapacity was due to his unreasonable refusal to submit to suitable medical treatment, namely, a further surgical operation for the radical cure of the hernia. The matter came before SIR GERALD HURST, K.C., the judge of the Westminster County Court, who heard the case on Feb. 27, 1942, with the assistance of Dr. Brend, the well-known specialist in nervous diseases, as his
C medical assessor. The arbitrator decided in the employers' favour; the Court of Appeal agreed, and the workman appeals to this House.

The employers, upon whom rested the burden of proving the workman's unreasonable refusal, called as witnesses three doctors who expressed the view that the operation was advisable and should be successful. The workman gave evidence that he was prepared to take medical advice, but that he was advised that he should not undergo such an operation. The arbitrator in his
D judgment says that he did not accept the workman's assertion that he had previously been so advised by a doctor whom he named but who was not available as a witness since he was in the army, but two other medical men of high standing were called as witnesses to support the workman's case. They stated that they were definitely against such an operation which they thought would be positively injurious to the man's nervous condition. The previous operation on the workman for this same hernia, instead of making him a fit man, had, according
E to them, induced a condition of neurosis which, in the view of these two doctors (both of whom had also examined him before the first application), had persisted and was likely to be further aggravated if a second operation were now attempted.

This concluded the evidence and counsel for the workman began his final speech by arguing that, in view of the failure of the first operation to produce a cure and of the nervous disturbance which resulted from it, the workman was
F not acting unreasonably if, even apart from any advice, he refused to be operated upon for the second time; and, further, that, in view of the advice now given against the operation by the two specialists, the court had no material before it which could justify the view that the man was acting unreasonably. At this point the arbitrator stopped the workman's counsel and called on counsel for the employers. During the latter's speech the arbitrator intimated that the medical assessor would like to examine the workman and this examination took
G place in private out of court. We have no information as to what passed between the workman and Dr. Brend, but, upon the resumption of the hearing, the arbitrator intimated that the medical assessor's view was in favour of the proposed operation. After further argument from counsel on both sides, the arbitrator gave judgment saying that he had had the advantage of Dr. Brend's advice and that he accepted and adopted his conclusions, which he recounted at some length, and which included the view that it was impossible to link up
H the alleged neurosis either with the accident or with the operation. As the two medical witnesses who had given evidence for the workman had both seen him shortly after the previous operation and both definitely attributed his neurosis to that operation, whereas Dr. Brend had never examined the man before, this is a somewhat striking contrast in opinion. The arbitrator went on to say:

> The advice of Dr. Brend is that he should have the operation . . . I think I am entitled to rely upon the advice of the medical assessor. He takes the view that the operation would have no effect upon his condition at all. The operation is not dangerous and I hold it as unreasonable for the workman to refuse to undergo it.

Accordingly, the arbitrator awarded that all payments by way of compensation under the Workmen's Compensation Act should be suspended, with consequential provision for what was to happen if, after such an operation, the workman was still incapacitated.

The workman appealed to the Court of Appeal, and that court (MACKINNON, L.J., LORD CLAUSON, and GODDARD, L.J.) dismissed the appeal. In the leading judgment MACKINNON, L.J., described the issue between the parties as involving two questions, first : A

> Whether the proposed operation would remove the man's inability to work and restore him to the condition of a fit man able to earn his living . . .

And the second, whether the workman had unreasonably refused to undergo that operation. The first of these two questions does not seem to be quite accurately phrased, for there may be operations which it would be wise for a person to undergo if the success of the operation was probable, even though B it was not certain. But the more material question in this case is that of unreasonable refusal. MACKINNON, L.J., correctly states that this question :

> . . . was not a medical one but one purely for the county court judge to decide on the evidence called before him whether the man had unreasonably refused to undergo that operation . . .

In arguing this question out, in order to reach his own conclusion, MACKINNON, C L.J., appears to depart from this view of the matter and to treat the question as though it were whether the reason advanced by the specialists against submitting to the operation was a good and sufficient reason. The reason, he says "was wholly based upon the likelihood of its increasing or continuing his neurotic or hysterical symptoms," and he treats the issue as depending on the validity of this medical view, instead of keeping to the question he had already formulated, viz., whether the workman was unreasonable in refusing to be operated upon. D The material question, as this House recently pointed out in *Steele* v. *Robert George & Co.* (1), is not whether the medical advice given to the workman against an operation is more soundly based than advice in favour of it, but whether the workman who refuses to be operated upon is acting reasonably in view of the advice he has received.

The decision of the arbitrator makes it clear that he based his conclusion mainly upon the advice of his medical assessor, and the medical assessor derived E his view from an interview with, and presumably an examination of, the workman. If it had not been for the medical assessor's examination, the arbitrator was apparently prepared to decide in favour of the workman—at any rate he had stopped the argument of the workman's counsel. There is thus raised the exceedingly important question of the proper function and powers of the medical assessor in workmen's compensation cases, and as to this the House must express its conclusion, which will, of course, have an application to many F other cases in the future as well as to the present one.

It is necessary to draw a clear distinction between the functions under the Workmen's Compensation Acts of a medical referee and of a medical assessor. Medical referees are appointed by the Home Secretary under sect. 38 of the Act of 1925. The statute lays upon them various duties. Under sect. 16 a medical referee may in certain circumstances be called on to certify that the G incapacity of a workman who is receiving weekly payments is likely to be of a permanent nature. Under sect. 19, a medical referee may be called on to give a certificate as to the condition of a workman and as to his fitness for employment in cases where the previous report of a medical practitioner is not accepted by both sides. The certificate in both these cases is conclusive evidence as to the matters so certified. Under sect. 23 (3) (*b*), a report may in certain events be required from a medical referee as to the workman's condition. Under H sect. 43 (1) (*f*), a medical referee may be called on to give a decision (which will be final) where the employer or the workman is aggrieved by the action of a certifying surgeon in connection with a certification that the workman is, or is not, suffering from an industrial disease which results in his disablement. And, lastly, under Sched. I, para. 11, to the Act :

> Any committee, arbitrator or judge may, subject to regulations made by the Secretary of State and the Treasury, submit to a medical referee for report any matter which seems material to any question arising in the arbitration.

Two things are particularly to be noted in connection with the above list of duties laid on medical referees. In every case the statute, or a regulation made under it, requires the workman to submit himself for examination by the medical referee. And in every case the medical referee after such examination makes a written report or certificate embodying his conclusion. In some cases it is especially provided, and in every case it is plainly implied, that the contents of the report or certificate will be open for the purpose of examination A by the parties. Where the report of a medical referee is made under para. 11 of sched. I, the reference to him can only be made after all the medical evidence has been taken (see Regulations as to Medical Referees, 1932, para. 36), and it has been held that his report on the case submitted is not to be taken as final and conclusive, but is to be considered along with other evidence before the tribunal: *Dowds* v. *Bennie* (2); *Johnstone* v. *Cochrane* (3). The parties, therefore, in all these cases know what is the question which the medical referee has been B asked and precisely how he has replied.

Contrast with this the position of the parties in such a case as the present, where the medical assessor is given no statutory authority to examine the workman and is under no obligation to disclose his opinion after such examination to anyone but the arbitrator. It is true that a medical assessor, when he sits with an arbitrator under Sched. I, para. 5, is himself necessarily one of the C panel of medical referees, but that circumstance cannot in itself impose upon the workman an obligation to submit himself for examination by the assessor, and cannot constitute the assessor, however eminent, a sort of unsworn witness who cannot be cross-examined, and whose testimony may be conveyed to the arbitrator in a whisper, or at any rate need not be fully stated to the parties. I am not impressed with the consideration that the workman in the present case did not object to being examined by the medical assessor; his counsel D may well have felt that his case might be seriously prejudiced if he did object. In my opinion, the view of the medical assessor, based on his private examination of the workman, was improperly introduced into the case, and inasmuch as the arbitrator avows that his decision is based upon the medical assessor's advice, the decision cannot stand.

My Lords, I am aware that, if your Lordships accept the view which I have presented in this opinion, the House will be condemning a practice which we E are told has of recent years become almost universal in county courts when dealing with workmen's compensation cases involving a medical question. We are told that in such cases it is quite common for the medical assessor to make an examination of the workman and to report his opinion to the arbitrator. But to treat a medical assessor, or indeed any assessor, as though he were an unsworn witness in the special confidence of the arbitrator whose testimony F cannot be challenged by cross-examination and perhaps cannot be even fully appreciated by the parties until judgment is given, is to misunderstand what the true functions of an assessor are. He is an expert available for the arbitrator to consult if the arbitrator requires assistance in understanding the effect and meaning of technical evidence. He may, in proper cases, suggest to the arbitrator questions which the arbitrator himself might put to an expert witness with a view to testing the witness's view or to making plain his meaning. The G arbitrator may consult him in case of need as to the proper technical inferences to be drawn from proved facts, or to the extent of the difference between apparently contradictory conclusions in the expert field. In *Hall* v. *British Oil and Cake Mills* (4), SCRUTTON, L.J., in several passages of his judgment, treats a medical assessor's answers to the judge's inquiries as "evidence," and even speaks without objection of a medical assessor or a nautical assessor giving "evidence of facts." But I cannot agree that this is within the scope H of an assessor's legitimate contribution. LORD LOREBURN's judgment in *Woods* v. *Thomas Wilson* (5), at p. 292, puts the medical assessor's functions as high as they can properly be put. LORD PARMOOR in that case, at p. 311, aptly defines the medical assessor's function as being:

> . . . not to supply evidence but to help the judge or arbitrator to understand medical evidence.

LORD PARKER concurred in this view. It would seem desirable in cases where the assessor's advice, within its proper limits, is likely to affect the arbitrator's conclusion, for the latter to inform the parties before him what is the advice which he has received. But I propose that the House should definitely lay it down that it is not part of the functions of a medical assessor as such to conduct a personal examination of the workman or to report the effect of the examination and his deductions from it to the arbitrator.

If, as will sometimes be the case, the arbitrator finds himself faced with a difficult decision in view of the conflict of medical testimony before him, he has the power, under Sched. I, para. 11, at the end of the medical evidence, to submit the medical issue, duly defined, to a medical referee. And inasmuch as the medical assessor is on the panel of medical referees, there may be cases in which it would be convenient and proper for the arbitrator to choose his medical assessor for the purpose. This will involve an adjournment. But it will also involve that the workman is under an obligation to submit to examination; that the reference will define the question upon which a report is required, and will include a statement of the medical evidence that has been given (see Form Q. in the schedule to the Regulations); and that the report will be in writing and will be available to the parties as part of the materials on which the final arguments and the ultimate decision will be based. Such a report will not, of course, expose the medical referee to cross-examination.

We have been referred to the decision of the Court of Appeal in *Smith* v. *Foster* (6), but the proposition deduced from that decision that the medical assessor may examine the workman and communicate his opinion privately to the judge is wrong and must be overruled.

In *Lane* v. *Leitch* (7) the Irish Court of Appeal refused to interfere where the medical assessor had examined the applicant in the presence of the doctors who had given evidence on either side, but the court pronounced no opinion upon the right of the medical assessor to make an examination and based its conclusion on the ground that there was other evidence to support the view taken, and that no protest had been raised. I think, however, that the real ground of objection, viz., that the medical assessor is unsworn and cannot be cross-examined, applies in this instance also.

If the only error in dealing with this case was the examination of the workman by the medical assessor and the reliance placed by the arbitrator on the opinion derived from that examination, the proper procedure would be to refer the case back to the arbitrator for a rehearing based on none but proper materials. But there is a further point taken on behalf of the workman which enables the House to dispose of the appeal finally. Even if the medical assessor's opinion were to be included in the matters which the arbitrator had to weigh, there was really nothing before the arbitrator which could support his conclusion that the workman unreasonably refused to undergo the second operation. As I have already pointed out in this opinion, and as has been laid down in this House before, the question whether a workman is unreasonable in refusing to undergo a surgical operation is not to be determined by considering whether the best medical opinion would think such an operation advisable or safe, but by judging whether it is proved that the workman, having regard to all the circumstances (including medical advice offered to him against the operation) was unreasonable in so refusing. I venture to quote a sentence of my own in *Steele's* case (1), at p. 500 ([1942] 1 All E.R. at p. 449):

> It may in some cases be quite reasonable for a man to decide not to undergo an operation if his own doctors advise him against it, for it is the conclusion reached by his doctor which governs his decision much more than the logic by which his doctor has reached the conclusion.

It is true, of course, that the question to be answered is a question of fact to be decided by the arbitrator on the facts and on the evidence; but in the present case the arbitrator appears to me to have misdirected himself as to what the question of fact is and as to what are the materials relevant to decide it; and, with all respect to the Court of Appeal, a similar misconception also appears in their judgments. There was in fact no evidence sufficient to prove that the workman had unreasonably refused to be operated upon, and inasmuch as the burden of proving his unreasonableness lay on the employers, the workman must succeed.

I move that the appeal be allowed with costs here and below. An award should be made dismissing with costs the employers' application to review.

Lord Thankerton: My Lords, the opinion just expressed by Viscount Simon, L.C., so exactly represents the opinion held by myself that I find it unnecessary to add anything.

Lord Russell of Killowen: My Lords, in my opinion the arbitrator erred in two respects. In the first place, he has allowed himself to be influenced by an alleged fact not proved by the evidence given before him on oath, but apparently imparted to him by the medical assessor as a result of his private interview with the workman. The alleged fact to which I refer is (to quote the judgment) "the fact that the respondent has suffered from the bombing due to the war both in London and in Watford." There is no record in the arbitrator's notes of the evidence of any reference to bombing. It is said that a note of the workman's evidence in chief taken by the solicitor for the employers contains a passage to the following effect: "I have been in Watford two years having had to leave my other house as result of bombing." But this passage, even if proper for our consideration, indicates no bombing at Watford, and was not, apparently, of sufficient importance to deserve a place in the notes of the arbitrator, or indeed in the notes of the counsel representing the employers. It is only after the assessor had returned from his interview with the workman, and the arbitrator had intimated the assessor's opinion, that any reference to bombing, or fear of bombing, or to the fact of bombing at Watford, appears in the arbitrator's notes of counsel's arguments. To me the inference is irresistible, that this alleged fact rests, and rests only, on a statement by the assessor to the arbitrator. That it influenced the arbitrator in adopting the assessor's view is, in my opinion, evident from the words which follow immediately after the passage which I have already cited from the arbitrator's judgment. They run thus:

> . . . and the view he takes is that this disposition of the respondent [i.e., what the arbitrator had already described as the workman's nervous disposition] would have taken the same course even if the minor rupture now present had not taken place at all. He also draws attention to the fear of going into hospital . . . It is impossible to link up the alleged neurosis or the nervous temperament either with the accident or the operation.

As I read the judgment on this point, it is based on the view that the alleged neurosis or the nervous temperament is to be linked up, not with the accident or the operation, but with the bombing of which the assessor has informed the arbitrator.

The second respect in which I think the arbitrator has erred is in holding that the workman was unreasonable in refusing to undergo a second operation. It is true that this is a question of fact upon which the finding of an arbitrator is conclusive unless in considering it he has misdirected himself, or unless there is no evidence to support the finding. In this case the arbitrator has misdirected himself. Having posed the question which he ought to answer, he has directed his mind in answering it to a different question. The question which he had to answer was whether on the evidence the employers (who were asking for a review on the ground of unreasonable refusal) had discharged the onus which lay on them of proving that this workman was unreasonable in refusing to undergo an operation. As I read the judgment it is merely a statement that the assessor advises that the workman should have an operation, that the operation is not dangerous and that it would have no effect on the nervous condition; and further that he, the arbitrator accepts this advice of the assessor. The arbitrator says that he takes:

> . . . the view that the operation would have no effect upon the condition at all. The operation is not dangerous, and I hold it is unreasonable for the workman to refuse to undergo it.

There is here no consideration of the question whether, notwithstanding the advice alleged to have been given by the panel doctor, and notwithstanding the advice contained in the evidence of the two distinguished experts called on behalf of the workman, it was nevertheless upon the facts of this case unreasonable in this workman to refuse to undergo the operation. The only question considered was the correctness of the rival medical views, and the only foundation for the answer of unreasonableness was the opinion of the arbitrator (founded upon the advice of the assessor) that the advice given on the side of the employers was right and that given on the side of the workman erroneous.

My Lords, it was for the employers when they made this application to prove their case. The onus was on them, and in view of the evidence of Dr. Drought and Sir Ambrose Woodall the burden was a very heavy one. It is sufficient to say that they fell a very long way short of discharging it; and, if the arbitrator had directed himself to the consideration of the real question which he had to answer, he must have so found.

For these reasons I would allow the appeal, and since the employers have failed to establish their claim to a review, it should be ordered that an award be made in favour of the appellant with costs throughout.

I need only add that I concur in the observations of VISCOUNT SIMON, L.C., on the subject of the duties, powers and functions of a medical assessor.

LORD MACMILLAN: My Lords, I concur.

LORD WRIGHT: My Lords, I agree so completely with the observations of VISCOUNT SIMON, L.C., in this case that I do not desire to add anything; and I agree with the opinion which he has delivered generally.

Appeal allowed with costs.

Solicitors: *W. H. Thompson* (for the appellant); *Carpenters* (for the respondents.) [*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

KNOTT *v.* BLACKBURN AND ANOTHER.

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J., Macnaghten and Tucker, JJ.), **November 23, 1943.**]

Criminal Law—Vagrant—Found on enclosed premises for an unlawful purpose—Enclosed area—"Area"—Fenced railway siding—Vagrancy Act. 1824 (c. 83), s. 4.

A railway siding fenced on all sides where the tracks connect with the running lines is not an "enclosed area" within the meaning of the Vagrancy Act, 1824, s. 4.

[**EDITORIAL NOTE.** The word "area" is used generally of a space, but in the Vagrancy Act, 1824, s. 4 it is used in association with the words "dwellinghouse, enclosed yard and garden." In this context, it is held to have a special meaning and must refer to the space below the ground floor of a house for the purpose of lighting the basement.

AS TO ROGUES AND VAGABONDS, see HALSBURY, Hailsham Edn., Vol. 25, pp. 440-444, paras. 790-793; and FOR CASES, see DIGEST, Vol. 37, pp. 363-365, Nos. 1651-1662.]

APPEAL by way of case stated from a decision of the magistrates sitting at Warrington. The facts are fully stated in the judgment of VISCOUNT CALDECOTE, L.C.J.

Vernon Gattie for the appellant.

The respondents were not represented.

VISCOUNT CALDECOTE, L.C.J.: The London, Midland and Scottish Railway, at a place near Warrington, has some sidings which are called Dallam sidings. They are in no way different from the railway sidings with which we are all familiar. They are lengths of track with stop blocks at one end of them and points at the other end joining the sidings with the main line of the railway. There is a fence on every side, except that there is no fence placed across the lines for the obvious reason that any such fence would block the running of the traffic. Two men, who happen to have been employees of the railway company but who had no duty to be on these sidings at the time, were found there, and it is said that they were there for an unlawful purpose. They were charged with an offence under the Vagrancy Act, 1824, s. 4. That section creates a number of offences, with only one of which this case is concerned. It provides that every person committing any of the offences for which the offender is to be deemed an idle and disorderly person:

> . . . having been convicted as an idle and disorderly person [and] every person pretending or professing to tell fortunes or using any subtle craft, means, or device, by palmistry or otherwise, to deceive and impose on any of His Majesty's subjects . . . [and] every person being found in or upon any dwellinghouse, warehouse, coachhouse, stable, or outhouse, or in any inclosed yard, garden or area, for any unlawful purpose . . . and every person apprehended as an idle and disorderly person and violently resisting any constable, or other peace officer so apprehending him or her, and being subsequently convicted of the offence for which he or she shall have been so apprehended . . . .

is a rogue and vagabond within the true intent and meaning of the Act. The section is a penal one. The magistrates in this case have found that these persons were there for an unlawful purpose, but they have dismissed the information against them for being there, in breach of the words which I have read, on the ground that the Dallam sidings are not an "area" within the meaning of the section.

We have been told that there is no authority as to the precise significance of the word "area," and that different meanings have been given to the word in A different parts of the kingdom when charges have been made against persons under this part of the section. It appears to me that the word "area" would not in 1824 be used, in this context, to describe the large spaces which at that time were frequently to be found all over the country enclosed by ring fences. The two words "yard" and "garden" are plainly words of very limited scope. Either of them might, at the most, run to a comparatively small number of acres, as in the case of a garden. But one contention which has been urged here B before us on behalf of the prosecutors, the London, Midland and Scottish Ry. Co., is that the word can be applied to the spaces to which I have referred, provided the condition is satisfied that the space is enclosed, and that it does not matter how large the space is, it still is within the meaning of the Act of 1824 an "area." Having regard to the use of the word "yard" and the use of the word "garden," immediately followed by the word in question here, "area," and bearing in mind that this is a penal section, I think the word "area" should be construed C in the sense in which the magistrates have construed it. As is stated in the special case, the use of the word "area" to denote that part of the basement of a house which is open to the air was very familiar, and, indeed, is familiar to most people to-day. It is a word which is commonly used to denote the open space below the level of the ground which has been excavated for the purpose of building a house upon the site, and the magistrates came to the conclusion D that that was the sense in which the word is used in this Act.

I think that that is the right interpretation. If it is not the right view, the argument must proceed to such extreme lengths as to make the use of the word really either inapt or a word which could have been used without including the words "yard" or "garden" at all. It would have been sufficient to say: in or upon any dwellinghouse, and so on, or in any enclosed area. Then the words might have been much plainer in the sense in which counsel for the appellant E wants them to be construed than they are. I think, on the whole, the right construction of this word, in the absence of authority, should be held to be that which was placed upon it by the magistrates, and I, therefore, think that this appeal should be dismissed.

MACNAGHTEN, J.: I am of the same opinion. The word "area" in the Vagrancy Act, 1824, used in connection with the words "yard" and "garden," F plainly includes a place that is described as a basement area, a well-known feature of very many houses in London and in the country at that date. I have no doubt that these railway sidings cannot be described as an "enclosed area." They were not in fact enclosed. Whether the words "enclosed area" might apply to an enclosure that is not connected with a house, I should prefer to leave open for consideration. There are in some places small enclosed pieces of ground in connection with such things as waterworks and electricity works. G Those may be "enclosed areas" within this Act.

TUCKER, J.: I agree. Counsel for the appellant concedes that, in order to succeed he must show that the word "area" in this section is really equivalent to the word "space," and that it would include a landowner's large park. I think, having regard to the context in which the word is used in the section, it is impossible to give the word that very wide meaning, and, unless it can be given H that very wide meaning, I think it is inapplicable to the facts of this particular case. I am, therefore, of opinion that the magistrates came to a correct decision, although, speaking for myself, I should desire to reserve consideration of the question whether an "area" must always be an excavated piece of land.

I agree that this appeal fails.

Appeal dismissed.

Solicitor: *A. E. Eddy* (for the appellant).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Applied. ASSOCIATED LONDON PROPERTIES, LTD. *v.* WILLIAMS. [1948] 1 All E.R. 442.

DUKE OF WESTMINSTER *v.* STORE PROPERTIES, LTD.

[CHANCERY DIVISION (Bennett, J.), **December 14, 1943.**]

Emergency legislation—Landlord and tenant—War damage contribution—Payment in consideration of licence—"Rent"—War Damage Act, 1943 (*c.* 21), *s.* 50.

The applicant was the landlord of certain premises, the lease of which, in Nov., 1936, became vested in the respondent company. The lease contained a covenant that the premises were to be used as a private dwelling-house only. On Dec. 12, 1936, the applicant gave his licence to the respondents to use the premises as business offices, in consideration whereof the respondents covenanted to pay £50 "yearly rent" in addition to the rent of £125 per annum reserved by the lease. The question for the determination of the court was whether, upon the true construction of the licence and the War Damage Act, 1943, the £50 payable annually in respect of the licence was rent within the meaning of sect. 50 of the Act:—

HELD: in sect. 50 of the Act the word "rent" bears its legal technical meaning. The £50 payable by virtue of a collateral agreement containing no demise was not a rent.

[**EDITORIAL NOTE.** It is well-settled that rent is a sum reserved upon a demise of property and a sum merely covenanted to be paid is not necessarily rent. There are two questions: (i) whether the additional sum was rent: (ii) whether the word "rent" in the War Damage Act, 1943, s. 50 had to be construed in this strict sense. It is here held that since there was no demise in the deed of Dec. 12, 1936, the additional sum was not rent strictly speaking and it is then held that the statute uses this word in the strict sense.

AS TO NATURE OF RENT, see HALSBURY, Hailsham Edn., Vol. 20, pp. 158,159, paras. 170, 171: and FOR CASES, see DIGEST, Vol. 31, pp. 213, 214, Nos. 3523-3533, pp. 216-218, Nos. 3550-3566, pp. 219, 220, Nos. 3571-3577.]

Case referred to:

(1) *Donellan* v. *Read* (1832), 3 B. & Ad. 899; 31 Digest 218, *3565*; 1 L.J.K.B. 269.

APPLICATION by the landlord to determine whether an annual payment, in consideration of a licence, paid by the lessees was rent reserved within the meaning of the War Damage Act, 1943, s. 50, so as to be taken into account in ascertaining the proportion of the War Damage contribution for which the landlord was liable in respect of the premises. The applicant was the landlord of certain premises which, by a lease dated May 30, 1930, were demised to T.S., Ltd. The lease contained a proviso that the premises were to be used as a private dwellinghouse only. In Nov., 1936, the lease became vested in the respondent company. On Dec. 12, 1936, the applicant, in consideration of the respondent's covenant to pay £50 "yearly rent" (in addition to the £125 per annum reserved by the lease) granted a licence to the respondents to use the premises as business offices.

E. G. Eardley-Wilmot for the applicant.

A. C. Nesbitt for the respondent company.

BENNETT, J.: The facts which give rise to the question asked by the summons are fully stated in the affirmation of F. A. Carlton Smith, filed in this action on Aug. 6, 1943. They are not in dispute, and I need not restate them.

The question is whether the annual sum of £50 payable by the defendants to the plaintiff under the licence of Nov. 12, 1936, is rent within the meaning of the War Damage Act, 1943, s. 50. The point is a very short one and depends, I think, entirely upon whether the word "rent" is used in sect. 50 in its technical sense or is to be given some other and, if so, what meaning.

The War Damage Act, 1943, contains an interpretation section, sect. 123, but this assigns no meaning to the word "rent". I was not referred to any provisions in the Act which indicate that the word is used in any special sense, and, therefore, I see no ground upon which I can properly base a decision that the word "rent" is to have attributed to it a meaning other than its technical meaning. It is clear, I think, that the annual sum payable under the licence is not rent in the technical meaning of that term. A money rent is a sum reserved by a lessor upon the occasion of a demise of land: see *Donellan* v. *Read* (1).

The licence of Nov. 12, 1936, does not purport to create a new demise in consideration of an additional rent of £50 per annum. The terms of the licence are inconsistent with the idea that the parties intended it to operate as a surrender of the premises comprised in the lease of May 30, 1930, and to create a new demise thereof. The fact that in the licence the annual sum of £50 payable thereunder is spoken of as a rent is of no assistance to the defendants. I am not concerned with what the parties have chosen to call that payment. What I am concerned with is the nature of the payment and whether it is rent within the meaning of the section in the Act of Parliament which I have to interpret. The truth is that the sum in question is not the consideration for the demise of the land comprised in the original lease, but is the consideration payable under a collateral agreement to enable the tenant to do upon the land then vested in him an act which otherwise he could not lawfully do.

The language of sect. 50 seems to me to confirm the view I have formed, that the word "rent" is used in the section in its technical sense, because in the three places in the section in which the word is used, namely, subsects. (3), (7) and (9), the word is used in connection with the word "reserved." This connection indicates to my mind that the rent to which the section refers is something which arises upon the occasion of a demise and is the subject of a reservation out of the subject of a demise. A sum payable to a landlord by a tenant by virtue of a collateral agreement containing no demise cannot, I think, properly be referred to as a rent reserved.

For these reasons I propose to make a declaration that, on the true construction of the said licence and the War Damage Act, 1943, the yearly sum of £50 (in the said licence referred to as "yearly rent") payable under the said licence in respect of the licence thereby granted, is not rent reserved for the period in which the relevant date falls within the meaning of the said Act for the purpose of ascertaining for each such period during the currency of the said licence the proportion which such rent bears to the contributory value of the premises demised by the said lease.

Declaration accordingly. The defendant to pay the costs as between party and party.

Solicitors: *Boodle, Hatfield & Co.* (for the applicant); *Markby, Stewart & Co.* (for the respondent company).

[*Reported by* R. L. Ziar, Esq., *Barrister-at-Law.*]

DIRECTOR OF PUBLIC PROSECUTIONS v. KENT AND SUSSEX CONTRACTORS, LTD. AND ANOTHER.

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J., Macnaghten and Hallett, JJ.), **November 11, 1943.**]

Emergency Legislation—Petrol rationing—False returns with intent to deceive made by servant of company—Liability of company.

Criminal Law—Criminal liability—Corporations—Mens rea—Whether intention of servant imputed to company.

The respondents were a limited company and an officer thereof. Both were charged with offences under the Defence (General) Regulations, reg. 82 (1) and (2), in that with intent to deceive they produced documents and furnished information for the purposes of the Motor Fuel Rationing (No. 3) Order, 1941, which were false in material particulars. The returns were signed by the transport manager of the company. The respondents contended that the offences charged required for their commission an act of will or state of mind which a body corporate could not have:

HELD: the knowledge and intention of its servants were to be imputed to the body corporate.

[**EDITORIAL NOTE.** In the case of a company documents have to be prepared by one or more of its officers. It is quite incapable of acting apart from the acts of its officers. It was argued that in the case of a false return made in respect of petrol the officer making the return should be charged and not the company. It is, however, held that such an offence may be committed by the company which may be charged and fined in respect of the offence.

AS TO CRIMINAL LIABILITY OF CORPORATIONS, see HALSBURY, Hailsham Edn., Vol. 8, pp. 111-113, paras. 178, 179; and FOR CASES, see DIGEST, Vol. 13, pp. 408-411, Nos. 1286-1308.]

Cases referred to:

*(1) *R.* v. *Cory Bros. & Co.*, [1927] 1 K.B. 810; Digest Supp.; 96 L.J.K.B. 761; 136 L.T. 735.

(2) *R.* v. *Birmingham and Gloucester Ry. Co.* (1842), 3 Q.B. 223; 14 Digest 127, *991*; 3 Ry. & Cau.Cas. 148; 2 Gal. & Dav. 236; 11 L.J.M.C. 134.

(3) *Mackay* v. *Commercial Bank of New Brunswick* (1874), L.R. 5 P.C. 394; 1 Digest 588, *2248*; 43 L.J.P.C. 31; 30 L.T. 180.

(4) *Ranger* v. *Great Western Ry. Co.* (1854), 5 H.L. Cas. 72; 1 Digest 592, *2269*; 24 L.T.O.S. 22.

*(5) *Chuter* v. *Freeth & Pocock, Ltd.*, [1911] 2 K.B. 832; 13 Digest 352, *899*; 80 L.J.K.B. 1322; 105 L.T. 238.

*(6) *Pearks, Gunston & Tee, Ltd.* v. *Ward*, [1902] 2 K.B. 1; 14 Digest 40, *102*; 71 L.J.K.B. 656; 87 L.T. 51.

*(7) *Mousell Brothers* v. *London & North Western Ry. Co.*, [1917] 2 K.B. 836; 14 Digest 44, *133*; 87 L.J.K.B. 82; 118 L.T. 25.

*(8) *Pharmaceutical Society* v. *London & Provincial Supply Assocn.* (1880), 5 App.Cas. 857; 13 Digest 408, *1286*; 49 L.J.Q.B. 736; 43 L.T. 389.

*(9) *Law Society* v. *United Service Bureau, Ltd.*, [1934] 1 K.B. 343; Digest Supp.; 103 L.J.K.B. 81; 150 L.T. 159.

(10) *Chisholm* v. *Doulton* (1889), 22 Q.B.D. 736; 14 Digest 32, *32*; 58 L.J.M.C. 133; 60 L.T. 966.

(11) *Parker* v. *Price* (1943), Mar. 31 unreported.

(12) *R.* v. *Tyler and International Commercial Co.*, [1891] 2 Q.B. 588; 13 Digest 409, *1297*; 61 L.J.M.C. 38; 35 L.T. 662.

(13) *Triplex Safety Glass Co.* v. *Lancegaye Safety Glass* (1934), *Ltd.*, [1939] 2 K.B. 395; [1939] 2 All E.R. 613; Digest Supp.; 108 L.J.K.B. 762; 160 L.T. 595.

Appeal by the Director of Public Prosecutions by way of case stated from a decision of the magistrates for Glamorganshire sitting as a court of summary jursidiction at Aberdare, dated Feb. 2, 1943. The facts are fully set out in the judgment of Viscount Caldecote, L.C.J.

P. Colin Duncan for the appellant.

Carey Evans for the respondents.

Viscount Caldecote, L.C.J.: In this case the respondents, the Kent and Sussex Contractors, Ltd., were charged under the Defence (General) Regulations, regs. 82 (1) and 82 (2). A person who desires to obtain petrol coupons must observe the requirements of the Motor Fuel Rationing (No. 3) Order, 1914, and in order to strengthen the law it was thought necessary to enact by the Defence (General) Regulations, r. 82 (1), that, if a person with intent to deceive:

> . . . produces, furnishes, sends, or otherwise makes use of . . . any book . . . or other document which is false in a material particular he shall be guilty of an offence.

It is also enacted by reg. 82 (2) that:

> If, in furnishing any information for the purposes of any of these regulations or of any order, rule or byelaw made under any of these regulations, any person makes any statement which he knows to be false in a material particular, or recklessly makes any statement which is false in a material particular, he shall be guilty of an offence against that regulation.

The respondents were charged with those two offences, namely, producing a return false in a material particular with intent to deceive and, secondly, with making a statement which they knew to be false in a material particular. When the informations came to be heard, certain evidence was given, and as found by the special case the respondent company sent in certain returns made for the purposes of the Motor Fuel Rationing (No. 3) Order, 1941, signed by M. G. Knowler, the transport manager of the respondent company, in respect of a vehicle which was in fact controlled by the respondent company. That return was false in material particulars and it was known by him to be false in material particulars; it was contended on that evidence by the appellant that the offences charged were proved to have been committed, but the respondents met that contention, according to the special case, by a contention that a body corporate could not in law be guilty of the offences charged, as an act of will or state of mind was implicit in the commission of the offences and that, therefore, the respondent company was not guilty of the offences charged. The magistrates accepted that contention. They thought that the contentions on behalf of the respondents were right and dismissed the information. We have to say whether they came to a correct determination and decision in point of law.

The special case appears to me to raise a question of law as to whether a body corporate, namely, a limited company in this case, can in law be guilty of the offences charged, or whether a company is incapable of any act of will or state of mind. When, however, counsel for the respondents came to argue the case before us, it appears that he was not fully satisfied with the way the case was stated or the question raised for the opinion of this court, and he has laid an argument directed to a question which, so far as I understand his argument, seems to me different from that which appears to be raised by the A special case.

I think it is only right that we should deal with the question which appears to be raised by the special case. It may be that other contentions raised by counsel for the respondents will have to be considered in determining that question. For my part I think it is a little easier than it would have been, because he has not disputed the proposition that the company can in the abstract be found to have an intention to do something wilfully.

B The position of a company, so far as criminal offences are concerned, is that it cannot be charged with, or rather it cannot be found guilty of, certain criminal offences, such as treason, or other offences for which it is provided that death or imprisonment is the only punishment. The law has been stated in a way which has made it, I think, clearer as time has passed that there are a number of criminal offences of which a company can be found guilty. In the judgment in *R.* v. *Cory Brothers & Co.* (1), at p. 816, there is a convenient citation from the C judgment of PATTESON, J., in *R.* v. *Birmingham and Gloucester Ry. Co.* (2), as follows:

> In . . . *R.* v. *Birmingham and Gloucester Ry. Co.* (2) the particular passage which I think useful is to be found in the judgment of PATTESON, J., delivering the judgment of the court, where that learned judge, after citing a passage from a decision of HOLT, C.J., which is to this effect: Note, per HOLT, C.J.: "A corporation is not indictable but particular members of it are," proceeds to say [at p. 232]: "What the nature D of the offence was to which the observation was intended to apply does not appear; and as a general proposition it is opposed to a number of cases, which show that a corporation may be indicted for breach of a duty imposed upon it by law, though not for a felony, or for crimes involving personal violence, as for riots or assaults."

Under the Defence (General) Regulations it is very common for offences to be created in which certain ingredients are required to be found and this particular case seems to me very clearly to be one of such cases. They are offences in E which it is not material to consider whether there is or is not *mens rea*, which I understand to mean criminal intention, but they are cases which state the ingredients constituting an offence. For instance, in this case one of the necessary ingredients in one of the offences is an intent to deceive. When an intent to deceive is stated to be necessary, it seems to me quite idle to go in search of the right answer to the question as to whether a *mens rea* or not is involved.

F We have been referred to a large number of cases, one of which is *Mackay* v. *Commercial Bank of New Brunswick* (3). There the opinion of their Lordships given by SIR MONTAGUE SMITH includes this passage, quoted from the judgment of LORD CRANWORTH, L.C., in *Ranger* v. *Great Western Ry. Co.* (4), which I most respectfully accept:

> Strictly speaking the corporation cannot itself be guilty of fraud. But where a corporation is formed for the purpose of carrying on a trading or other speculation G for profit, such as forming a railway, these objects can only be accomplished by the agency of individuals; and there can be no doubt that if the agents employed conduct themselves fraudulently, so that if they had been acting for private employers the persons for whom they were acting would have been affected by their fraud, the same principles must prevail where the principal under whom the agent acts is a corporation.

In a case to which we have not been referred, *Chuter* v. *Freeth & Pocock, Ltd.* (5), the question seems to me to be similar to the one raised in this case. The H headnote is:

> By the Sale of Food and Drugs Act, 1899, s. 20 (6), it is enacted that every person who, in respect of an article of food or drug sold by him, gives to the purchaser a false warranty in writing, shall be liable on summary conviction to a fine as therein mentioned, unless he proves that when he gave the warranty he had reason to believe that the statements or descriptions contained therein were true:—Held, that a joint stock company incorporated under the Companies Acts can be convicted of an offence under the above enactment.

LORD ALVERSTONE, L.C.J., said, at p. 836:

> The magistrate has held that, inasmuch as "the person" who gives a false warranty

is made liable unless he proves that when he gave the warranty "he had reason to believe" that the statements or descriptions contained therein were true, therefore "the person" cannot be construed as including a corporation, but must be limited to natural persons capable of belief. In my view that is too narrow a construction. Where a person is capable of giving a warranty that person is liable to a fine. There is no reason why a warranty should not be given by a corporation. It can give a warranty through its agents, and through its agents it can believe or not believe, as the case may be, that the statements in the warranty are true. A similar point has been raised in cases concerning the liability of a corporation in actions which, in the case of an individual, would involve an inquiry into a state of mind, such as fraud, libel, or malicious prosecution. It is well settled that a corporation may be liable in all those actions. Further, the question in this case has in substance been decided by Channell, J., in *Pearks, Gunston & Tee* v. *Ward* (6). Taking the principle of the Act into consideration there is no reason why in sect. 20 (6), "person" should not include corporation.

In *Pearks, Gunston & Tee, Ltd.* v. *Ward* (6) Channell, J., dealt at length with this question. He was dealing with the Food and Drugs Act, 1875, s. 6, a section which provided that no person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance and quality of the article demanded by such purchaser. There is also another section in the Act, sect. 3, which provides that:

> No person shall mix, colour, stain, or powder, or order or permit any other person to mix, colour, stain, or powder, any article of food with any ingredient or material so as to render the article injurious to health, with intent that the same may be sold in that state, and no person shall sell any such article so mixed, coloured, stained or powdered . . .

It was in reference to those two sections that Channell, J., said, at p. 11:

> By the general principles of the criminal law, if a matter is made a criminal offence, it is essential that there should be something in the nature of *mens rea*, and, therefore, in ordinary cases a corporation cannot be guilty of a criminal offence, nor can a master be liable criminally for an offence committed by his servant.

I stop there to observe that there Channell, J., was dealing with the subject at large. He continued, at p. 11:

> But there are exceptions to this rule in the case of quasi-criminal offences, as they may be termed, that is to say, where certain acts are forbidden by law under a penalty, possibly even under a personal penalty, such as imprisonment, at any rate in default of payment of a fine; and the reason for this is, that the legislature has thought it so important to prevent the particular act from being committed that it absolutely forbids it to be done; and if it is done the offender is liable to a penalty whether he had any *mens rea* or not, and whether or not he intended to commit a breach of the law.

Again he elaborates those propositions. Then he passes from sect. 3 to the section which requires intent to be proved. He says, at p. 12:

> As to sect. 3 there is a slight difference, because, reading sect. 3 and sect. 5 together, it seems that *mens rea* is involved in the offence, though it need not be proved by the prosecution, as it must in ordinary criminal offences. It is, however, so far an element in the offence that if the defendant succeeds in proving that he had no *mens rea* he is to be acquitted, the burden of proof thus being shifted from the prosecution to the defence. A provision of that kind is enacted where the legislature desires to prevent the act from being done, although it is recognised that there may be cases in which the act is done innocently, and in which the person ought, therefore, not to be convicted. In those cases the defendant can prove his innocence; but, as it would be difficult for the prosecution to prove *mens rea* if the onus were upon them to do so in the ordinary way, the enactment is, consequently, framed in this particular way. There may, therefore, be more difficulty in applying the rule in those cases to a corporation than there is under sect. 6. Speaking for myself, I am inclined to think that a corporation would come under sect. 3 as well as under sect. 6, but the question is not quite so clear, and possibly it may have to be argued hereafter.

In *Mousell Brothers* v. *London & North Western Ry. Co.* (7) the Railway Clauses Consolidation Act, 1845, was considered. Sects. 98, 99 of that Act are as follows:

> 98. Every person being the owner or having the care of any carriage or goods passing or being upon the railway shall, on demand, give to the collector of tolls, at the places where he attends for the purpose of receiving goods or of collecting tolls for the part of the railway on which such carriage or goods may have travelled or be about to travel, an exact account in writing signed by him of the number or quantity of goods conveyed by any such carriage, and of the point on the railway from which such carriage or goods have set out or are about to set out, and at what point the same are intended to

> be unloaded or taken off the railway ; and if the goods conveyed by any such carriage, or brought for conveyance as aforesaid, be liable to the payment of different tolls, then such owner or other person shall specify the respective numbers or quantities thereof liable to each or any of such tolls.
>
> 99. If any such owner or other such person fail to give such account, or to produce his way-bill or bill of lading, to such collector or other officer or servant of the company demanding the same, or if he give a false account, or if he unload . . . any part of his . . . goods at any other place than shall be mentioned in such account, with intent A to avoid the payment of any tolls payable in respect thereof, he shall for every such offence [be liable to a penalty].

In *Mousell's* case (7) ATKIN, J., as he then was, said on p. 845 :

> To ascertain whether a particular Act of Parliament has that effect or not regard must be had to the object of the statute, the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom it would in ordinary circumstances be performed, and the person upon whom the penalty is imposed.

B Then at the end of his judgment he says this, at p. 846 :

> I see no difficulty in the fact that an intent to avoid payment is necessary to constitute the offence. That is an intent which the servant might well have, inasmuch as he is the person who has to deal with the particular matter. The penalty is imposed upon the owner for the act of the servant if the servant commits the default provided for in the statute in the state of mind provided for by the statute. Once it is decided C that this is one of those cases where a principal may be held liable criminally for the act of his servant, there is no difficulty in holding that a corporation may be the principal. No *mens rea* being necessary to make the principal liable, a corporation is in exactly the same position as a principal who is not a corporation.

It is necessary to bear in mind the position of a company, which is quite different from that of a private individual, a real person. It could not be put better than LORD BLACKBURN puts it in *Pharmaceutical Society* v. *London and Provincial* D *Supply Assocn.* (8), at p. 870 :

> A corporation may in one sense, for all substantial purposes of protecting the public, possess a competent knowledge of its business, if it employs competent directors, managers, and so forth. But it cannot possibly have a competent knowledge in itself. The metaphysical entity, the legal "person," the corporation, cannot possibly have a competent knowledge.

Bearing that in mind, I think that a great deal of the argument of counsel E for the respondents as to whether you can impute to a company the knowledge or intent which the agent of the company has, falls to the ground, because although the directors or general manager of a company are its agents, a company is incapable of acting or speaking or even thinking except in so far as its secretary or general manager or directors and so on have either spoken, acted or thought. In *Law Society* v. *United Service Bureau, Ltd.* (9) the matter seems to me to have F been made even clearer than in the case to which I have referred. There the Solicitors' Act, 1843, s. 46, provided that :

> Any person not having in force a practising certificate, who wilfully pretends to be . . . qualified or recognised by law as qualified to act as a solicitor, shall be liable on summary conviction to a penalty.

At p. 349, AVORY, J., said :

> Mr. Strauss has taken two points in support of the magistrate's decision. The first G is that the qualification contemplated by sect. 46 can only be possessed by a natural person. With that I have already dealt. The second is that the words "wilfully pretends" in sect. 46 could have no application to a corporate body because "wilfully" involves some *mens rea* which a corporate body cannot have. I think that that point fails and that a corporate body might "wilfully pretend" within the meaning of sect. 46 to be qualified to act as solicitors. It has been laid down over and over again that where a statute absolutely prohibits the doing of an act it is sufficient to show that the person accused did the forbidden act intentionally and that it is not H necessary to go further and prove what is commonly known as *mens rea* or any intention other than to do the thing forbidden.

Counsel for the respondents has stoutly maintained the position that a company is incapable of having a *mens rea* and a *mens rea* cannot be imputed to it even if and when its agents have committed the offence. Here the question raised as to *mens rea* seems to me to be quite irrelevant because the regulation says that, if a person with intent to deceive does certain things, or, if he does it knowing it to be false in a material particular, as is alleged, he shall be guilty of an offence. There was ample evidence on the facts stated in the special case as proved or admitted that this company has, by the only people who could act or speak or think for it, made a return with intent to deceive, and in the second case made a statement which it knew to be false in a material particular.

The magistrates have found certain facts. They have decided on the facts and they think that the company is incapable of having that state of mind or forming an intention or having knowledge. I think the magistrates were wrong in arriving at that decision and I think the case should go back to them with an intimation of our opinion to that effect, and for their determination upon the facts.

MACNAGHTEN, J.: I am of the same opinion and have very little to add. In this case there are two respondents, one is a limited company and the other is an officer of that company. The charge against them was that with intent to deceive they made use, for the purpose of the Motor Fuel Rationing (No. 3) Order, 1941, of a document, namely, a fortnightly vehicle record, which was false in a material particular. The contention put forward on their behalf before the magistrates is set out in the case in these terms:

> On behalf of the respondents it was contended that a body corporate could not in law be guilty of the offences charged, as an act of will or state of mind was implicit in the commission of the offences and that, therefore, the respondent company was not guilty of the offences charged and accordingly the respondent Orpin [the officer of the company] must also be acquitted.

That contention found favour with the magistrates and accordingly they dismissed the summons. Counsel for the respondents disclaiming any responsibility for the wording of the case, says here he does not think it was happily worded, but I do not think that there is any substantial difference between what has stated in the case as the contention of the respondents and what he has put before us. A body corporate is a "person" to whom, amongst the various attributes it may have, there should be imputed the attribute of a mind capable of knowing and forming an intention—indeed it is much too late in the day to suggest the contrary. It can only know or form an intention through its human agents, but circumstances may be such that the knowledge of the agent must be imputed to the body corporate. Counsel for the respondents says that, although a body corporate may be capable of having an intention, it is not capable of having a criminal intention. In this particular case the intention was the intention to deceive. If, as in this case, the responsible agent of a body corporate puts forward a document knowing it to be false and intending that it should deceive, I apprehend, according to the authorities that VISCOUNT CALDECOTE, L.C.J., has cited, his knowledge and intention must be imputed to the body corporate. In my opinion the submission that was made to the magistrates that the company could not in law be capable of a criminal intention is one that cannot be sustained.

HALLETT, J.: I agree. As the point in this case appears to be of considerable importance, and not to be precisely covered by any of the authorities, I should like to add a few words of my own.

The Motor Fuel Rationing (No. 3) Order, 1941, para. 12 (1), says:

> Every person desiring to obtain: (*a*) a licence under any of the provisions of this Order, or (*b*) coupons for the purposes of this Order, shall furnish such information: (i) as may be requested by or on behalf of the Board of Trade; (ii) as may be prescribed by direction of the Board of Trade and any such direction may specify the form in or on which such information is to be furnished.

The Defence (General) Regulations, reg. 82 (1) provides:

> If, with intent to deceive, any person: (*a*) forges or uses, or lends to or allows to be used by any other person, any document issued for the purposes of any of these regulations or of any order, rule or byelaw made under any of these regulations; or (*b*) makes or has in his possession any document so closely resembling such a document as aforesaid as to be calculated to deceive; or (*c*) produces, furnishes, sends or otherwise makes use of, for the purposes aforesaid, any book, account, estimate, return, declaration or other document which is false in a material particular; he shall be guilty of an offence against that regulation.

Then by reg. 82 (2) it is provided:

> If, in furnishing any information for the purposes of any of these regulations or of any order, rule or byelaw made under any of these regulations, any person makes any

> statement which he knows to be false in a material particular, or recklessly makes any statement which is false in a material particular, he shall be guilty of an offence against that regulation.

According to the case the record which was here sent by the respondent was a record for the purposes of the Motor Fuel Rationing (No. 3) Order, 1941, since those who desired coupons had to supply certain information, and the information which they supplied was false. By reg. 99B the provisions of the Interpretation Act, 1889, are made applicable, and by the Interpretation Act, 1889, s. 2 (1) it is provided that :

> In the construction of every enactment relating to an offence punishable on indictment or on summary conviction, whether contained in an Act passed before or after the commencement of this Act, the expression " person " shall, unless the contrary intention appears, include a body corporate.

Therefore, looking back at reg. 82, under which these respondents are charged, the words " any person " *prima facie* include a limited liability company. The argument for the respondent company, as I understand it, is that the contrary intention appears, because an incorporated company cannot have been guilty of intent to deceive. Inasmuch as a corporation is a fictitious person, it is obvious that it is not capable of acting in its own person but can act only through its agent or servant. For that reason it seems to me that it is not helpful to consider the case of a principal who could act in his own person, and I derive no help in this case from *Chisholm* v. *Doulton* (10), or, a decision to which I was a party, *Parker* v. *Price* (11). At one time the extent of the liability in a civil action of tort was a matter of doubt, due partly to the theoretical difficulty of imputing wrongful intention to fictitious persons, but as regards civil proceedings these doubts have, in the course of time, been cleared up and it is not necessary to refer to them.

So also, in criminal matters the liability of a corporation has been to some extent, and it may be still is, a matter of doubt due partly to technical difficulties of procedure and partly to the theoretical difficulty of imputing criminal intention to a fictitious person. As to difficulties of procedure, they have been in part dealt with by legislation, such as the Criminal Justice Act, 1925, s. 33. As regards the theoretical difficulty of imputing criminal intent to fictitious persons I think there has been a development in the attitude of the courts.

The first case that I might mention is *Pharmaceutical Society* v. *London and Provincial Supply Association* (8). In that case at p. 870, LORD BLACKBURN said :

> If you could get over the first difficulty of saying that the word " person " here may be construed to include an artificial person, a corporation, I should not have the least difficulty upon those other grounds which have been suggested.

The next case dealt with and to which I should like to refer is *R.* v. *Tyler and International Commercial Co., Ltd.* (12). In that case at p. 594, BOWEN, L.J., said :

> I take it to be clear that in the ordinary case of a duty imposed by statute, if the breach of the statute is a disobedience to the law punishable in the case of a private person by indictment, the offending corporation cannot escape from the consequences which would follow in the case of an individual by shewing that they are a corporation.

That seems to me to be good sense and good law. Here, as I have already pointed out, if a corporation, a fictitious person, desires to obtain coupons for petrol, it must furnish the information required by the appropriate authority. If the information required by the appropriate authority is falsely given with intent to deceive, I think that there are good reasons why the person who requires coupons should not, in the words of BOWEN, L.J., escape from the consequences which would follow in the case of an individual by showing that they are a corporation.

Then there was *Pearks, Gunston & Tee, Ltd.* v. *Ward* (6). Then in 1917 there comes *Mousell Brothers* v. *London & North Western Ry. Co.* (7). There there were two sections dealt with. The first was the Railways Clauses Consolidation Act, 1845, s. 98, which says :

> Every person being the owner or having the care of any carriage or goods passing or being upon the railway shall, on demand, give to the collector of tolls, at the places where he attends for the purpose of receiving goods or of collecting tolls for the part

> of the railway on which such carriage or goods may have travelled or be about to travel an exact account in writing signed by him of the number or quantity of goods conveyed by any such carriage, and of the point on the railway from which such carriage or goods have set out or are about to set out, and at what point the same are intended to be unloaded or taken off the railway; and if the goods conveyed by any such carriage, or brought for conveyance as aforesaid, be liable to the payment of different tolls, then such owner or other person shall specify the respective numbers or quantities thereof liable to each or any of such tolls.

That seems to me to correspond to the requirements of the Motor Fuel Rationing (No. 3) Order, namely, that every person who desires to obtain coupons for motor fuel shall give the information required by the authority. Then the Railways Clauses Consolidation Act, 1845, s. 99, says:

> If any such owner or other such person fail to give such account, or to produce his way-bill or bill of lading, to such collector or other officer or servant of the company demanding the same, or if he give a false account, or if he unload . . . any part of his . . . goods at any other place than shall be mentioned in such account with intent to avoid the payment of any tolls payable in respect thereof, he shall for every such offence [be liable to a penalty]

Here, if a person, in giving the information required by the Statutory Rules and Orders made under the Defence (General) Regulations gives a false account with intent to deceive, he is liable to a penalty. In the case of a company it was held that, if the false account is given by a servant or agent with intent to deceive, that is sufficient to justify a conviction of such people employing him. As ATKIN, J., said, at p. 846:

> I see no difficulty in the fact that an intent to avoid payment is necessary to constitute the offence. That is an intent which the servant might well have, inasmuch as he is the person who has to deal with the particular matter.

Those seem to me to be words which are eminently applicable to the matters which we have to consider here today.

With regard to *Law Society* v. *United Service Bureau, Ltd.* (9), I do not agree that the judgment of AVORY, J., at p. 349, when determining the matter that he had to consider, is inconsistent with the views that I have already expressed.

Finally, in *Triplex Safety Glass Co.* v. *Lancegay Safety Glass* (1934), *Co* (13) the judgment of DU PARCQ, L.J., seems to me to assume that a corporation by its servants or agents may be guilty of malice so as to render itself liable to be indicted for criminal libel.

For these reasons in my opinion this appeal should be allowed. It seems to me that the magistrates were wrong, and I agree that the case should be remitted to them for their determination.

Appeal allowed with costs. Case remitted to justices to determine.

Solicitors: *Treasury Solicitor* (for the appellant); *Stephenson, Harwood & Tatham* (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

THOMPSON (H.M. INSPECTOR OF TAXES) *v.* MAGNESIUM ELEKTRON, LTD.

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and Goddard, L.JJ.), **December 16, 17, 1943.**]

Income Tax—Trade receipt—Payments in consideration of restrictive covenant—Agreement for purchase of chlorine—Agreement of same date for refraining from manufacture—Composite agreement.

The appellant company wished to commence the manufacture of magnesium. For this purpose chlorine was a necessary chemical and this they intended to produce by a process which yielded caustic soda as a by-product. The I.C.I. company did not wish to have the appellant company as a competitor in the caustic soda market and negotiations took place between the two companies, the result of which was an agreement dated Dec. 14, 1936, by which I.C.I. agreed to supply the appellants' requirements in chlorine at a basic price over a period of 10 years. By another document of the same date the first agreement and the negotiations leading thereto were recited and it was agreed that the appellants should refrain from manufacturing or being interested in the manufacture of chlorine or caustic soda; and that, so long as the appellants observed this covenant, I.C.I. would pay to the appellants compensation at an agreed rate for the loss incurred as the result of their abstention from the manufacture of chlorine and caustic soda; and there was a proviso that, if I.C.I. should fail to perform any of their obligations, the appellants were to be entitled to determine the agreement and the first agreement. The question was whether the payments receivable by the appellants under the second agreement were trade receipts. It was contended for the appellants that the agreements were distinct and severable :—

Held : the transactions formed a composite whole under which the appellants secured a supply of a commodity which they required in their business. The payments were, therefore, trade receipts.

[**EDITORIAL NOTE**. In some cases the consideration for a restrictive covenant has been held to be a separate matter and has not been required to be brought into consideration in assessments to income tax. Each case, however, must be considered on its own facts and it is here held that the whole is one composite agreement and the payments are required to be brought into account in assessing tax.

As to Trade Receipts, see HALSBURY, Hailsham Edn., Vol. 17, pp. 126, 127, para. 237, pp. 147, 148, paras. 306-308; and for Cases, see DIGEST, Vol. 28, pp. 17-20, Nos. 87-99.]

Cases referred to :

(1) *Birmingham & District Cattle By-Products Co., Ltd.* v. *Inland Revenue Comrs.* (1919), 12 Tax Cas. 92; Digest Supp.

(2) *Beak* v. *Robson*, [1942] 2 K.B. 149; [1942] 1 All E.R. 639; Digest Supp.

Appeal by the taxpayer from an order of Macnaghten, J., dated Jan. 15, 1943. The facts are fully set out in the judgment of Lord Greene, M.R.

J. Millard Tucker, K.C., and *J. S. Scrimgeour* for the appellants.

The Attorney-General (*Rt. Hon. Sir Donald B. Somervell, K.C.*) and *Reginald P. Hills* for the respondent.

Tucker, K.C. : If the periodic payments made to the appellants under the agreement in question are taxable at all, they are not part of the receipts of the appellants from the exercise of their trade and, therefore, cannot be assessed under Sched. D, case I. The payments were made to the appellants for not carrying on a trade which they had originally intended to carry on. The payments were not made to them to carry on their trade in a particular manner. In the present case the position is the same as in *Birmingham & District Cattle By-Products Co., Ltd.* v. *Inland Revenue Comrs.* (1). The appellants are being paid for the restriction and for nothing else. I ask the court to apply the principle laid down in *Beak* v. *Robson* (2) to the present case. A sum of money cannot be a receipt of a trade and fall within the charging rule of Sched. D unless the trade is truly the source of the payment.

Counsel for the respondent were not called upon.

Lord Greene, M.R. : The facts in this case can be stated shortly. The appellants were about to set up the trade or business of manufacturing magnesium. For this purpose it was necessary for them to provide themselves with chlorine, which is an essential material in the manufacture of magnesium. This chlorine they could either buy or they could manufacture. The particular method of manufacturing chlorine which they had in contemplation was one in which caustic soda was a by-product, and caustic soda would have commanded a ready market. If, on the other hand, they had wished to buy chlorine, they would have had to obtain it from a supplier who was in a position to supply what they needed.

They had negotiated with Imperial Chemical Industries (whom I will call I.C.I.) and the price quoted to them was apparently one which they regarded as prohibitive. They accordingly set themselves to prepare to manufacture chlorine for themselves by the electrolytic process to which I have referred. This proposal seems to have caused I.C.I. to think again, because that company seems to have been particularly sensitive in the matter of allowing other manufacturers to get into the caustic soda market. In any case, negotiations took place, and the effect of them is succinctly stated in para. 8 of the case, in which it is said :

> Imperial Chemical Industries, who were determined that the company (that is, Magnesium Elektron, Ltd.) should be out of the caustic soda market, had further discussions with Major Ball and agreed to supply chlorine provided that the company gave up the idea of manufacturing chlorine and caustic soda.

The position at that stage was that the company, the appellants, could obtain the chlorine that they needed from I.C.I., but only on the terms that they themselves should not manufacture chlorine. That bald statement of the preliminary agreement on the face of it, of course, shows that there was a good deal which would have to be discussed—matters of detail for working out a complicated arrangement of that kind, and the shape which the final agreement took was a contract under which I.C.I. agreed to sell to the appellants and the appellants agreed to buy from I.C.I. their requirements of chlorine, and a contract under which the appellants bound themselves not to take part in or be interested in the manufacture of caustic soda or chlorine. Those were part of the terms upon which the appellants succeeded in obtaining for themselves the contract for the supply of chlorine which they desired, but they were not the sole terms. It would appear that the appellants were willing to enter into that covenant with regard to the manufacture of chlorine and caustic soda only if they got some payment to recoup them, or in part to recoup them, for the profits they might have made if they had in fact manufactured the chlorine and sold the resultant caustic soda. Therefore, the conditions upon which the appellants got their supply of chlorine from I.C.I. were conditions under which, so to speak, on the debit side they subjected themselves to the covenant, and on the credit side received something back in the shape of payment. But the whole transaction was one which, it seems to me, must be regarded as a composite one under which they were able to secure for themselves a firm contract for the supply of the chlorine which they needed.

The argument of counsel for the appellants really is based on the view that the two contracts to which I have referred must be regarded as two quite separate and distinct contracts, one a contract for the sale and purchase of chlorine, and the other a contract under which, for a consideration, the appellants gave up any right they might have had to manufacture chlorine or caustic soda, or be interested in their manufacture. In my opinion, that is a view of the situation which cannot be supported. First of all, we have the finding of the Commissioners with regard to the agreement that led up to these two documents. When the documents are themselves looked at, the first of them, in point of signature (they both bore the same date, Dec. 14, 1936), is the one under which I.C.I. agreed to supply to the appellants the whole of their requirements of chlorine, on the terms there set out, but the limit of the obligation of I.C.I. was to supply chlorine sufficient to produce 4,000 tons of magnesium, and, in the event of I.C.I. not choosing to supply the excess, the appellants were to be entitled to purchase it elsewhere. There was a basic price of £10 per ton agreed, with provisions for adjusting that price in certain circumstances. The agreement was to last for 10 years. That agreement, on the face of it, does not refer to the second agreement signed after the first agreement had been signed. The second agreement recites the original intention of the appellants to manufacture chlorine; it recites the first of the two agreements which it calls "the principal agreement"; it recites that in the negotiations leading up to the principal agreement it was agreed that I.C.I. should indemnify the appellants against certain contingent liabilities in respect of an electric power contract —which is irrelevant here—and then there is a further recital, which is the relevant one, that it was agreed in the negotiations:

> . . . that M.E.L. [that is, the appellants] should (except as defined in cl. 4 hereof) restrict themselves from manufacturing caustic soda and chlorine on the terms and conditions hereinafter appearing.

That is a perfectly plain statement, that, as part of the negotiations which resulted in the principal agreement, it was agreed that this restrictive covenant should be entered into. The agreement then contains, in cl. 4, the restrictive covenant by the appellants, which is limited to the continuance of the principal agreement. It is to the effect that they will not:

> . . . directly or indirectly manufacture or be concerned engaged or interested in any capacity whatever in the manufacture of caustic soda and/or chlorine in any form.

Then there is a provision relating to the 4,000 tons limit, which I do not think it necessary to read. I am omitting for the moment cl. 5, which is the clause under which the payments in question fell to be made, because I am considering for the moment the connection between this contract and the principal agreement. That connection is confirmed in cl. 6, because under that clause, if I.C.I. should fail to perform or observe any of the obligations undertaken by them, then, in such event, the appellants are to be entitled to give I.C.I. notice to determine the agreement and the principal agreement. That clause is not so important as the recital I have mentioned, which in terms says what had been agreed in the negotiations leading up to the execution of the principal agreement. In my opinion, the legal effect of these agreements is in all relevant matters, save for one particular, beyond question. Whether or not this second agreement is a condition of the appellants being able to secure for themselves a contract for the supply of chlorine is, as it seems to me, the real question in deciding whether or not the sums received under cl. 5 are trade receipts. Under cl. 5, I.C.I., so long as the appellants perform their restrictive covenants, are to pay quarterly, as there mentioned, a sum equivalent to £6 15*s.* in respect of each ton of caustic soda which the appellants would have produced in that quarter if they had in fact manufactured their own requirements of chlorine by the electrolytic process. Then there is a rule for ascertaining what that would amount to in terms of caustic soda in the case of chlorine delivered by I.C.I. to the appellants under the principal agreement.

I pause there just to deal with one matter on which there has been some controversy. The obligation of I.C.I. to make these payments is not in terms confined to the case where I.C.I. was itself supplying the whole of the appellants' requirements. Macnaghten, J., I think, construed the clause as applying only to the extent to which the appellants' chlorine was obtained from I.C.I., and on that basis he regarded these payments as in fact a rebate on the price to be paid for the chlorine under the principal agreement. It is pointed out with some force (and I will assume that the argument is right, as I am disposed to think it is) that the payments to be made by I.C.I. would extend to the case where I.C.I. had declined to supply more than 4,000 tons, and the appellants had procured the excess by purchase from some other supplier. I need not express a conclusive opinion upon that point. I will assume that the argument of counsel for the appellants upon it is right. He then proceeded to say that that shows that Macnaghten, J., must have been wrong in regarding these payments as a rebate against the price which would have to be paid to I.C.I. for chlorine under the principal agreement; but it does not, with respect to him, carry him very far, in my view, because it would then be regarded, according to the reasoning of Macnaghten, J., as a compensation for, or a reimbursement of, part of the price which the appellants were paying to the outside supplier. Macnaghten, J., as I have said, regarded these payments as rebates, and, on the construction that counsel for the appellants puts forward of cl. 5, I might add to that: rebates in cases where I.C.I. was the supplier, and reimbursement of part of the price where some outside supplier provided the chlorine or part of it. I am not disposed to disagree with the view of Macnaghten, J., as modified in the way I have suggested on that point. Nevertheless it seems to me that there is no real necessity to introduce that argument into the solution of the problem. The problem, as I see it, is to be solved in a very simple way. A manufacturer of magnesium desires to obtain a firm contract for the supply of chlorine which he requires in manufacturing his magnesium. He gets that contract by entering into a complicated arrangement under which he agrees not to manufacture or be interested in the manufacture of chlorine or caustic soda, that undertaking being qualified, so to speak, by a payment made to him to cover either the whole or a part of the loss that he incurred by not manufacturing chlorine or caustic soda. When the whole thing is linked up together, it must be regarded, in my opinion, that one of the terms under which he was to get his contract was the incurring of a liability under the covenant, minus the benefit of this payment. Regarded in that way the payments seem to me to be trade receipts, just the same as if, in order to get a contract for the supply of chlorine, they had entered into some collateral bargain, under which they incurred expense. Here they are getting their chlorine on terms under which with one hand they give away their covenant, and with the other at the same time they get these payments. That appears to me to stamp them with the character of trade receipts, and, in my opinion, the assessment was rightly made under case I, and the appeal fails.

MacKinnon, L.J.: I agree, and I do not think I need add anything.

GODDARD, L.J.: I agree.

Appeal dismissed with costs.

Solicitors: *Rhys Roberts & Co.* (for the appellants); *Solicitor of Inland Revenue* (for the respondent).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

A

THE ORTHODOX PATRIARCHATE OF JERUSALEM *v.* THE MUNICIPAL CORPORATION OF JERUSALEM.

[PRIVY COUNCIL (Lord Atkin, Lord Thankerton, Lord Porter, Lord Clauson, Sir George Rankin), **July 8, 12, October 19, 1943.**]

B *Privy Council—Palestine—Rating—Exemption from payment of rates—Whether "taxation" includes municipal rates—Edicts and firmans overridden by statutory liability—Municipal Corporations Ordinance (Palestine), 1934, s. 102—Rates and Taxes (Exemption) Ordinance (Palestine), 1938, s. 15 (b).*

Under the Rates and Taxes (Exemption) Ordinance, 1938, s. 15 (*b*), the appellant, a religious body, claimed exemption from payment of rates to the Municipal Corporation of Jerusalem. This claim to exemption C was based on edicts and firmans dating from 625 A.D. to *circa* 1897 A.D.; but the chief question was whether the word "taxation" in the Rates and Taxes (Exemption) Ordinance, 1938, s. 15 (*b*), included municipal rates, thereby enabling the appellant to make use of the procedure authorised by the section:—

HELD: (i) the word "taxation" is used in its narrower meaning throughout the Rates and Taxes (Exemption) Ordinance, 1938, and, therefore, D these proceedings were not authorised by sect. 15 (*b*) of the Ordinance.

(ii) even if exemption from municipal rates had been granted by the edicts and firmans, such exemption was not available against rates levied under the Municipal Corporations Ordinance, 1934, which contained no saving clause in respect of such exemptions.

[**EDITORIAL NOTE.** This is purely a question of the construction of the Ordinance E in question. The judgment, however, contains a valuable statement of the evidence necessary when claims to exemption are based upon ancient documents.

AS TO EXEMPTION FROM RATES, see HALSBURY, Hailsham Edn., Vol. 27, pp. 377-379, paras. 807-811; and FOR CASES, see DIGEST, Vol. 38, pp. 455-457, Nos. 212-226.]

APPEAL from a judgment of the Supreme Court of Palestine, dated July 31, 1940, which unanimously affirmed a judgment of the District Court of Jerusalem, F dated June 3, 1940. The facts are fully set out in the judgment of their Lordships delivered by LORD THANKERTON.

Sir Herbert Cunliffe, K.C., and *Kenelm Preedy* for the appellant.

A. S. Comyns Carr, K.C., and *D. C. Bartley* for the respondent.

LORD THANKERTON: This is an appeal from a judgment dated July 31, 1940, of the Supreme Court of Palestine, sitting as a Court of Appeal, which unanimously affirmed a judgment of the District Court of Jerusalem dated G June 3, 1940, by which the appellant's petition claiming exemption from payment of any rates to the respondent corporation was dismissed.

The appellant's petition was presented under the Rates and Taxes (Exemption) Ordinance, 1938, s. 15 (*b*), which provides as follows:

> Any state, religious community or body, charitable organisation or educational institution to which this Ordinance applies claiming by virtue of any treaty or firman H or any other ground whatsoever any exemption from taxation other than the exemptions for which provision is made in this Ordinance, may within one year from the commencement of this Ordinance petition the District Court in accordance with the provisions of the Crown Actions Ordinance and notwithstanding anything contained in that Ordinance the provisions thereof shall apply to such claims as though they were claims which could be brought against the Government under the provisions of that Ordinance.

The main question under this section is whether municipal rates are included under the word "taxation," so as to render the procedure authorised by the section available to the appellant. Both courts have decided this point in favour of the appellant. There was a minor contention as to the absence of the Attorney-General, who was originally made a party to the proceedings, but who was dismissed from the case at the first hearing, as no claim was made against him by the appellant. Both courts decided against the respondent on this contention, and the contention was not revived before the Board.

On the merits, the appellant's claim to exemption was based on certain edicts and firmans, the earliest being dated in 625 A.D., and the latest *circa* 1897 A.D. Both courts below held that the exemptions granted in these edicts and firmans did not relate to or include municipal rates, and the trial judge further held that, even if they did so apply, any such exemption came to an end on the enactment of the Municipal Corporations Ordinance, 1934, which contained no saving clause relative thereto.

Their Lordships agree with the courts below that the arbitration award, dated Oct. 21, 1935, in arbitration proceedings between the present appellant and the Government of Palestine is of no assistance in the present proceedings, as the award was not concerned with municipal rates and the present respondent was not a party to the arbitration proceedings.

The first question is whether the word " taxation " in the Rates and Taxes (Exemption) Ordinance, 1938, s. 15 (*b*), includes municipal rates, so as to render the present proceedings competent. Their Lordships are unable to agree with the view expressed by the lower courts. The word may be used in either the more limited meaning or the wider meaning, which would include rates, and the question as to which meaning is intended must fall to be decided on the terms of the Ordinance in question. So regarded, it appears clear to their Lordships that throughout the Ordinance a distinction is preserved between taxes and rates. The title prescribed by sect. 1 names both, and while Part I relates to " Exemption from Municipal Rates," Parts II and III relate respectively to exemptions from " The Rural Property Tax " and " The Urban Property Tax." Part I provides for exemptions from municipal property rates, municipal general rates and municipal education rates, and the Municipal Corporations Ordinance, 1934, s. 102, is referred to for their meaning. In the opinion of their Lordships it is not to be assumed that the narrower meaning of " taxes " used in Parts II and III, in contrast with the use of " rates " in Part I, is superseded by the use of the wider meaning of " taxation " in Part IV; on the contrary, it is to be assumed that the narrower meaning was advisedly preserved in Part IV. It follows that the present proceedings, which claim exemption from municipal rates, are not authorised by sect. 15 (*b*) of the Ordinance.

This view supersedes consideration of the appellant's contention that exemption from municipal rates is granted by the edicts and firmans founded on, but their Lordships desire to make two observations. In the first place, their Lordships are of opinion that the evidence in this case is unsatisfactory, and would be insufficient to enable a proper decision to be arrived at, if such decision was necessary. Such matters as the historical setting of these documents, and the nature of certain taxes or imposts referred to, might well be more adequately ascertained and explained. In the second place, however, their Lordships desire to express their concurrence in the view of the trial judge, that, even if exemption from municipal rates had been granted by these edicts and firmans, such exemption could not remain available against rates levied under the Municipal Corporations Ordinance, 1934, which, by sect. 102, confers the power to levy rates in such terms as to leave no room for any implication of exemptions, and which contains no saving clause to cover the appellant's claim.

It follows that the appeal fails, and should be dismissed with costs. Their Lordships will humbly advise His Majesty accordingly.

Appeal dismissed with costs.

Solicitors: *Stoneham & Sons* (for the appellant); *Herbert Oppenheimer, Nathan & Vandyk* (for the respondent).

[*Reported by* HUBERT B. FIGG, ESQ., *Barrister-at-Law.*]

Re BIRD (*deceased*), HENN *v.* BIRCH.

[CHANCERY DIVISION (Uthwatt, J.), **November 24, 1943.**]

Rentcharges and Annuities—Payment free of tax—Stated amount—Income of trust fund payable to widow and deficiency below stated sum payable out of capital—Finance Act, 1941 (*c.* 30), *s.* 25.

By his will the testator directed his trustees to pay the income of a trust fund to his wife during her widowhood and after her remarriage to pay the income of one half of the trust fund to her for life, and, if in any year the income received by his wife from the trust fund during her widowhood should amount, after deduction of income tax at the current rate for the time being, to less than £500, the trustees should resort to the capital of the trust fund to make good the amount of the deficiency. From the date of the testator's death in 1932 until the death of his widow in 1941, the income of the trust fund after deduction of income tax was less than £500. The trustees took out a summons to determine (i) whether the difference between the income of the trust fund and £500 was an interest given to the widow free of income tax; and (ii) whether the provision was a "provision however worded for the payment of a stated amount free of income tax" within the meaning of the Finance Act, 1941, s. 25:—

HELD: (i) upon the true construction of the will the interest given to the widow was an interest free of income tax.

(ii) the disposition of the whole or a fractional quantity of a fluctuating income from an unvarying source is a stated amount and the deficiency of that amount from a fixed sum is also a stated amount within the meaning of sect. 25.

[**EDITORIAL NOTE.** A "stated amount" is not necessarily stated in figures and may require to be calculated. It is here held that a deficiency of income of a trust fund below a certain amount is a "stated amount" within the section.

AS TO THE FINANCE ACT, 1941, s. 25, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 34, p. 119.]

Case referred to:

*(1) *Re Hawkins, King* v. *Hawkins*, [1943] 1 Ch. 67; [1943] 1 All E.R. 39.

SUMMONS by the trustees of the testator's will to determine questions arising thereunder. The testator by his will directed his trustees to create a trust fund from his residuary estate and then by cl. 8 provided: "My trustees shall pay the income of the trust fund to my said wife during her widowhood and after her remarriage shall pay the income of one half of the trust fund to her during the remainder of her life without power of anticipation during coverture and I direct that if in any year the income received by my said wife from the trust fund during her widowhood shall amount after deduction at the source of income tax at the current rate for the time being therefrom to less than £500 then my trustees shall resort to the capital of the trust fund and shall thereout make good to my said wife the amount of the deficiency." From the date of the testator's death in 1932 until the death of his widow in 1941 the income each year of the trust fund after deduction of income tax was less than £500. On a summons taken out by the trustees, UTHWATT, J., held that, as a matter of construction of the will, the amount resulting from the subtraction of the trust income from £500 was given free of income tax. The remaining question to be determined was whether the provision in the will that any deficiency below £500 should be made up out of capital was a "provision however worded for the payment of a stated amount free of income tax" within the meaning of the Finance Act, 1941, s. 25.

Hector Hillaby for the trustees.

Geoffrey Cross for the personal representatives of the testator.

Raymond Jennings for the residuary legatee.

UTHWATT, J.: The testator by cl. 8 of his will made the following provision:

> My trustees shall pay the income of the trust fund to my said wife during her widowhood and after her remarriage shall pay the income of one half of the trust fund to her during the remainder of her life without power of anticipation during coverture And I direct that if in any year the income received by my said wife from the trust fund during her widowhood shall amount after deduction at the source of income tax at

the current rate for the time being therefrom to less than £500 then my trustees shall resort to the capital of the trust fund and shall thereout make good to my said wife the amount of the deficiency.

I have already held that the sum resulting from the subtraction of the trust income from £500 is as a matter of construction given free of income tax.

The question now to be determined is whether the provision so read is a "provision however worded for the payment of a stated amount free of income tax" within the meaning of the Finance Act, 1941, s. 25. It is not disputed, and could not, I think, be disputed, that an amount to be ascertained by carrying out mathematical operations where none of the factors can vary is a "stated amount." It is, however, argued that, where (as is the case here with the return from the trust income) one of the factors may vary in amount from time to time with the result that the amount payable from time to time under the provision is unpredictable, no amount is stated and that the provision is more properly described as a provision for the payment of an unstated amount than as a provision for the payment of a stated amount.

In my opinion, this argument gives too narrow a meaning to the phrase "stated amount." "Stated amount" is not, I think, confined to an amount stated in terms of currency. An amount can, in my view, be stated by reference to the income from time to time of an identified trust fund. The amount in currency of that income from time to time cannot, save perhaps in exceptional cases, be set out or predicted, but the source of the income referred to—the aggregate of the property for the time being comprised in the trust fund—does not change, and the income referred to, though subject to fluctuation in amount, remains the same thing, namely, the income produced by that aggregate. It is the amount of that income whatever it may be from time to time that is stated. The statement is the statement of an amount. The statement is complete in itself and no future happenings can vary the amount so stated.

Some small support for my conclusion is to be found from the terms of sect. 27 of the Act, where specific income (a phrase which in its context obviously includes income from an identified trust fund) is assumed for certain purposes to be income of a stated amount.

If I am right in the view I have expressed, it follows that the deficiency from a fixed sum of the income of a trust fund is also a stated amount for the purposes of the section. In my opinion, therefore, the provision before me falls within the Finance Act, 1941, s. 25.

The only reported authority bearing on the point under consideration is *Re Hawkins* (1). FARWELL, J., had there to consider first a direction by a testator to pay out of income rates, taxes and outgoings, costs of repair and insurance in respect of his house, and, second, a bequest to the testator's wife, so long as she and any of his dogs and horses were alive, for the keep of his dogs and horses while living and not given away, of a certain amount in each year in respect of each such animal. The sum payable under the first provision was held not to be and that payable under the second provision was held to be a "stated amount." My decision in this case is consistent with the decision of FARWELL, J., on the second provision and, indeed, falls well within it, for extraneous circumstances—for instance, conduct of the wife in disposing of animals—could affect the annual amount payable, while in the case before me no extraneous circumstance can affect the income of the trust fund in the sense in which I have defined it above.

As regards the decision upon the first provision, I agree with the result at which FARWELL, J., arrived, but I rest my agreement upon the broad ground that the bequest, though necessarily satisfied in money, was in substance a provision for the discharge of certain obligations and that it was no part of the object of the provision to state an amount or to arrive at an amount as an end in itself. Such a provision can hardly be "a provision however worded for the payment of a stated amount."

Declaration accordingly.

Solicitors: *Stafford Clark & Co.*, agents for *Hawkins & Co.*, Dudley (for the plaintiffs); *Jaques & Co.*, agents for *Edwin Jaques & Sons*, Birmingham (for the defendant).

[*Reported by* R. L. ZAIR ESQ., *Barrister-at-Law.*]

REID *v.* COGGANS OR REID.

[HOUSE OF LORDS (Viscount Simon, L.C., Lord Thankerton, Lord Russell of Killowen, Lord Macmillan, and Lord Wright), **October 25, December 21, 1943.**]

Rentcharges and Annuities—Annuity—Bond inter vivos—Grant for life of grantor—Grantee predeceasing grantor—Duration of annuity.

By a bond *inter vivos*, a father covenanted to pay "during my lifetime" an annuity to his son. The son predeceased his father, leaving his widow as his executrix. The executrix claimed that she was entitled to be paid the annuity during the father's lifetime. It was contended that the words "during my lifetime" did not extend the grant beyond the lifetime of the grantee but merely confined payment to the lifetime of the grantor so that his personal representatives would not be bound:—

HELD: on the true construction of the words of the instrument, the annuity was payable during the life of the grantor, even though the grantee had predeceased him. Since the instrument itself fixed the time for payment, the presumption that a grant is for the life of the grantee was not applicable.

[**EDITORIAL NOTE.** In strictness annuity seems to mean nothing more than an annual payment, but in actual practice it has come to be used of a payment which will be made annually during the life of the annuitant. Of course, annuities payable for other periods are not unknown, but in such cases the period will be specially stated. It is here shown, however, that, if a particular period is stated, that period is not curtailed by the previous death of the annuitant, but the annual sum continues to be payable until the expiration of the stated period.

AS TO DURATION OF ANNUITIES, see HALSBURY, Hailsham Edn., Vol. 28, pp. 195-201, paras. 357-201; and FOR CASES, see DIGEST, Vol. 39, pp. 135-143, Nos. 292-372.]

Cases referred to:

(1) *Harbin* v. *Masterman*, [1896] 1 Ch. 351; 39 Digest 144, *392*; 65 L.J.Ch. 195; 73 L.T. 591.

*(2) *Savery* v. *Dyer* (1752), Amb. 139; 39 Digest 112, *41*.

*(3) *Re Cannon, Cannon* v. *Cannon* (1915), 114 L.T. 231; 39 Digest 136, *303*.

(4) *Young's Trustees* v. *Shelton's Executors*, [1937] S.C. 28.

(5) *M'Donald's Trustees* v. *M'Donald's Executrix*, [1940] S.C. 433.

APPEAL by the defender from the decision of the First Division of the Court of Session (LORD PRESIDENT NORMAND, LORD FLEMING and LORD MONCRIEFF, LORD CARMONT dissenting), reversing the decision of the LORD ORDINARY, LORD ROBERTSON. The facts are fully set out in the opinions.

Sir David King Murray, K.C., (*Solicitor-General for Scotland*) and *Robert MacInnes* for the appellant.

Charles Mackintosh, K.C., and *H. W. Guthrie* for the respondent.

VISCOUNT SIMON, L.C.: My Lords, the question here is as to the proper construction of an *inter vivos* bond entered into by a father, William Reid, in favour of his son, Robert Reid. The bond, duly signed and attested, is in the following terms:—

> I, William Reid, ironmaster, residing at Stanfield, Coatbridge, for the love favour and affection which I have and bear to my son Robert Reid, residing at 1, Larch Road, Dumbreck, Glasgow, do hereby bind myself to pay to the said Robert Reid during my life an annuity of £480 sterling, and that yearly on March 1, in each year beginning the first payment thereof on March 1, 1933, for the year preceding and so forth yearly during my lifetime with a fifth part more of each of the said yearly payments of liquidate penalty in case of failure and the interest of each of the said payments at the rate of five per centum per annum from the term of payment thereof during the not-payment of the same; and I consent to registration hereof for preservation and execution.

The son has died, leaving a widow who is his executrix-dative. The father (the defender, who is appellant before this House) is still living, and what we have to decide is whether the widow, who is the pursuer and present respondent, is entitled to be paid by her father-in-law annually the sum of £480, notwithstanding that her husband is dead, so long as the defender is alive. The LORD ORDINARY (LORD ROBERTSON) came to the conclusion that the claim failed. He pointed out that the grant of an annuity to A.B., without any further qualification, unquestionably confers on A.B. a right to the periodic payment which terminates on A.B.'s death, but that, when the grant is *inter vivos*, the obligation to continue the payment continues to attach to the grantor's personal representative in the event of the grantor predeceasing the annuitant. He drew the conclusion that the qualification in the bond that the payment should be made only during the father's life had the effect of stopping the payments when the father died without extending them beyond the son's death. In the Court of Session LORD CARMONT took the same view, but the majority of the Court (LORD PRESIDENT NORMAND, LORD FLEMING, and LORD MONCRIEFF) held that the pursuer succeeded, holding that the presumption that an annuity, granted without any further qualification, terminates on the grantee's death was overcome by the express term that it is to be paid during the life of the grantor.

My Lords, after considerable reflection, I have come to the conclusion that the decision of the Court of Session is correct.

An " annuity " means an annual sum, and the period for which this annual sum has to be paid must be gathered, in the light of the relevant facts, from the language of the instrument conferring it. Where no period is fixed in the instrument itself during which the annual sum has to be paid, the court would without question hold that the period of such payment was limited to the lifetime of the annuitant in all cases where the only alternative is a payment in perpetuity. And this for a very good reason. If the payment has to be made in perpetuity, the distribution of the estate of the testator (where the annuity is given by a will and is, as usually happens, a charge on the whole estate, or of the estate of the covenantor after his death (where the annuity is secured by covenant) will be held up for an indefinite time, unless the court is in a position to authorise the executors to retain a sum to secure the annuity and distribute the rest (as in *Harbin* v. *Masterman* (1)). Even so, the sum retained would have to be held by the legal personal representatives, or by the court, in perpetuity. No court would willingly attribute to a testator or covenantor the intention of bringing about such a state of things. These, I think, are the considerations which explain the observation of Lord Hardwicke when sitting in the Court of Chancery in *Savery* v. *Dyer* (2), that :

> . . . if one gives by will an annuity . . . to A., A. shall have it only for life; for if A. might give it to his executors, it might go from executors to executors for ever.

It may, therefore, be properly and accurately said that, where no time for the duration of the annual payments is fixed by the instrument that creates the annuity, the time is to be presumed to be the life of the annuitant. But where the instrument itself fixes the time, as it does in the present case, there is no room for the application of this *prima facie* rule of construction. The plain words of the instrument must prevail and no implication to the contrary arises.

I move that the appeal be dismissed with costs.

LORD THANKERTON : My Lords, the appellant is the father and the respondent is the widow and sole executrix of the deceased Robert Reid, who died on Nov. 5, 1940. On Feb. 24, 1933, the appellant granted a bond of annuity in favour of his said son in the following terms :

> I, William Reid, ironmaster, residing at Stanfield, Coatbridge, for the love favour and affection which I have and bear to my son Robert Reid, residing at 1, Larch Road, Dumbreck, Glasgow, do hereby bind myself to pay to the said Robert Reid during my life an annuity of £480 sterling, and that yearly on March 1, in each year beginning the first payment thereof on March 1, 1933, for the year preceding and so forth yearly during my lifetime with a fifth part more of each of the said yearly payments of liquidate penalty in case of failure and the interest of each of the said payments at the rate of five per centum per annum from the term of payment thereof during the not-payment of the same ; and I consent to registration hereof for preservation and execution. In witness whereof . . .

The bond was duly signed and attested, and was registered in the Books of Council and Session for preservation and execution on Aug. 3, 1942.

The only question at issue is whether, on a proper construction of the bond, the appellant's obligations thereunder terminated on the death of Robert Reid, or continue to be enforceable by the respondent as his executrix.

The LORD ORDINARY, LORD ROBERTSON, decided in favour of the appellant, holding that his obligations terminated on the death of his son. On a reclaiming motion, this decision was reversed by the First Division of the Court of Session.

The majority in that Court was composed by the LORD PRESIDENT, LORD FLEMING and LORD MONCRIEFF; LORD CARMONT dissented.

My Lords, I am of opinion that the decision of the First Division was correct, and I agree with the reasons given by the majority of the judges of the First Division, that there is here an effective reference to a term other than the life of the annuitant, and that that term is the measure of the endurance of the right. The dissentient judges, the LORD ORDINARY and LORD CARMONT, both appear to me to have wrongly assumed that the words "during my life" and "during A my lifetime" are necessarily added or qualifying words, whereas they appear to me to constitute an express statement, and the only statement, of the period of duration of the obligation. This view is confirmed by an important consideration which is not dealt with in either of the courts, and that is the nature and purpose of such a bond in Scots law.

This bond is a formal bond with a consent to registration for execution, which will warrant summary diligence. As is proper, it is drawn by a skilled lawyer, B whom we are entitled to credit with a knowledge of the requisites necessary to render such a bond effective. STEWART ON DILIGENCE, at p. 413, says:

> It need scarcely be said that in every case to warrant summary diligence, the bond must be *ex facie* regular and the debtor's obligation clear and specific. If the obligation is in any way indefinite or requires something to be ascertained judicially before execution can be done, summary diligence is incompetent. The bond must, of course, be probative. C

In BELL'S PRINCIPLES OF THE LAW OF SCOTLAND, s. 68, it says:

> It is important to observe the distinction between a bond as the groundwork of summary execution, and as the groundwork of an action. The difference of effect practically is, that summary execution, besides avoiding delay and expense, cannot be questioned or suspended without finding caution; while there is no such necessity in defending against an action. For summary execution, the obligation must be so D certain and precise, that it may at once be enforced without further inquiry.

In his LECTURES ON CONVEYANCING, PROFESSOR MONTGOMERIE BELL, after dealing with the clause of consent to registration for execution as a common clause in most deeds, including personal bonds (vol. I, pp. 209-210), deals with bonds of annuity as follows (vol. I, p. 259):

> Bonds of annuity may be granted in consideration of a price paid down, or for love and favour, or, generally, for good and sufficient causes and considerations. When a E price is paid, the amount must be specially set forth, in compliance with the provisions of the Stamp Acts. The receipt of it will be acknowledged and discharged, and in all cases the obligant will bind himself and his heirs, in usual form, to pay to the annuitant the amount of the annuity, at such terms or days as may be arranged, during the lifetime of the annuitant, or for such length of time as may be agreed on, with penalty in case of failure, and interest, as usual in regard to money obligations.

In the recent SCOTS STYLE BOOK, vol. I, p. 283, there is a style for "Bond F of annuity for life, granted in consideration of a price paid, and without any security beyond the granter's obligation." It is as follows:

> I, A.B., in consideration of the sum of £ sterling instantly paid to me by C.D., do hereby bind myself and my heirs, executors and representatives whomsoever, all jointly and severally, without the necessity of discussing them in their order, to pay to the said C.D. during all the days of his lifetime a free liferent annuity of £ sterling, and that at two terms in the year, Whitsunday and Martinmas, by equal G portions, beginning the first payment at Whitsunday, 1902, of a proportion of said annuity corresponding to the period from the date hereof (or from the day of) to that term, and the next payment at Martinmas, 1902, for the half-year preceding, and so forth half-yearly, termly, and proportionally thereafter during the lifetime of the said C.D. . . . In witness whereof . . .

The form given in the JURIDICAL STYLES, vol. II, p. 326 *et seq.*, is materially identical. H

The bond here in question is clearly formal and uses common words of style; its frame consists of two parts, the first part consisting of a general description of the obligation, and the second part, which begins with the words "and that yearly," is exegetical of the first part and is intended to define precisely, for the purposes of summary diligence, the periodical amount and the duration of the pecuniary obligation, along with the usual clause as to interest and penalties. This is the common frame of such a bond, and, for present purposes, it makes no difference what the consideration is.

The only statement of a *terminus ad quem* is the twice repeated "during my lifetime," which is clear and unambiguous and apt to warrant summary diligence, and I can see no justification for any implication which would qualify these words. The word "annuity" means an annual payment, and any implication which might arise in the absence of any express statement of the *terminus ad quem*, is irrelevant in the presence of such a statement, as not only would the implication qualify and alter the express statement, but it would render the bond inapt as a warrant for summary diligence. For this reason I am of opinion that the cases cited as to construction of testamentary deeds, and the English authorities cited, are of little assistance in the present case. Further, in my opinion, it has been wrongly assumed that the words "during my life" and "during my lifetime" were added words. It is much more likely, having regard to the passage from Bell's Lectures and the Styles, that the alteration of the style consisted in the substitution of "my" for "his" in the middle of these words, which would mean that the granter's lifetime superseded and took the place of the annuitant's lifetime as prescribing the duration of the obligation.

I am, therefore, of the opinion that the terms of the bond are clear and unambiguous, and that there is no justification for holding that the duration of the granter's obligation is other than the period of the granter's lifetime. In my view, it is impossible to find in the language of this bond—as Lord Carmont did—that the obligation was to continue only during the joint lives of the granter and the grantee. If the legal draftsman had so intended I cannot imagine that he would have omitted the use of such a familiar term. For the reasons that I have ventured to express, I agree with the conclusion of the majority of the judges of the First Division that the appellant's obligation continues during his lifetime, and the appeal fails.

Lord Russell of Killowen: My Lords, I would dismiss this appeal. I agree with the interlocutor pronounced by the First Division, and with the reasons given by the majority of the judges. The sole question is what is the meaning to be attributed to the language used in the bond, the relevant words of which are as follows:

> I, William Reid . . . for the love favour and affection which I have and bear to my son Robert Reid . . . do hereby bind myself to pay to the said Robert Reid during my life an annuity of £480 sterling and that yearly on March 1, in each year beginning the first payment thereof on March 1, 1933, for the year preceding and so forth yearly during my lifetime.

In reaching a conclusion on this point we can only be guided by the wording of the bond. We must not start with any assumption or surmise of probability of intention on the part of the executant. His intention must be gathered from the words of the document.

Both the Lord Ordinary and Lord Carmont have, I think, started with the assumption that the intention was to grant a life-annuity to his son, and that the reference to the father's own life was inserted only for the purpose of reducing that life annuity to something less, and ending it in the event of the father dying in the lifetime of the son.

I cannot accept this view. It appears to me to be contrary to the language of the bond. The reference to the life of the father does not purport to be inserted as a qualification or limitation of a gift of a life annuity. It is part and parcel of the gift itself, the gift being the creation of a liability of the father to the son to pay to him during the father's life an annuity of £480.

With all deference to those who entertain a different view of the construction of this bond, I think it is wrong to approach the problem from the starting point that the words in the bond "an annuity" mean an annuity for the life of Robert, and then to proceed to treat the reference to the father's life as a qualification or cutting down of that life annuity. The word "annuity" means an annual sum, the duration of the payment of which will vary according to the terms of the document which creates it. Thus it may be an annual sum payable in perpetuity, or during the life of the grantee, or during a life other than that of the grantee, or during joint lives, or during a term of years, or during some other defined period.

Two propositions in relation to annuities have been established by authority many years ago, and have been acted upon and have governed titles to annuities ever since. The first is that a grant of an annuity to A. with no other context to assist, is to be construed as being an annuity which ends with A.'s life; the reason being, as explained by Lord Hardwicke in *Savery* v. *Dyer* (2), that the only possible alternative was the view that it was to be paid for ever. In that case the gift which was under consideration was a gift by will of an annuity to A. during the life of the testator's executor. A. having died during that life, it was held that the annuity did not cease to be payable on A.'s death, but passed to his executor. This established the second proposition, viz., that, where some period which is not the life of the grantee is specified as the period during which the annual sum is payable, the annual sum continues to be payable to the executors of the grantee in the event of the grantee dying during that period. The context no longer permits the view that the payment is confined to the lifetime of the grantee. These two propositions are well settled in English law. It will be sufficient to quote from the judgment of Sargant, J., in the case of *Re Cannon, Cannon* v. *Cannon* (3), in which he said at p. 232:

> *Prima facie* when an annuity is given it is only for the life of the annuitant, but if another term for payment is pointed out, then, that term is not inserted by way of restriction to the period of the annuitant's life, but is in substitution for that period. This was decided long ago in *Savery* v. *Dyer* (2).

They are equally well settled in the Scottish Courts, see *Young's Trustees* (4), and *M'Donald's Trustees* (5).

It is said, however, that the case is different if in the grant of an annuity *pur autre vie*, the other life is the life of the grantor, and that no reported case can be found which deals with such a grant. It is true that, so far as I know, the reported cases, and certainly all those cited to us, are cases of gifts by wills in which the other life cannot be the life of the grantor; but I can see no reason why the fact that the other life in the case of a gift *inter vivos* is the life of the grantor should make any difference in the construction of the gift. Nor can I see any reason why the construction of the gift of an annuity *inter vivos* should differ from the construction of such a gift by will.

Nor does the absence of reported authority cause me surprise. Wills are often home-made. Deeds creating annuities are not. They are normally prepared by skilled draftsmen, who, if instructed that the annuity was to cease on the death of either the grantee or the grantor, would adopt the common form of creating an annuity for their joint lives.

For myself I find it difficult to understand how the appellant can escape liability without in some way re-writing the bond. His contention is that the son's annuity is for the son's life; if so then the bond runs thus: "I bind myself to pay to my son during my life an annuity during his life," a piece of drafting which I venture to say creates (if the appellant's contention is correct) a liability which is nonsensical and impossible of fulfilment, for, if the son dies first, the sum is not paid during the grantor's life, and, if the grantor dies first, the sum is not paid during the son's life. The truth is that the result desired by the appellant can only be reached by re-writing the bond and providing for the payment of an annuity during the joint lives of the father and son. The bond is clearly not a home made document, and the draftsman instead of confining the payment to the familiar conveyancing period of joint lives, has defined the payment as one which is to continue during the lifetime of the father.

The construction which the First Division has attributed to the bond is one which is consonant with the wording of the document unaltered in any respect. It was indeed suggested that the words "his executors administrators and assigns," or "his representatives" or some similar words ought to have been added after the son's name; but such an addition would only have been an unnecessary statement of the operation in law of the bond if the construction in question is adopted.

My Lords, but for the fact that in this case a difference of opinion exists in the Scottish Courts, I would not have troubled your Lordships at this length. I would have been well content to rest my vote on the reasons given by the Lord President, Lord Fleming and Lord Moncrieff. Respect for the opinions of those who take a different view of the construction of this document is my justification for stating in my own words the reasons why I think that this appeal should fail.

LORD MACMILLAN: My Lords, by a bond of annuity the appellant, William Reid, bound himself during his lifetime to pay to his son Robert an annuity of £480. The son has died but the father survives. The question is whether the father is liable to continue paying the annuity to the respondent who is the A son's executrix.

The obligation, it will be observed, is to pay the annuity to the son without mention of his representatives. The general principle (see STAIR'S INSTITUTIONS, III, 5, 5), is that heirs:

> . . . have right, not only to obligements conceived in favour of the defunct and his heirs, but, though there be no mention of heirs, unless, by the nature of the obligement, there be a specialty, appropriating the same to the person of the defunct only.

B It is agreed on all hands that in the case of the grant of an annuity there is "a specialty appropriating the same to the person of the defunct only" unless there is a context necessitating a contrary interpretation. This is because an annuity is *prima facie* presumed to be only for the life of the annuitant.

In the present case the fact that the appellant undertook to pay the annuity "during my lifetime" is said to extend the appellant's obligation beyond C the life of the grantee of the annuity. If speculation were permissible, it is, to say the least of it, not improbable that by the introduction of the words "during my lifetime" the appellant intended, not to expand his son's rights, but rather to prevent the obligation to pay the annuity from binding his own representatives, as without these words it would have bound them. This is the view taken by the LORD ORDINARY and by LORD CARMONT, and the fact that the appellant has maintained it throughout these proceedings indicates that it was D also the appellant's own view of what he meant.

But speculation is not permissible and the extent of the appellant's obligation must be determined by the language which he has used, not by surmise as to what he intended. This is a formal document prepared by the appellant's legal advisers and framed with the precision appropriate to a bond which contains a consent to registration for execution, rendering it on registration "in effect and execution the same as a decreet in absence," see ROSS'S LECTURES E ON THE LAW OF SCOTLAND, 2nd edn., p. 120. The initial words of obligation are expanded and given the requisite exactitude by the detailed clause which follows in which the appellant undertakes to pay the annuity on a certain day in each year and "so forth yearly during my lifetime." I cannot read these words as meaning anything other than what they say.

While it is true that an annuity is in the ordinary case for the life of the F annuitant, this is by no means always so. As the writer of the article on Annuities in the ENCYCLOPAEDIA OF THE LAWS OF SCOTLAND, vol. I, para. 897, points out:

> . . . an annuity may exist during the life of the granter, or of the grantee, or of any third party; or during the joint continuance of any number of lives; or during the longest of any number of lives.

It all depends on the terms of the instrument creating it. In the present in-G stance, if the appellant instead of binding himself to pay the annuity "during my lifetime" had bound himself to pay it for twenty years, I do not doubt that he would have been bound, if his son had died within the twenty years, to go on paying it to his son's representatives until the expiry of the twenty years. I cannot see any ground for reaching a different conclusion where the obligant binds himself to pay the annuity yearly during his lifetime.

I am accordingly in favour of dismissing the appeal.

H

LORD WRIGHT: My Lords, the short point of construction to be determined in this case has given rise to marked difference of high judicial opinion. For myself I am constrained to agree with their Lordships of the First Division.

The appellant, William Reid, by a bond of annuity, dated Feb. 24, 1933, and registered in the Books of Council and Session on Aug. 3, 1942, bound himself to pay to his son, Robert Reid, "during my life" an annuity of £480 "and that yearly on March 1, in each year . . . and so forth yearly during my lifetime." Robert Reid died on Nov. 5, 1940, leaving his widow, the present respondent, surviving. She brought this action as her late husband's executor. The issue is whether the annuity terminated on the death of Robert Reid or whether it continued to be payable to his executor during the lifetime of the grantor.

The first question is whether the annuity was personal to Robert Reid as being intended for his personal maintenance and enjoyment. In support of the view that it is to be so regarded it is said that it was from a father to his son and that the grant is actually prefaced by the recital that it is made for love, favour A
and affection. But in my opinion these expressions are formal words often found in a gratuitous benefaction and do not in themselves show an intention to limit the grant to the son personally or to exclude its transmission to his personal representatives on his death. There are no facts in evidence which would justify a finding that the annuity was intended to be personal to the grantee. The court has no right to guess at the grantor's intention. Nor do I think that the word annuity by its inherent import indicates that the annual B
payment though described as an annuity is limited to the life of the annuitant. The word *prima facie* connotes, I think, simply an annual payment. It is true that where an annuity is granted to a named annuitant without any express limitation, it will generally be taken to cease on the death of the annuitant. So it was held in England long ago by Lord Hardwicke, L.C., in *Savery* v. *Dyer* (2). But, as Lord Hardwicke explains, this is so because if the grantee might give it to his executors, it might go on "from executors to executors C
for ever." Lord Hardwicke was there, it is true, dealing with a gift by will of an annuity granted during the lifetime of the testator's executor. He held that the annuity did not cease on the grantee predeceasing the testator's executor, but transmitted to the grantee's executor. The restriction to the grantee's lifetime was only by implication. Lord Hardwicke said

> . . . as the testator has given an express limitation, it destroys that implication. D

That decision no doubt had reference to a testamentary disposition which could only take effect on the testator's decease. But in my opinion it shows that an annuity expressed to be payable to a kinsman may transmit to the kinsman's executor and it also states the reason why an annuity which would otherwise cease on the annuitant's death continues and is payable to his executor if there is a definite limitation other than the annuitant's death. The express limitation prevails over the limitation which is merely implied. E

The appellant's argument sought to meet this way of approaching the question (apart from the distinction sought to be drawn between a testamentary disposition and an obligation by bond) by starting with the premise that in a case like this the general rule that the grant was limited to the grantee's life still remained in force notwithstanding an express limitation to the grantor's lifetime. Thus, it was said, in consequence of combining the express and the implied F
limitation, the grant was to be construed as being for the joint lives of grantor and grantee. This would obviously not be so in the case of a testamentary disposition and to that extent the testamentary disposition is different from a grant by deed. But in my opinion this difference does not affect the true principle, which is that the express limitation supersedes the implied limitation. The term of the grantor's life is in substitution for the term of the annuitant's life, if I may adopt the words of Sargant, J., in *Re Cannon* (3). That indeed G
was a will case, like a number of other authorities to the same effect which have been referred to. But the general principle is in my opinion that the implied limitation to the particular annuitant's lifetime is superseded (apart from special cases, as where the annuity is merely personal) where another specific limitation is expressed, whether that express limitation be the donor's lifetime, or a fixed period, or the lifetime of a person other than the annuitant, or any similar specified period. Any fixed term of years would be inconsistent H
with a limitation to the period of the annuitant's life, because that might be either longer or shorter than the specific limitation which is expressly fixed. I can see no reason for distinguishing a period to be ascertained by the death of the grantor from any other definite term. The gift here is expressed to be for an annuity during the grantor's lifetime. To convert that defined period into a different period, namely, the joint lives of grantor and grantee, is in my opinion to re-write the terms of the bond and turn it into an annuity for joint lives instead of one for the single life of the grantor. That, I think, is not,

as a matter of construction, competent. On the express language of the bond it is simply a grant *pur autre vie*, because in my opinion "*autre vie*" in this context means any life other than the annuitant. I cannot avoid this conclusion unless I hold that the grant is personal to the annuitant, a view which I have already rejected.

It is curious that, as the LORD PRESIDENT observes, there is no English case which has decided that an annuity payable under contract or deed is during the obligant's life to be dealt with as an annuity *pur autre vie*. But I agree with him that the authorities, both Scottish and English, which he cites, state principles applicable to the present case. I need not repeat the citations. Indeed I should be content simply to express my concurrence in every substantial respect in the judgments of the LORD PRESIDENT, LORD FLEMING and LORD MONCRIEFF but for the difference in this case of high judicial opinion.

I would dismiss the appeal.

Appeal dismissed with costs.

Solicitors: *Abbott, Anderson, Braithwaite & Whittaker*, agents for *J. and J. Gartshore Scott*, Glasgow, and *Simpson & Marwick*, Edinburgh (for the appellant); *Druces & Attlee*, agents for *John W. & G. Lockhart*, Ayr, and *Macpherson & Mackay*, Edinburgh (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

INLAND REVENUE COMMISSIONERS *v.* TRINIDAD PETROLEUM DEVELOPMENT CO., LTD.

[KING'S BENCH DIVISION (Macnaghten, J.), **November 1, 2, 3, 1943.**]

Revenue—Excess profits tax—Computation of capital—Deduction of debt—Companies interconnected in standard period but not in chargeable accounting period—Finance (No. 2) Act, 1939 (c. 109), *s.* 17, *Sched. VII, Pt. II, para.* 2 (1).

The respondent company had selected the years 1935 and 1937 as its standard period for the purposes of excess profits tax. Until January, 1937, the whole of the respondent's share capital was beneficially owned by another company to whom the respondent was also indebted for money lent. In January, 1937, the debt was discharged and, since that date, owing to an increase in the respondent's share capital and the issue of newly created shares to the public, the respondent has ceased to be a subsidiary of the lending company which has owned only 50 per cent. of its shares. It was contended for the Crown that in computing the capital of the respondent company for its standard period the debt due to the lending company could not be deducted in accordance with the Finance (No. 2) Act, 1939, Sched. VII, Pt. II, para. 2, since during that period the respondent was a subsidiary of the lending company, and, by sect. 17 of the Act, the debt must, therefore, be ignored in computing the capital of both companies:—

HELD: sect. 17 of the Finance (No. 2) Act, 1939, applies only to companies interconnected after Apr. 1, 1939, and, since the respondent ceased to be a subsidiary before that date, it was not precluded by the provisions of that section from deducting the debt in the computation of its capital for the standard period.

[**EDITORIAL NOTE.** Special rules govern the calculation of the profits of interconnected companies. It is here held that, upon the proper construction of the Finance (No. 2) Act, 1939, s. 17, these special methods are applicable only in the case of companies which are interconnected after Apr. 1, 1939.

FOR THE FINANCE (NO. 2) ACT, 1939, s. 17, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, pp. 1202, 1203.]

APPEAL by the Crown against a decision of the General Commissioners for the City of London who allowed the appeal of the respondent company from assessments to excess profits tax. The facts are fully set out in the judgment.

The Attorney-General (*Sir Donald B. Somervell, K.C.*), and *Reginald P. Hills* for the appellants.

J. Millard Tucker, K.C., *Frederick Grant, K.C.*, and *J. W. P. Clements* for the respondent company.

Macnaghten, J.: This is an appeal by the Crown from a decision of the General Commissioners for the City of London with regard to two assessments to excess profits tax made upon the respondent, the Trinidad Petroleum Development Co., Ltd., in respect of the chargeable accounting periods from Apr. 1, 1939, to July 31, 1939, and from Aug. 1, 1939, to July 31, 1940.

A The facts which give rise to the question at issue in this appeal are short and simple. The respondent was incorporated on May 7, 1918, as a company limited by shares for the purpose of acquiring and operating oilfields and oil concessions. It had a capital of £100,000 divided into 10,000 shares of £10 each. Down to the end of the year 1936 a company called the British Controlled Oilfields, Ltd., was the beneficial owner of all those shares, and the respondent was indebted to that company for money lent to an amount exceeding £800,000. In December, B 1936, the respondent increased its capital from £100,000 to £1,000,000 by the creation of 900,000 shares of £1 each and, at the same time, each of the original shares of £10 was divided into 10 shares of £1 each, so that the capital became £1,000,000 divided into a million shares of £1 each. In the following month the public subscribed for 500,000 of the respondent's shares in cash, and the respondent then took the opportunity of discharging its debt to the British Controlled Oilfields, Ltd., by the payment of £200,000 in cash and the issue of C 400,000 £1 shares as fully paid. Those are the facts and all the facts that are material to the question at issue on this appeal.

Sect. 12 of the Finance (No. 2) Act, 1939, imposes excess profits tax on so much of the profits of a trade or business as exceed its "standard profits"; sect. 13 provides that the "standard profits" of a trade or business are to be computed by taking the profits of its "standard period," and sect. 14 provides for the computation of the profits and capital of the trade or business during the D "standard period" and the chargeable accounting periods.

Rules with regard to the computation of capital are contained in Pt. II of the seventh schedule to the Act. R. 2 (1) provides that any borrowed money and debts are to be deducted from the capital. If that rule be applied to the respondent, which has provisionally selected the years 1935 and 1937 as its "standard period," the result is that, on comparing the capital of the respondent E in 1935, diminished as it would then be by the debt due to British Controlled Oilfields, with its capital in 1939 and 1940 when that debt had been discharged, the capital in the latter period would be so much greater than in the former and the proviso in sect. 13 (3) would take effect. That subsection reads as follows:

> If the trade or business was commenced on or before July 1, 1936, the standard F profits for a full year shall be ascertained by reference to the profits of the standard period as hereinafter defined and, subject as hereinafter provided, shall be, where the standard period is one year, the amount of those profits and, where the standard period is two years, half the amount of those profits: Provided that if the average amount of the capital employed in the trade or business in any chargeable accounting period is greater or less than the average amount of the capital employed therein in the standard period, the standard profits for a full year shall, in relation to that chargeable accounting period, be increased, or, as the case may be, decreased, by the statutory percentage G of the increase or decrease in the average amount of the capital employed in the trade or business.

In the case of the respondent the statutory percentage of the increase would be 8 per cent.

The question at issue in this appeal depends on the meaning and effect of sect. 17 of the Act which contains provisions with regard to "interconnected companies," which means companies whereof one is a subsidiary of the other. H Subsect. (6) of sect. 17 provides that:

> For the purposes of this section, a body corporate shall be deemed to be a subsidiary of another body corporate if and so long as not less than nine-tenths of its ordinary share capital is owned by that other body corporate . . .

The respondent was, therefore, a subsidiary of British Controlled Oilfields, Ltd., until the month of January, 1937, because, up to that date the whole of its ordinary share capital was owned by the British Controlled Oilfields; but, in the month of January, 1937, when the issued share capital of the respondent had been increased to £1,000,000, and the British Controlled Oilfields held but half of its ordinary share capital, the respondent ceased to be a subsidiary of British Controlled Oilfields, Ltd.

It is provided by sect. 17 (1) of the Act as follows :

> Where any interest, annuity or other annual payment, or any royalty or rent, is paid by one body corporate to another body corporate, and one of those bodies corporate is a subsidiary of the other, or both are subsidiaries of a third body corporate, the capital, profits and losses of both bodies corporate shall be computed for the purposes of this Part of this Act [that is the part relating to excess profits tax] as if (*a*) the interest, annuity, annual payment, royalty or rent were not payable ; (*b*) any debt in respect of which any such interest is payable did not exist . . .

The contention of the Crown is that this enactment is quite plain ; that, since in 1935 and 1936 the respondent company was a subsidiary of the British Controlled Oilfields, the debt that was due from the respondent to that company must be treated as if it did not exist and, if it did not exist, it could not be deducted, with the result that the capital of the respondent company during those years, undiminished by the debt then due to British Controlled Oilfields, Ltd., would not in 1939 and 1940 be affected by the discharge of the debt in 1937.

On the other hand, it is said on behalf of the respondent that sect. 17 is dealing, and dealing only, with the cases where two or more companies are interconnected during a chargeable accounting period, for excess profits tax is not chargeable on persons or companies that ceased to carry on a trade or business on or before Mar. 31, 1939. The contention of the respondent company is borne out by the fact that the section makes provision for what is to happen where the two companies are interconnected by one being subsidiary to the other during a chargeable accounting period. Subsect. (3) says :

> If the subsidiary company is a subsidiary of the principal company throughout the chargeable accounting period, such capital employed in, and profits or losses arising from, the trade or business of the subsidiary company as is employed or arise in (i) the chargeable accounting period ; or (ii) any year constituting or comprised in the standard period of the principal company, shall be treated for the purposes of this Part of this Act as if it or they were capital employed in, or as the case may be, profits or losses arising from, the trade or business of the principal company.

Subsect. (4) provides for the case where a company is subsidiary to another company for part only of a chargeable accounting period :

> If the subsidiary company is a subsidiary of the principal company during part only of the chargeable accounting period, the excess or deficiency of profits of the subsidiary company for that part of that period shall be treated as increasing or, as the case may be, decreasing the excess or deficiency of profits of the principal company for the whole period and shall not be deemed to be an excess or deficiency of profits of the subsidiary company.

In the case of a company such as the respondent, which ceased to be a subsidiary before Apr. 1, 1939, the fact that it was a subsidiary during its " standard period " seems quite immaterial. The capital of the company can be ascertained independently of the other company, just as its profits or losses must be ascertained independently of the other company, and there would seem to be no reason why sect. 17 should be applied to it. The section itself deals with the computation of the profits during the chargeable accounting periods ; it says nothing about the standard profits, except in that portion of subsect. (3) which I have read, where the subsidiary is a subsidiary throughout the whole of the chargeable accounting period.

I have come to the conclusion, though not without doubt, that sect. 17 ought to be read as applying only to companies interconnected after Apr. 1, 1939, and that companies which ceased to be " interconnected " before that date, and are, therefore, chargeable to the excess profits tax separately, do not come within its provisions. In my opinion, therefore, the decision of the commissioners in this case was right, with the result that the appeal fails with costs.

Appeal dismissed with costs.

Solicitors : *Solicitor of Inland Revenue* (for the appellants) ; *Robb* (*Elvy*) *&* *Co.* (for the respondent company).

[*Reported by* GWYNEDD LEWIS, *Barrister-at-Law.*]

Re AN APPEAL FROM DISALLOWANCES AND SURCHARGES BY LIONEL PRESCOTT WALKER, DISTRICT AUDITOR OF THE MINISTRY OF HEALTH FOR NO. 4 DISTRICT, AND *Re* AN APPLICATION BY WALTER SAMUEL LEWIS AND OTHERS FOR A DECLARATION AND RELIEF IN RESPECT OF THE SAID SURCHARGES.

[King's Bench Division (Viscount Caldecote, L.C.J., and Atkinson, J.), **December 9, 1943.**]

Local Government—Remuneration of employees—Children's allowances—Fair and reasonable—Discretion of local authority—Local Government Act, 1933 (*c.* 51), *ss.* 106, 228, 229, 230.

After a meeting with their staff representatives and after inquiring into the practice of other employers, the Birmingham Corporation decided to contribute towards the increased cost of living expenses of their non-manual employees by paying a fixed weekly rate of war bonus according to age or sex with the addition of 2*s.* 6*d.* per week for each child in the case of married men, widowers or widows. These latter payments were called children's allowances. The district auditor disallowed the children's allowances as (i) unlawful since they were not "remuneration or salaries," or (ii) unreasonable since they had no relation to the value of the services rendered :—

Held : the payment of such children's allowances was within the statutory powers of the local authority and, in the circumstances, the amounts paid were fair and reasonable.

[**EDITORIAL NOTE.** The remuneration which may be paid by a local authority to its officers and other employees is governed by statute and may generally be said to be in the discretion of the authority. Such remuneration must, however, be fair and reasonable. The real objection taken here was that two men doing the same work might receive different rates of pay because one had children dependent on him and the other had not. The criterion, it was said, is the work done for the authority and not the man's responsibilities. It has been held, however, that a local authority like other employers, may adjust a man's wages or salary in accordance with the man's responsibilities, so long as the remuneration is still fair and reasonable.

As to Remuneration of Officers of Local Authorities, see HALSBURY, Hailsham Edn., Vol. 21, p. 62, para. 102 ; and for Cases, see DIGEST, Vol. 33, p. 15, Nos. 48-52.]

Cases referred to :

*(1) *Roberts* v. *Hopwood,* [1925] A.C. 578 ; 33 Digest 20, *83* ; 94 L.J.K.B. 542 ; 133 L.T. 289 ; *revsg.,* S.C. *sub nom. R.* v. *Roberts, Ex p. Scurr,* [1924] 2 K.B. 695.

(2) *National Association of Local Government Officers* v. *Bolton Corporation,* [1943] A.C. 166 ; [1942] 2 All E.R. 425.

Appeal, under the Local Government Act, 1933, s. 229, by members of the City Council of the Birmingham Corporation, from a decision of the district auditor disallowing, under sect. 228 of the Act, certain items in the accounts of the corporation. The facts are fully set out in the judgment of Viscount Caldecote, L.C.J.

Maurice FitzGerald, K.C., and *E. J. C. Neep* for the appellants.

Sydney G. Turner, K.C., and *C. E. W. Simes* for the respondent.

Viscount Caldecote, L.C.J. : This appeal comes before the court under the provisions of the Local Government Act, 1933, s. 229. The respondent is a district auditor appointed under the Act by the Minister of Health and assigned as district auditor of No. 4 District. It is part of his duty to audit the rating, education and public assistance accounts of the Birmingham Corporation. In the course of this duty he has disallowed certain items of account on the ground that they are contrary to law and has surcharged the amount of the disallowed items upon the three last named appellants, as the persons responsible for incurring or authorising the expenditure (see sect. 228 (1) (*b*)). These three appellants are members of the city council, and it was agreed by them at an interview which they had with the respondent, that they should be the persons surcharged with a view to an appeal to the High Court against the auditor's decision, as provided by the Local Government Act, 1933, s. 229.

The material facts are that the non-manual employees of the corporation had by their representatives put forward proposals for an increased cost of living bonus to be paid in addition to their basic salaries. After making inquiry as to the practice of large scale employers within the city, and as to schemes in force under other public authorities, the council approved a scheme for the payment of a fixed weekly rate of war bonus according to age or sex to which was added in the case of married men, widowers or widows who received salaries not exceeding £550 per annum an amount of 2*s.* 6*d.* per week payable in respect of each child under 14 years of age or under 18 if undergoing full-time education. These last mentioned payments were called "children's allowances" and were so referred to throughout these proceedings.

Upon auditing the account the respondent gave informal intimation to the council of his intention to question the children's allowances, having found, to use his words:

> . . . that the children's allowances had no relation to the services rendered by the recipients thereof but were grants or gifts made to such recipients dependant upon factors other than the rendering of services.

Thereupon the interview to which I have referred took place and eventually the respondent by certificate dated Apr. 16, 1943, disallowed sums amounting to £48 13*s.* 8*d.*, being the amount of children's allowances in certain selected areas, on the ground that they were not salary or remuneration within the meaning of all or any of the relevant statutes or of the relevant orders, and that they were gratuities which the corporation had no statutory power to pay. The respondent was, on this ground, of opinion that the classes of expenditure in question were contrary to law. In his certificate he also held that, even if the sums in question could be held to be salary or remuneration, they were unreasonable, whereas salaries paid by a local authority must be reasonable. As to his last finding no question of amount was raised in the appeal. It was common ground that the children's allowances were as a whole either lawful or unlawful. The appellants now appeal, in the first place against the disallowance of these items and the consequent surcharge. They also ask for a declaration under the Local Government Act, 1933, s. 230.

The departments of the corporation involved in this appeal are the rating, the education and the public assistance departments. By virtue of the Rating and Valuation Act, 1925, s. 55, the corporation was enabled to appoint:

> . . . for the purposes of this Act such rating officers, valuation officers and other officers as they think fit, and to pay to any officers so appointed such reasonable salaries as they think fit.

Similarly by virtue of the Education Act, 1921, s. 148 (1), the corporation was enabled to appoint necessary officers and to "assign to them such salaries or remuneration (if any) as they think fit."

Lastly, as provided by the Public Assistance Order, 1930, para. 151:

> . . . the council may appoint or employ any officer or servant on such terms and conditions of service as they think appropriate, . . . and may pay him reasonable remuneration.

The slightly differing terms of these enactments make no difference to their meaning and effect. It was indeed conceded in argument and I think rightly conceded by the respondent that the material provision for our consideration is the Local Government Act, 1933, s. 106, which provides as follows:

> (1) The council of every borough shall appoint fit persons to be town clerk, treasurer, surveyor, medical officer of health and sanitary inspector or inspectors, and shall also appoint such other officers as the council think necessary for the efficient discharge of the functions of the council. (2) Subject, as respects the offices of medical officer of health and sanitary inspector, to the provisions of this Part of this Act, the council may pay to an officer appointed under this section such reasonable remuneration as they may determine . . .

The council is thus given a wide but not unlimited discretion as to the amount of salaries or remuneration which they may pay to their employees. That discretion must be exercised reasonably but there is nothing in the words of the section to show that the powers of the council within proper limits are to be shared with or controlled by the auditor, still less that the court is put in a position to override the discretion of the council once it has been exercised within the limits permitted by law. The question in this case is whether the council has acted within the powers entrusted to them by Parliament. A council might act in bad faith, but nothing of that kind is alleged here; again, a council

might adopt such a scale of salaries or wages as to make the amounts so unreasonable as to be unlawful. No such suggestion was made to us by the respondent. His disallowance of the items in question is based on a different and more fundamental ground altogether ; he is impressed by the fact that two employees may, and as he shows by examples in fact do, receive different salaries or remuneration (and in future I will only use one word "salaries" to cover both) although the services they render to the corporation are precisely similar and of the same value. The discrimination it is said is due not to the A
different values of their services but to the fact that one has a child or children and the other has not. The respondent says in a statement of his reasons for disallowance and surcharge :

> It follows that the remuneration for the service rendered is the amount of the basic rate of salary plus the appropriate basic war bonus, because this is the rate paid to a childless officer in his grade.

That contention was repeated by counsel for the respondent in answer to the B
appellants' submission that they had acted in good faith within their powers. Children's allowances, it was said, are not remuneration or salaries ; the amounts payable by way of children's allowances have indeed no relation to the value of the service and are unreasonable and, therefore, unlawful, because in making them the council had regard to extraneous matters. In support of this contention the respondent relied mainly upon extracts from opinions given in the House of Lords in *Roberts* v. *Hopwood* (1), commonly known as the *Poplar* case. C
The headnote of the report, I think, accurately states the effect of the decision :

> Held, (i) that the discretion conferred upon the council by the statute must be exercised reasonably, and that the fixing by the council of an arbitrary sum for wages without regard to existing labour conditions was not an exercise of that discretion ; (ii), that an expenditure upon a lawful object might be so excessive as to be unlawful, and that to the extent by which the amount exceeded legality the auditor was bound to disallow it and surcharge the excess upon the persons responsible. D

The passage to which the respondent attached most importance is to be found in the opinion of LORD WRENBURY, at p. 612 :

> Wages are the pecuniary return for services rendered. To determine the proper or true amount which in a given state of facts has been paid or is payable for services rendered is far from easy. It can never be determined with exactness. It is impossible to name in any particular case an amount which if diminished by 1*s*. a week would be too small, and if increased by 1*s*. a week would be too large. But it is possible to E
> name an amount which would certainly be too large—as, for instance, if a charwoman were paid £2 a day. Using my best endeavour to state the matter in general terms, I express it thus : Wages in a particular service are such sum as a reasonable person, guiding himself by an investigation of the current rate in fact found to be paid in the particular industry, and acting upon the principle that efficient service is better commanded by paying an efficient wage, would find to be the proper sum. The figure to be sought is not the lowest figure at which the service could be obtained, nor is it F
> the highest figure which a generous employer might, upon grounds of philanthropy or generosity, pay out of his own pocket. It is a figure which is not to be based upon or increased by motives of philanthropy nor even of generosity stripped of commercial considerations. It is such figure as is the reasonable pecuniary equivalent of the service rendered. Anything beyond this is not wages. It is an addition to wages, and is a gratuity. The authority is to pay not such sum but such wages as they think fit.

What had happened in the *Poplar* case (1) was that the borough council had G
paid to its lowest grade of workers, men and women, a minimum wage of £4 per week, that being in the judgment of the council the lowest wage a local authority ought as a model employer to pay for adult labour. The district auditor in arriving at a figure beyond which he thought it would be illegal to go took the pre-war rate, increased it by the cost of living and added £1 by way of margin. Above that he disallowed the payments. The auditor's view which was upheld in the House of Lords was based upon the mere amount which he H
thought was excessive and unjustifiable. There was an upward limit in fixing wages and everything above that limit was illegal simply because it was excessive. LORD BUCKMASTER at p. 590 pointed out the difficulty in drawing a line but said that the line had to be drawn somewhere. The borough council had not, he thought, based their decision :

> . . . upon the ground that the reward for work is the value of the work reasonably and even generously measured, but that they took an arbitrary principle and fixed an arbitrary sum, which was not a real exercise of the discretion imposed upon them by the statute.

In the present case the council exercised their powers coupled as they were with a duty to the ratepayers, with a great deal of care. The appropriate committees made inquiries to inform themselves about the practice of other large employers. There was no desire on the appellants part to be pioneers or model employers. They seem to me to have recognised that they were entrusted with a discretion which must be exercised reasonably and in the interest of the ratepayers. The council were manifestly, in my opinion, anxious to apply their minds to the facts with which they were faced. The non-manual employees had asked for an increase in their salaries to meet a rise in the cost of living. In the course of the negotiations the staff representatives put forward a scheme which would provide for a smaller addition to the cost of living bonus upon the condition that children's allowances were included in the scheme. It is true that nothing was said on the staff side to suggest that, if their suggestions were not accepted, they would resign their positions. In fact the children's allowance scheme would result in a lower expenditure than a flat rate addition to the cost of living bonus. But I cannot think that the council were only empowered to grant additions to salaries in response to a threat to strike or to resign. Yet something very like such a proposition seems to me to be involved in the argument for the respondent.

The fact that the plan ultimately approved by the council was cheaper than another proposal which the staff representatives were prepared to accept does not seem to me to be of much importance. No question of amount arises here. The attack made on the children's allowances was that they are wholly wrong in principle as not being in the words of LORD WRENBURY a "pecuniary return for services rendered." I do not think it is possible to accept that view. These payments to particular employees were part of what was their reward for the services they rendered. The fact that one got more than another, though each gave the same service, is not on the facts of this case indicative of illegality.

The so-called children's allowances are additions, in each particular case in which they are given, to the basic salary and cost of living bonus, though this part of the salary is calculated by reference to the needs and circumstances of each employee. Collective bargaining does not, in my opinion, exclude the consideration of personal or individual circumstances. If in order to obtain an efficient and satisfied servant the corporation thought it right to pay him an amount based in part on his expenses, I can see nothing illegal or unreasonable. It goes without saying after the *Poplar* case (1) that the amount might be so unreasonable, that is to say, so excessive as to be illegal. Once it is admitted, as it is here, that no objection can be made to the mere amount, I think the objections made by the auditor are bound to fail. To describe the payments as "a gratuity, and, therefore, unlawful," as the respondent does, is, with all respect to him, to beg the whole question. They were asked for and given as part of a settlement of a request for a revised scale of salaries, and were clearly intended in good faith to be paid as part of the consideration for services rendered.

On these grounds I am of opinion that the appellants should succeed in their appeals and the auditor's disallowance and surcharge should be quashed.

In these circumstances the question of a declaration under s. 230 of the Act does not arise. If my opinion on the main question had been in favour of the view taken by the respondent, I should have thought it right to make the declaration asked for, and indeed the respondent, we were informed, took no objection to such a declaration.

ATKINSON, J.: The Birmingham Corporation saw fit to remunerate in part certain of their non-manual servants during the year commencing Oct. 1. 1941, by a war bonus, the amount of which depended in part on the age of the servant and in part on whether the servant had children. It included 2*s.* 6*d.* per week for each child.

The auditor claimed that that part of the war bonus, the payment of which depended upon the fact of the recipient having a child or children, was beyond the statutory powers of the corporation and ought to be disallowed. He has, in fact, disallowed certain payments, amounting to £48 13*s.* 8*d.*, in the hope, I gather, of the council getting the view of this court upon the legality of the payments, and he has surcharged them upon certain members of the council.

Shortly stated, his contention is that the corporation have power to remunerate only for services rendered, and that the amount paid for children's allowances has no relation to the services rendered by the servants and, therefore, is not and cannot be regarded as remuneration, but in truth is a gratuity and is, therefore, unlawful.

Whether the remuneration is payable under the Rating and Valuation Act, 1925, or the Education Act, 1921, or the Public Assistance Order, 1930, or the Local Government Act, 1933, s. 106, seems immaterial. The power is to pay such reasonable remuneration, whether salary, wages or emoluments, as the council may determine: see *National Association of Local Government Officers* v. *Bolton Corporation* (2), at p. 178.

It was not suggested, at any rate in argument here, that there is anything unreasonable in the total amounts paid. It is not the amount which is criticised but the nature of and cause for the payments. On the other hand, the council contend that the payments challenged were strictly remuneration for services rendered and were paid as a result of negotiation to determine to what extent and in what manner the remuneration payable to servants of the corporation should be brought up to pre-war value.

The question whether children's allowances are properly payable as remuneration seems to me to depend on the facts. May I give two illustrations, which I imagine could not be open to challenge. If a corporation being disturbed at the declining birthrate passed a resolution declaring that they would pay every servant a bonus of 2*s.* 6*d.* per week for every child born 12 months after the date of the resolution, I think the auditor would have very good ground for disallowing such a bonus. It would have no relation to services rendered. But, on the other hand, if a servant says to the council: "The salary you are paying me is worth only two-thirds of what it was in pre-war days, I am expecting a child, and I cannot stay with you unless you will agree to pay me £10 a year more if and when the child comes, and a further £10 a year for each and every child I might have in future"—if those are the only terms upon which the corporation can keep men they want, it would be impossible to contend that the £10 increase per child was not remuneration for services rendered.

The facts here were as follows. By July, 1941, the cost of living had risen to a very material extent, or putting it in another way, the pound would not buy as much as in pre-war days, and, therefore, was of less value than it had been. The result was that the members of the staff of the city council found that the remuneration for their services was of considerably less value than it had been, although their services were of no less value. The problem of how that remuneration was to be brought more in harmony with the value of their services was discussed by a joint committee of staff and council representatives. The staff representatives said, in effect, that, while they thought that everyone was entitled to an increase of pay during the period of depreciated currency, the members who were worst hit by the reduced value of their remuneration, and who had, therefore, the greatest claim to an increase of remuneration, where those with children. The single man had only to face the increased cost of feeding, housing and clothing of one individual; the father of a family had to face the increased cost of feeding, housing and clothing several individuals. Their attitude was this: we men without children do not ask that our remuneration should be brought more nearly to pre-war value than to a slight extent, but we join with fathers of families, whose ranks they probably looked forward to joining, in asking that their remuneration should in some way be brought more nearly in harmony with its pre-war value, and the way suggested was an allowance for each child. The proposal was considered by the council representatives. They went into it carefully; they made many inquiries as to the practice of other large scale employers, and they were satisfied that an all-round advance could not be resisted and that the proposal would cost the council less that an all-round increase of the same amount. The joint committee recommended the salaries, wages and labour committee to adopt the proposal. That committee considered the matter and recommended the council to adopt it, which in the end they did. The result was that men between 21 and 24 got a further increase of only 2*s.* 6*d.* per week, men over 24 got 4*s.* 3*d.*, or approximately £11 a year, and men with children got a further weekly allowance of 2*s.* 6*d.* per child. There was already in existence a war bonus. These further payments brought the total war bonus for men between 21 and 24 up to £21 10*s.* a year, men over 24 to £26 a year, men with one child £32 10*s.* a year, and with two children,

£39, and so on. Now Smallman's salary and Wilkes' salary were especially mentioned by the auditor. Smallman's salary of £450 became £481 19*s.* 8*d.*, he got £31 19*s.* 8*d.*, and Wilkes got £20 10*s.* Wilkes' £20 10*s.* was made up simply of the old basic war bonus, plus the new basic war bonus. Smallman's pay consisted of those two war bonuses, plus payment for his two children. With the increase in the cost of living of 29 per cent. it cannot, of course, be said that £481 19*s.* 8*d.* in 1941-42 was worth as much as £450 in pre-war days.

The case of *Roberts* v. *Hopwood* (1) has been referred to for the principles which ought to guide a local authority in determining what salaries or wages they can pay. The House of Lords was dealing with an extreme case, a pre-war wage of 23*s.* 6*d.* was deemed equivalent to 43*s.*, with the cost of living 82 per cent. over that of 1914. However, the council had paid a sum of £4 all round, and the auditor in considering that figure accepted the 43*s.* plus £1 by way of margin, and disallowed anything paid over that amount.

In that case LORD BUCKMASTER said that the general rule applicable is that the council should pay such wages as they might think fit, the discretion as to the reasonable nature - and I stress that word—of the wages being with them, that their discretion was a very wide one and that the court ought to show great reluctance before they attempted to determine how the discretion ought to be exercised, but he said there must be a real exercise of the discretion imposed upon them in determining the value of the work reasonably and even generously measured. Further, he made this clear that the purchasing power of the sums paid was a relevant factor to be considered. LORD ATKINSON put that point in these words at p. 592 :

> It is but right and natural that the rate of wages should rise if the cost of living rises, because this tends directly to keep the purchasing power of the labourer's wage at what it was before the cost of living increased.

He went on to approve what BANKES, L.J., had said, that payments ought not to be far in excess of those necessary to obtain the services required and such excess is in reality a gift, in addition to remuneration for services. He went on to say something rather relevant I think to this case, that justice and common sense demanded that they should take into consideration external methods of fixing wages, whether by trade union rates, cost of living, payments of other local or national authorities or otherwise, and that they would fail in their duty if they put aside all these aids to the ascertainment of what was just and reasonable remuneration, and allowed themselves to be guided by some eccentric principles of socialistic philanthropy.

Remuneration must be that which is thought to be fitting and proper for the services rendered, and must be reasonable. LORD SUMNER emphasised the necessity of reasonableness and after pointing out that the courts are ill equipped to weigh the merits of one solution of a particular question as against the other, said the auditor was entitled to ask whether the council had been guided by aims and objects not open to them and to the extent to which they had in consequence exceeded a reasonable expenditure it was his duty to disallow it. His view seemed to be that the court cannot interfere unless the remuneration is both unreasonable in amount and unreasonable because the council have given weight to matters not open to them. LORD WRENBURY emphasised the view that anything beyond a reasonable pecuniary equivalent of the services rendered is not wages.

The problem presented to the council was, as I have said, that, while the services rendered remained of the same value, the salaries they were paying had become of less value. The currency in which the salaries were paid was depreciated in that the purchasing power was reduced. The Board of Trade index showed that the cost of living had gone up by 29 per cent., £100 was worth about £77 or, put in another way, £129 was required to do what £100 had done in the past.

To what extent was it fair and reasonable for an employer to make good that deficiency ? It is plain from the passages to which I have been referred that increased cost of living is a matter to which an employer ought to contribute meaning by " ought " that it would be unfair and unreasonable not so to do. If the council were entitled to contribute to the increased cost of living, surely it was for them to say to what extent and in what manner they would so contribute. If increased cost of living is a matter properly calling for the consideration of the employer, it must be relevant to ascertain to what extent any particular applicant or class of applicants is affected by the increase.

If the applicant lives in and is fed and housed by the employer an increase in pay might not unreasonably be refused. If he is a single man he is not affected as much as a married man with a family. The obligation to contribute to a deficiency in the salary of the latter must be greater than that of contributing to the deficiency in the salary of the former.

To my mind it is wholly wrong to say that the contribution has no relation to the services rendered or to the value of the services rendered. That value was fixed before the war and the contribution challenged was a step and only a step towards making good that value.

In the report on this matter of the salaries, wages and labour committee to the council I find this passage :

> As regards cost of living, although the Ministry of Labour index figures show that an increase of 29 per cent. has taken place since the outbreak of war, at no point in their application do the recommendations attempt to give more than a partial recompense for this.

I cannot see that the fact that Wilkes is content to accept an addition of £20 10*s*. to his salary of £450 because he has no children makes it unfair and unreasonable for Smallman to want and receive an addition of £31 19*s*. 8*d*. to his salary of £450 because having two children he is more badly hit by the depreciation of the purchasing power of that salary. It is not putting the matter accurately to say that the 5*s*. a week paid to Smallman was paid because he had two children or as a reward for having two children. It was paid to him because having two children he suffered more from the reduction in the true value of the salary paid to him than did Wilkes.

The fundamental fallacy in the auditor's view, I think, best appears in a short paragraph on p. 3 of his reasons :

> The addition of children's allowances imports into the payment "a motive of philanthropy or generosity stripped of commercial considerations" and is "an addition to the reasonable pecuniary equivalent of the services rendered" which is measured by the basic salary plus the basic war bonus. It is therefore not remuneration or salary within the meaning of the statutes but a gratuity and therefore unlawful.

There is no warrant whatever for saying that Wilkes' £20 10*s*. made his remuneration, or that a similar sum would have made Smallman's remuneration, the pecuniary equivalent of the services rendered, or for saying that that equivalent is measured by the basic salary plus the basic war bonus. The agreed pecuniary equivalent of the services rendered was £450 of pre-war value. An addition of 4½ per cent. when the cost of living has risen by 29 per cent. does not maintain or produce anything like that pecuniary equivalent, and Smallman's £31 19*s*. 8*d*., which was only an addition of about 7 per cent. left his remuneration still far below its pre-war value, and, therefore, far below the pecuniary equivalent of his services. To apply the test of LORD WRENBURY the payments challenged were in fact a contribution and only a contribution to the pecuniary equivalent of the services rendered. Applying the test suggested by LORD SUMNER, I cannot see how it can be said that the council were guided by objects and aims not open to them.

In my judgment, tested by any of the tests suggested in *Roberts* v. *Hopwood* (1), these payments were fair and reasonable. They had the clearest relation to the services rendered in that they were made to bring, and not wholly but only partially, the remuneration of the class most badly hit by the war up to pre-war value.

If the council had brought every salary right up to pre-war value, they would have been within their rights. That is clear from the *Poplar* case (1). If so, it must be within their power to bring some only of the salaries (the salaries of the hardest hit) up to pre-war value and, of course, still more must it be within their power to bring those salaries part way up to pre-war value.

I think the motion must succeed.

Appeal allowed. Leave to appeal to the Court of Appeal.

Solicitors : *Sharpe, Pritchard & Co.*, agents for *Sir Frank Wiltshire*, Town Clerk, Birmingham (for the appellants) ; *Bircham & Co.* (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

GOVER *v.* FIELD.

[COURT OF APPEAL (Scott, Luxmoore and Goddard, L.JJ.), **November 4, December 13, 1943.**]

Landlord and tenant—Rent restriction—Standard rent—Apportionment—County court decision final and conclusive—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), *s.* 12 (3)—*Increase of Rent and Mortgage Interest (Restrictions) Act,* 1938 (c. 26), *s.* 5.

The appellant was the lessee of a house which became controlled under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1939. Before 1939 she had let one room in that house at a rent of 11*s.* 6*d.* per week, but, on the coming into operation of the 1939 Act, the room was vacant and remained so until July, 1940, when it was let to the respondent at 10*s.* per week. In 1942 the respondent applied to have the standard rent of the room determined and the county court judge, apportioning the rent under sect. 12 (3) of the 1920 Act, as amended by sect. 5 of the 1938 Act, determined that the standard rent of the room was 3*s.* 8*d.* per week. In a subsequent proceeding to recover the amount of the rent overpaid, it was contended that the standard rent was wrongly determined :

HELD : under sect. 12 (3) of the 1920 Act the apportionment of the standard rent by the county court judge was final and conclusive and could not be questioned on appeal.

[**EDITORIAL NOTE.** The Act provides that a decision of the county court judge on the question of the apportionment of standard rent shall be final and conclusive. It is thus not subject to any appeal, even though the decision be wrong in law. The facts of this case and the decision show that not only are parts of houses in a very favourable position in respect of the apportionment of standard rent, but also that, even where a landlord lets a part of a house at a rent less than that obtained before it became a controlled house, he may still be charging a rent far in excess of the standard rent and, therefore, liable to be sued for repayment of overpaid rent. Further, the standard rent in such cases may be ridiculously low and the enactments as at present in force appear to work much injustice on landlords in this respect.

AS TO APPORTIONMENT OF STANDARD RENT, see HALSBURY, Hailsham Edn., Vol. 20, pp. 312-314, para. 369 ; and FOR CASES, see DIGEST, Vol. 31, pp. 564, 565. Nos. 7119-7127.]

Cases referred to :

(1) *Waterhouse* v. *Gilbert* (1885), 15 Q.B.D. 569 ; 29 Digest 494, *154* ; 54 L.J.Q.B. 440 ; 52 L.T. 784.

*(2) *Kimm* v. *Cohen* (1923), 40 T.L.R. 123 ; 31 Digest 573, *7210*.

APPEAL from a decision of His Honour JUDGE DRUCQUER given at Brentford County Court dated May 20, 1943. The facts are fully stated in the judgments.

E. L. Lane for the appellant.

R. S. Shove for the respondent.

SCOTT, L.J. : The court is agreed upon its conclusion in this appeal, but my brethren do not agree with the whole of my reasoning in matters to which I feel bound to call attention because of the importance to the public of the problems involved in the interpretation of the sections of this Act which have been considered.

The appeal discloses a case of great hardship, which it is difficult to suppose was within the mind of Parliament when it passed the relevant legislation. It arises out of the provision for fixing a " standard rent." I have read the judgments of LUXMOORE and GODDARD, L.JJ., and agree with their conclusion that the appeals must be dismissed ; but the result seems to me so unfair that, although I dismiss the appeal on the ground that there is no right of appeal to us from the fixing of the standard rent, I will state the reasons which, to say the least, make me doubt whether, on the proper construction of the statutes, Parliament intended it. Whether remedial legislation is either desirable or possible is not for me to say.

The facts can be stated shortly. Mrs. Gover was on Sept. 1, 1939, tenant of 119, The Grove, Ealing, upon the terms of a lease granted in 1934 and assigned to her by the lessees. That lease expired in 1939, and she remained on as tenant from year to year upon the same terms ; at what date in 1939 the lease expired is immaterial. The house was one which by reason of its rateable value was brought within the Rent Restriction Act of 1939, as from Sept. 1, of that year. For some time prior to July, 1939, she had let one room with certain conveniences, including water and light, for an inclusive weekly rent of 11*s*. 6*d*., to one Mackenzie, but in that month he ceased to be tenant.

When the new Act came into force she was in personal occupation of the whole house, no room being then sub-let, but on May 25, 1940, she let the same room to the respondent at 10*s*. 0*d*., a reduced and not an increased rent as compared with the rent that Mackenzie had paid.

For two years the rent was duly paid by the tenant and received by the landlady in the belief that there was nothing to interfere with their freedom of contract. On June 11, 1942, on an application by Field, under sect. 11 of the Act of 1923, the Brentford County Court, applying sect. 5 of the Act of 1938, declared that the standard rent of Field's room was 3*s*. 8*d*. weekly. This action for the recovery of over payments was then brought, and the trial judge gave Field judgment for £24 5*s*. 4*d*., being the difference between 10*s*. 0*d*. and 3*s*. 8*d*. on past payments of 10*s*. 0*d*. a week, doing this under sect. 14 of the Act of 1920, and sect. 7 (6) of the Act of 1938 (which extended to two years the period over which the tenant can get back overpayments of rent). However, he made this sum payable by deduction from future payments of current rent at 3*s*. 8*d*. a week and only gave leave for execution to issue upon default in that mode of payment. This condition of payment out of future rent is the subject of Field's cross-appeal. All figures were agreed, as were the relevant facts.

The argument of the appellant turned chiefly upon the proper interpretation of sect. 1 of the Act of 1920 as amended by the Act of 1939. As so amended the relevant words are as follows:

> Subject to the provisions of this Act [that is to say, the principal Acts as amended by the 1939 Act] where the rent of any dwellinghouse to which this Act applies has been since Sept. 1, 1939, or is hereafter [that is, after Sept. 1, 1939] increased, then, if the increased rent exceeds the standard rent by more than the amount permitted under this Act, the amount of such excess shall, notwithstanding any agreement to the contrary be irrecoverable from the tenant.

No question arises in the case about permitted increases.

Field's room when let in 1940 became "a separate dwelling" within sect. 12 (2) of the 1920 Act, as applied by sect. 3 (1) of the 1939 Act. At no time after the whole house had become controlled was the rent of Field's room ever increased; if the rent of the room before control when let to Mackenzie is relevant, the letting to Field effected a reduction of the rent. Indeed, it may be that the room was a separate dwellinghouse when Mackenzie had it, and that the rent of 11*s*. 6*d*. was, therefore, the standard rent. The argument for Field and the judgment of the county court judge were both based on the legal view that under sect. 1 of the 1920 Act the condition precedent, that there should have been an "increase of rent," is satisfied if, on a first creation of a separate dwellinghouse out of a larger house, by the letting of a part of the whole, the rent then fixed by agreement between the parties for the part is actually higher than the standard rent would be, if it were ascertained by the court by apportionment under sect. 5 of the Act of 1938. The argument for that view is very strong, but as applied in cases like the present it works such extreme hardship that I think the court should reject that conclusion unless the language of the relevant sections is absolutely clear. Except for one provision it is clear enough. That provision is sect. 5 of the Act of 1938.

Before dealing with that section I will state the considerations which make me think it inconsistent with the general scheme of the Acts when applied to such a case as the present. The word "rent" in sect. 1 of either the Act of 1920 or the Act of 1939 means rent in the ordinary sense—the periodic payment due from a tenant under his lease or other contract of tenancy; and the condition laid down in the section predicates an actual raising by the landlord of rent in that sense, whether it is the existing tenant whose rent is increased or a new tenant to whom the landlord has made the increased rent a term of his offer of a new tenancy. The wording of the section was different in the repealed Act of 1915. There sect. 1 (1) expressly dealt with any increase "above the standard rent as hereinafter defined"; and sect. 2 (1) (*a*) defined it as the rent at which the dwellinghouse was let on Aug. 3, 1914, or, if not then let, on the last previous letting (if any) or when first subsequently let; being the same provision as later in the 1920 and 1939 Acts with the necessary changes of date. The 1919 Act by sect. 2 allowed an increase of not more than 10 per cent., and by sect. 4 amended sect. 1 (1) of the 1915 Act, *inter alia*, by omitting the words "above the standard rent," to which I have called particular attention. Even if they had appeared in the Act of 1919, and had been repeated in 1920 and 1939 Acts I should have felt great difficulty in holding that the requisite of an increase of rent is satisfied without any actual increases of the new contractual rent over the previous contractual rent; but when the words of the 1915 Act were omitted by Parliament, I think the intention must have been to avoid any possible doubt, and to make it clear that the Act of 1919 only applied when an actual increase of rent had been made. The Act of 1939 merely left the crucial words of sect. 1 (1) of 1920 unaltered.

It would thus appear *prima facie* on the interpretation of the language of sect. 1 (1) of the 1920 Act, (upon which Field has to rely in order to make the excess over 3*s.* 8*d.* irrecoverable by the landlord and, therefore, if paid by the tenant, recoverable back by him from the landlord under sect. 16 of the 1920 Act, sect. 8 (2) of the 1923 Act, and sect. 7 (6) of the 1938 Act,) that there having been no actual increase of rent, Field could not succeed. Even if it be said that the above statutory language is not, as I think, clear, there are certain considerations which go to support my construction. (i) The Acts are all concerned with actual rents—with the amount of money payable as rent; and the expression "standard rent" does not mean a stereotyped actual rent, any more than the expression "minimum wage" in a statute means a stereotyped actual wage; it is merely an upward limit in the one case and a downward limit in the other. (ii) Under all the Acts, including that of 1939, the standard rent itself is *prima facie* ascertained in the first instance by reference to the actual rent (*a*) payable at a date named in the Act, or (*b*) the last rent previously paid, or (*c*) the first rent paid thereafter. In the 1915 Act it was Aug. 3, 1914; in the 1920 Act, passed on July 2, 1920, it was Mar. 20 of that year; in the 1939 Act, Sept. 1, 1939. (iii) The 1939 Act introduced a new criterion of control, namely, that of rateable value. This change had three effects; (*a*) it introduced control of houses as distinct from landlords; (*b*) it brought under protectional control all freehold houses within the rateable values named; (*c*) in the case of a "separate dwellinghouse," carved out of a freehold house, it made the actual rent of that part its standard rent, whether already let on Sept. 1, or when last previously let, or when first let at some subsequent date. To such a "dwellinghouse" sect. 5 of the 1938 Act could have no application. What the position of such a subsidiary "dwellinghouse" is when carved out of a larger house, not previously controlled, of which the occupier was not the freeholder but only a lessor or tenant, has not been the subject of judicial decision. I incline to think that, if the subsidiary dwellinghouse had been created and let at a rent before the house containing it came under control, that rent had become its standard rent, and, once so fixed under the previous Acts, remained its standard rent notwithstanding the 1939 Act. I take this view because sect. 5 of the 1938 Act has no application to it (since the containing house was not controlled, a pre-requisite of that section); and I think (not without doubt) that sect. 12 (3) of the 1920 Act is on that point to be construed on the same lines; that is to say, that there is not to be apportionment unless both houses the containing and the contained—are within the Acts. If I am right on this view, the standard rent of Field's room was 11*s.* 6*d.*, namely, the rent paid by Mackenzie.

The Acts contain no provision for a standard rent once notionally existing being subsequently varied by the court. The only question is whether the "house" constituted by Mackenzie's room, subsequently let to Field, possessed, even notionally, a standard rent. I incline to think that it did; but if it did, the judge made a mistake in attempting to apply sect. 5 of the Act of 1938. Anyhow it seems to me an extraordinary anomaly that the room should have a standard rent of 3*s.* 8*d.* when, if the whole house had been freehold and not leasehold or under tenancy, it would have been 11*s.* 6*d.*

How strongly what I venture to call the common sense construction of the Acts, at any rate of the Act of 1939, points to this interpretation may be seen if one takes a concrete illustration. Suppose two houses, Nos. 20 and 21, in a continuous London street of identical construction and internal accommodation, as is so often the case, each having the same rateable value as the appellant's house in the present case, so that both came under the 1939 Act on Sept. 1, 1939. No. 20 is the freehold of A., who lives in it; No. 21 is the leasehold of B., at £95 a year rent, and she lives in it. A. and B. both in Jan., 1939, let the front room on the ground floor to a weekly tenant at 11*s*. 6*d*. In each case the tenant went out before Sept., 1939, and neither room was re-let till May, 1940, when each let to a new tenant at 10*s*. 0*d*. In my view, the room in the freehold house became in Jan., 1939, a "separate dwellinghouse," and then acquired the status of a room with a standard rent of 11*s*. 6*d*.; and it still had that status on Sept. 1, 1939, and that was its standard rent for ever—or till Parliament passed a new Act. Can it be said that A.'s room had a standard rent of 11*s*. 6*d*., and B.'s of 3*s*. 8*d*.? The anomaly would be outrageous if it could. Unless the language of the Acts is too clear to escape that result, the illustration serves to show that the judge went wrong in applying sect. 5 of the Act of 1938 to the appellant's house.

The question may be examined from another angle. It is not quite certain that the Act of 1939 incorprates the whole of the Act of 1938, especially sect. 5. The principal Acts were continued in force by sect. 1, and were applied by the Act subject to modification, but the Act of 1938 was not a "principal act," and the Act of 1939 did not make it one. It is true that sect. 12 (3) of the Act of 1920 as modified in 1939 was incorporated, but the question of sect. 5 of the 1938 Act does not seem to have been considered. But I express no opinion on this point.

In the result it is left, to say the very least, in doubt how far sect. 5 of the Act of 1938 has any application to the 1939 Act houses which have had a room previously let; but for the purpose of our decision on these appeals that inquiry is academic. Parliament has made the determination of a standard rent by the county court judge final and conclusive; (see sect. 12 (3) of 1920 and sect. 5 of 1938); and as the county court judge fixed these two standard rents at 3*s*. 8*d*. and 3*s*. 4*d*. respectively by an adjudication *in rem*, those two rooms have been given the permanent status of "dwellinghouses" with standard rents of 3*s*. 8*d*. and 3*s*. 4*d*. respectively, and as Parliament has said that the decision of the county court judge shall be "final and conclusive," no appeal would have lain from him to us against the fixing of the standard rent: (see *Waterhouse* v. *Gilbert* (1), and particularly the judgment of the court at p. 571). I am not satisfied that the judge's decision was right; but nobody now can say that it was wrong. A mere error in law is no ground for going behind his "final and conclusive" decision. I should add that the question of appeal from the standard rent is not before this court, and I deliver this judgment on the footing that it had been fixed; and, it having been fixed, there is no means on an appeal for the recovery of overpayments of going behind that fixing.

I agree with the judgment proposed by **Luxmoore** and **Goddard**, L.JJ. The appeal will be dismissed with costs.

Luxmoore, L.J.: Mrs. Gover took an assignment on Feb. 14, 1938, of a lease of 119, The Grove, Ealing, created by a lease dated Apr. 16, 1934, and made between one Annie Fowler of the one part and Beulah Elsie Cottrell and E. M. J. Norfolk of the other part. The term of the demise was five years from Lady Day, 1934, with the option of extension for a further term of five years from the last mentioned date. The rent reserved was £95 payable quarterly on the usual quarter days. There is nothing unusual either in the lease or the assignment. Mrs. Gover did not exercise the option to extend the original term, but remained in occupation and became a tenant from year to year from Mar. 25, 1939, upon the terms of the original lease. The rateable value of the house is £95. The house became controlled under the Rent and Mortgage Interest (Restrictions) Act, 1939 hereinafter referred to as the Act of 1939) and then fell into that class which is usually referred to as "1939 houses." It had not previously been controlled. On May 25, 1940 the respondent became a subtenant of the appellant of one room in 119, The Grove, at a weekly rent of 10*s*. This room had before Sept. 2, 1939, been sub-let to one Mackenzie at a weekly rent of 11*s*. 6*d*. Mackenzie's sub-tenancy terminated in July, 1939. The room was not again sub-let until it was let to the respondent on May 25, 1940.

On June 11, 1942, the county court, at the instance of the respondent, declared that the standard rent of the room which was then occupied by him as a separate dwelling was 3*s*. 8*d*. per week. This declaration was admittedly made under sect. 12 (3) of the Act of 1920 as amended by sect. 5 of the Act of 1938. It is common ground that as from Sept. 29, 1938, the standard rent of a controlled dwellinghouse which forms part of another controlled dwellinghouse is always to be fixed by apportionment and not in accordance with the unamended provisions of sect. 12 (1) (*a*) of the Act of 1920. Sect. 12 (3) of the Act of 1920 provides that:

> Where for the purpose of determining the standard rent or rateable value of any dwellinghouse to which this Act applies, it is necessary to apportion the rent at the date in relation to which the standard rent is to be fixed, or the rateable value of the property in which the dwelling house is comprised, the county court may, on the application of either party, make such apportionment as seems just, and the decision of the court as to the amount to be apportioned to the dwellinghouse shall be final and conclusive.

Sect. 5 of the Act of 1938 provides that:

> Where a dwellinghouse to which the principal Acts apply is part of another dwellinghouse to which those Acts apply the standard rent of the first-mentioned dwellinghouse as from Sept. 29, 1938, shall be a standard rent ascertained by apportioning the standard rent of the second-mentioned dwellinghouse and sub-sect. (3) of of sect. 12 of the Act of 1920 shall apply accordingly notwithstanding that the first mentioned dwellinghouse was let as a separate dwellinghouse on or before Aug. 1, 1914, or on or before the date on which the second-mentioned dwellinghouse was first let.

It is to be observed that 119, The Grove did not become a controlled dwellinghouse until Sept. 1, 1939, but the room which had been occupied by Mackenzie down to July, 1939, was probably a controlled dwellinghouse under the earlier Acts, the standard rent being 11*s*. 6*d*. The room let to Field was not let on Sept. 2, 1939, and was not again let so as to become a separate dwellinghouse until May 25, 1940. The apportionment under the provisions mentioned was as already stated duly made on June 11, 1942.

The respondent instituted proceedings in the Brentford County Court to recover the sum of £24 5*s*. 4*d*., being the excess of the total rent paid by him to the appellant at the rate of 10*s*. per week from May 25, 1940, to Mar. 12, 1942, over and above the aggregate of the standard weekly rent of 3*s*. 8*d*. calculated over the same period. The action was tried by His Honour JUDGE DRUCQUER, who decided that the respondent was entitled to recover from the appellant the sum claimed. He ordered that the appellant should pay the said sum by deduction from the respondent's current rent of 3*s*. 8*d*. a week and should also pay the costs which were ordered to be paid on scale A by deduction from the respondent's current rent of 3*s*. 8*d*. a week beginning a week after the debt of £24 5*s*. 4*d*. has been paid.

The appellant has appealed to this court against this order and there is a cross-appeal of the respondent asking that the order may be varied by directing that the respondent do recover against the appellant the said sum of £24 5*s*. 4*d*., and the costs therein to be taxed on Scale B and that the said sum and the taxed costs be paid by the appellant Gover to the respondent forthwith. The hearing of the cross-appeal stood over until after the delivery of the judgment in the main appeal. The claim to recover the alleged overpayments is based on sect. 14 of the Act of 1920 as amended by the provisions set out in Sched. I to the Act of 1939. The material words are:

> . . . any sum . . . which is by virtue of this Act . . . irrecoverable by the landlord.

To ascertain to what these words refer it is necessary to consider sect. 1 of the Act of 1920 as amended by sched. I to the Act of 1939. The section as amended reads as follows:

> Subject to the provisions of this Act, where the rent of any dwellinghouse to which this Act applies . . . has been, since Sept. 1, 1939, or is hereafter, increased, then, if the increased rent . . . exceeds . . . the standard rent the amount of such excess shall . . . be irrecoverable from the tenant.

The appellant's contention is that the rent referred to in this section is the contractual rent agreed before the date of the control, and that unless this contractual rent has been increased after the material date the section has no operation. The main basis of this argument is that the words of the section to be construed differ from those to be found in sect. 1 in the Act of 1915 in that the words "above the standard rent" in the last mentioned section have been omitted from sect. 1 of the Act of 1920. It is to be observed that the omission of these words leaves sect. 1 of the Act of 1920 silent as to the criterion to be applied in deciding whether or not there has been an increase of rent. Strictly speaking, in a case where a standard rent is fixed under the Acts for a particular dwellinghouse it is impossible legally to have another and higher rent for the same dwellinghouse, and, if there is a standard rent in existence, it is impossible in the *prima facie* meaning of the words to have the rent of such dwellinghouse increased, although, of course, the landlord and tenant may agree to increase it, and in that sense, if there is a contract to let at a rent higher than the standard rent after the date when the standard rent came into existence, it may be said that the rent has been increased since the material date. If the meaning for which the appellant contends be the true meaning of the section, the whole object of the Acts would appear to be defeated, for although provision is made for the fixation of the standard rent, yet the difference between it and the agreed rent would not on the argument be irrecoverable because what is claimed to be the condition precedent of the Act, namely, the increase of the previous agreed rent to an agreed rent higher than the previous rent, would not be satisfied, and the standard rent referable to the dwelling house in question would in substance be replaced by the agreed rent so long as the previous agreed rent was not exceeded. In my judgment the appellant's contention is incorrect. I think the phrase "where the rent of any dwellinghouse to which the Acts apply has been since Sept. 2, 1939, or is hereafter increased" can properly be construed as referring to an increase above the standard rent attached or attachable to the dwellinghouse to be considered at the named date. Here the single room constituting the dwellinghouse was not part of another controlled dwellinghouse until Sept. 2, 1939, and consequently until that date sect. 5 of the Act of 1938 had no application and the standard rent of the room was, I assume, the 11*s*. 6*d*. a week payable by Mackenzie. Sect. 5 of the Act of 1938 was brought into operation automatically on the whole dwellinghouse becoming a controlled dwellinghouse on Sept. 2, 1939, by reason of the passing of the Act of 1939, and thereupon, although no apportionment was made, the standard rent of the room became 3*s*. 8*d*. a week because the subsequent apportionment in July, 1940, related back to that date, and consequently when Mrs. Gover agreed to let the room to Field for 10*s*. a week in May, 1940, the 10*s*. was then an inincreased rent having regard to the standard rent though the last mentioned rent was only ascertained at a later date. I find myself in complete agreement with the judgment of the county court judge on the construction of the material section.

It was said that the point was a new one, but the decision in *Kimm* v. *Cohen* (2) seems to me to cover it. In that case, the plaintiff, in Mar., 1921, let three rooms in a house to the defendant at a weekly rent of 20*s*. At the time of the letting the standard rent of the three rooms had not been ascertained. In Jan., 1923, the plaintiff sued the defendant for £11 arrears of rent. The county court judge held that the onus was on the defendant to prove the standard rent, and the hearing was adjourned to enable the defendant to obtain an apportionment under sect. 12 (3) of the Act of 1920. This was done, and on Apr. 20, 1923 the apportioned rent was fixed at 11*s*. 7*d*. per week. The defendant counterclaimed for the difference between the 20*s*. and the 11*s* 7*d*. over a period of 86 weeks, that is, from the date of the original letting to the date of the plaint. The county court judge held there could be no overpayment until the apportionment had been made, and he gave judgment for the plaintiff for the £11 and dismissed the counterclaim. On appeal to the Divisional Court, of which SANKEY and TALBOT, JJ., were the members, the court held that the apportionment operated retrospectively and the defendant was entitled to recover the overpayments from the date when his tenancy started. No point appears to have been made that the rent of 20*s*. was not an increased rent over any previous rent, but this does not affect the decision as to the retrospective effect of the apportionment.

For these reasons, I am of opinion that the appeal against the decision of the county court judge in this case fails. It will consequently be necessary to consider the cross-appeal of the respondent Field.

GODDARD, L.J. [read by LUXMOORE, L.J.]: The plaintiff is a tenant of a room in a house belonging to the defendant, who herself is a lessee. Before Sept. 1, 1939, the house was not subject to control. The room with which this action is concerned had, when the house was uncontrolled, been let at 11*s.* 6*d.* a week. The room was vacant on Sept. 1, 1939, and in July, 1940, the room previously let at 11*s.* 6*d.* was let by the defendant to Field at 10*s.* Meanwhile, as the rateable value of the house was under £100, it had become controlled on Sept. 1, 1939. After the plaintiffs had been in occupation for some two years it occurred, or more probably it was suggested, to them to apply to have the standard rent of their rooms ascertained. Rooms in a controlled house are in a curiously favoured position. While the standard rent of the whole house depends on the contractual rent which was being paid on Sept. 1, 1939, or if not then let, on the rent obtained on a previous letting, or if never before let, on the rent at which it was first let thereafter, the standard rent of rooms let as separate dwellings is, by sect. 5 of the Act of 1938, to be ascertained simply by apportionment and without regard to rents paid on previous lettings or when the rooms were first let. The standard rent in Field's case turned out to be 3*s.* 8*d.*, and the plaintiff in the action claimed the difference between the sum which he had paid and the amount he would have paid if the letting had been at the standard rent. The question raised depends on the construction of sect. 1 of the Act of 1920 which, however, must be read in the light of sect. 14 of the Act of 1920 and sect. 5 of the Act of 1938.

Sect. 1 as amended in point of date by the Act of 1939 provides that where the rent has been increased since Sept. 1, 1939, then, if the increased rent exceeds the standard rent, the amount of the excess shall be irrecoverable. The question is, increased beyond what ? Unlike sect. 1 of the Act of 1915, the section does not say increased beyond the standard rent, and, if the section stood alone, I should have felt able to give effect to the argument submitted for the defendant, for the rent has not been increased since the material date. It has in fact been decreased from that which previously obtained. But previous rents have no bearing on the standard rents in the case of rooms. The tenant had the right to go to the courts and get the standard rents fixed by apportionment, and there can be no doubt, I think, that once the standard rent has been fixed the tenant could not thereafter be required to pay more. The standard rent operates *in rem*, as has more than once been held in this court. The effect of that is that the standard rent attaches from the moment when the house is brought under control. There was always from Sept. 1, 1939, a standard rent applicable to the whole house, and there must accordingly always have been a standard rent attaching to any room which could be ascertained, though no one knew what it was until an application was made to fix it. Indeed, in *Kim* v. *Cohen* (2), it was expressly held by a Divisional Court that the apportionment operates retrospectively and, in my opinion, the decision was right. Therefore, it seems to me that anything over that sum is made irrecoverable and we are bound to read sect. 1 of the Act of 1920 in the same way as did the judge, with whose careful reserved judgment I feel constrained to agree. Like him I feel the decision imposes a great and unmerited hardship on the defendant. That in letting this room at a reduced rent it ever occurred to her or to her tenant that she was doing anything forbidden by this legislation, I do not suppose could be suggested. Looking at the Act of 1939 as a whole, I think its object was to stabilise rents at the figures then existing, and I cannot help thinking that, being passed in the hurry that it was with a very large number of other Acts when war was imminent, the position with regard to rooms separately let in controlled houses was overlooked. The extraordinary result seems to follow that, had the former tenant, who was paying 11*s.* 6*d.* remained in occupation, he could, directly control was imposed, have gone to the courts and got the standard rent of his room fixed, with the result that the contractual rent would have been reduced by about two-thirds.

Counsel for the respondent said that, if the former tenant had remained in possession, he could not have refused to pay the contractual rent, but I cannot see why he should not have made the application to fix the standard rent, nor why, if he had, the rent would not have thus been cut down. These Acts are as difficult and complicated as any on the Statute Book, and people who let rooms or small houses, and are often themselves in quite a humble station of life, find to their cost that they are engaged in a perilous business. They cannot be expected to know all the provisions of these Acts or to understand them if they do know of them, and in the present case a woman whose good faith is in no way assailed finds herself suddenly called upon to repay something like two-thirds of the rent she has been receiving from her lodger over a period of two years at least, and is, moreover, obliged to keep him at the reduced rent, which she probably would never have agreed to accept. I cannot think that Parliament ever contemplated such a state of affairs, but, if this be the result of the legislation, the courts cannot refuse to give effect to it.

Appeal dismissed with costs. The cross-appeal was settled but the court expressed their view that the county court judge had no jurisdiction to make an instalment order in this case.

Solicitors: *King & Corbyn* (for the appellant); *Parker, Thomas & Co.* (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

EVANS *v.* THE BRITISH DOUGHNUT CO., LTD.

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J., and Atkinson, J.), **November 30, 1943.**]

Food and Drugs—Trade description—Egg substitute—"Equivalent in use to 12 eggs"—Whole description to be considered—Merchandise Marks Act, 1887 (*c.* 28), *s.* 3.

The respondents were charged under the Merchandise Marks Act, 1887, with unlawfully applying a false trade description to a packet of food inasmuch as it was described on the packet as being equivalent in use to 12 eggs. A label on the packet bore the following: "Contains dried egg (Foreign) Contents equivalent in use to 12 eggs." The respondents contended that, in order to ascertain whether the wording was a trade description within the Act, it was only permissible for the court to look at so much of the words as formed part of the charge, and they argued that those words were only a statement as to the value of the food in question and not as to the material of which the food was composed, and the description was not, therefore, a trade description within the Act:—

HELD: (i) in determining whether the label amounted to a trade description within the Act, it was permissible for the court to look at all the words on the label.

(ii) the words were indicative of the material of which the food was composed.

[**EDITORIAL NOTE.** The words "trade description" might not by themselves be sufficient to refer to the nature and quality of the goods, but rather to the trade class within which they fall. The definition in the Act is, however, very wide, and it is held that a statement of the nature of the article sold is a trade description.

AS TO FALSE TRADE DESCRIPTIONS, see HALSBURY, Hailsham Edn., Vol. 32, pp. 673, 674, para. 985; and FOR CASES, see DIGEST, Vol. 43, pp. 244-245, Nos. 873-875.]

APPEAL by the Crown by way of case stated from a decision of magistrates for the county of Montgomery. The facts are sufficiently stated for the purposes of this report in the judgment of VISCOUNT CALDECOTE, L.C.J.

N. Parkes for the appellant.

C. R. Havers, K.C., and *C. E. Rochford* for the respondents.

VISCOUNT CALDECOTE, L.C.J.: The respondents were prosecuted for that they did:

> . . . unlawfully apply a false trade description to goods, to wit, a packet of "Eggstead", inasmuch as it is described on the packet as being equivalent in use to 12 eggs.

It was proved that the following words appeared on the label of the packet: "Contains dried egg (Foreign) Contents equivalent in use to 12 eggs." The contention was then made by the respondents, and the magistrates accepted the contention without going into the merits of the case—by which I understand them to mean, without considering whether the description was false or not—that the wording used on the packet forming the subject of the charge was not a trade description.

The prosecution was brought under the Merchandise Marks Act, 1887. In sect. 3 of that Act the expressions "trade description" and "false trade description" are defined as follows:

> The expression "trade description" means any description, statement, or other indication, direct or indirect, (*a*) as to the number, quantity, measure, gauge, or weight of any goods, or (*b*) as to the place or country in which any goods were made or produced, or (*c*) as to the mode of manufacturing or producing any goods, or (*d*) as to the material of which any goods are composed, or (*e*) as to any goods being the subject of an existing patent, privilege, or copyright, and the use of any figure, word, or mark which, according to the custom of the trade, is commonly taken to be an indication of any of the above matters, shall be deemed to be a trade description within the A meaning of this Act . . .
>
> "False trade description" means a trade description which is false in a material respect as regards the goods to which it is applied.

The contention of the respondents was that the words which I have read from the label on this packet of food were not a trade description within the meaning of sect. 3 (1) of the Act. It seems to me impossible to say in this case that the words on this packet of food were not a trade description. I do not B think it is right to confine oneself to the words which are relied upon as showing that the trade description was a false one. I think it is proper for the magistrates to look at the words on the packet of food as a whole. If that had been done in the present case they would have found the words: "Contains dried egg (Foreign) Contents equivalent in use to 12 eggs." The totality of those words seem to me clearly to make it impossible to come to the decision C that those words were not an indication, direct or indirect, as to the material of which the goods are composed, because in the plainest terms there is a description that they contain dried egg (foreign).

It is quite true that, having found that the label, as a whole, is a trade description, for the purpose of seeing whether it is a false trade description the words, "Contents equivalent in use to 12 eggs" are material. Counsel for the respondents has submitted that that is only a statement as to the value of the substance D as an article of food, and that the words "value," "quality," and "use" are not in the section. He says that these words, which are relied upon as being relevant to the question of the falsity of the trade description, are only a statement as to the value of the food in question and not a statement as to the material of which the food in question is composed.

For the reason I have mentioned, however, that you must look at all the words upon the label to see whether it is a trade description before you come E to the question of whether it is a false trade description, I think the magistrates were wrong in their construction of these words and, therefore, the case should go back to them with an intimation of our opinion in order that they may consider whether the description was in a material respect false.

ATKINSON, J.: I agree. It seems to me that, even if one confines one's attention to the precise words complained of, one cannot ignore the context F in order to determine whether or not the words complained of come within the definition of trade description. It seems to me quite plain that the words, read with the context, are an indication as to the material of which the goods are composed.

Appeal allowed with costs.

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *G. R. D. Harrison*, Welshpool G (for the appellant); *Durrant, Cooper & Hambling* (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

R. *v.* WOODWARD.

H [COURT OF CRIMINAL APPEAL (Viscount Caldecote, L.C.J., Atkinson and Tucker, JJ.), **December 8, 1943.**]

Criminal Law—Trial—Counsel assigned to prisoner—Brief returned—Second counsel assigned to prisoner shortly before trial—Request by prisoner to conduct his own case—Poor Prisoners' Defence Act, 1930 (c. 32).

A prisoner had been granted legal aid under the Poor Prisoners' Defence Act, 1930. The counsel allotted to him returned his brief and another counsel was allotted to him shortly before trial. The prisoner, thinking the latter counsel was not properly acquainted with all the facts of the case, asked to be allowed to conduct his own defence. The Assistant Recorder refused this request and the case for the prisoner was conducted by the second counsel:—

Held: the refusal of the prisoner's request was wrong and, in the circumstances, he should have been allowed to conduct his own case.

[**EDITORIAL NOTE.** This is a short point of practice in the administration of justice in criminal matters. Where counsel allotted to a prisoner at the last moment finds himself unable to take the case, the prisoner may, if he so desires, conduct his A own case.

As to Legal Aid, see HALSBURY, Hailsham Edn., Vol. 9, pp. 105, 106, para. 137; and for Cases, see DIGEST, Vol. 14, pp. 247, 248, Nos. 2406-2413.]

Case referred to:

(1) *R.* v. *Maybury* (1865), 11 L.T. 566; 3 Digest 345, *344*.

Appeal from a conviction of receiving property knowing it to have been B stolen and of larceny. The report is not concerned with the facts of the case but only with the right of the prisoner in certain circumstances to conduct his case after counsel has been assigned to him.

T. K. Edie for the appellant.

J. L. Gamgee for the Crown.

Viscount Caldecote, L.C.J.: This is a somewhat unusual case. The C appellant, who was convicted of one charge of receiving stolen property knowing it to have been stolen, and of two other charges of larceny, complains that he was convicted after a trial at which, against his will, he was forced to have counsel to defend him. The fact seems to have been that counsel had been allotted to him under the Poor Prisoners' Defence Act, and the counsel allotted to him had returned his brief, and the papers had been handed to another counsel.

After the prisoner had pleaded not guilty to the charges, the counsel to whom D the papers had been handed said that he appeared for the defendant, and after a little conversation as to whether the counsel was ready to proceed with the case, the prisoner said:

> I would rather not have legal aid. I would rather conduct the case myself. It is a matter of life and death, as will come out later on. I have been connected with the law for 42 years; and it is not fair to me to go on with this case without seeing counsel. E

Then in answer to the Assistant Recorder the prisoner said that he ought to be allowed to conduct his own case.

At later stages in the course of the trial the prisoner twice intervened to make some observations, or to ask a question of a witness, and he was told by the Assistant Recorder that he was in the hands of his counsel, and that he would be very well advised to leave those matters to counsel's discretion. Later on, upon the question of sentence, the prisoner made some observation as to the F want of evidence about a statement made by a witness, and the Assistant Recorder said: "I must preserve order; you are represented by counsel."

It is said on behalf of the prosecution that, once counsel has been briefed and is seised of the case, whatever that may mean, a prisoner is not in a position to repudiate counsel and to claim the right to conduct his defence for himself. We think that no person charged with a criminal offence can have counsel G forced upon him against his will. If counsel conducts a case and deals with a particular witness or with witnesses, still more if he conducts the case so far as to address the jury for the defence, a prisoner is not in a position to say that he wishes to take over his own defence, and to claim the right to put questions to witnesses who have already been examined, still less to supplement the remarks which counsel has already made by observations of his own. But nothing of that sort took place in this case. The prisoner right at the beginning said that H he wished to defend himself, on the quite intelligible ground that he had not had an opportunity of seeing the counsel who was going to appear for him, and he was refused what we think was his right to make his own case to the jury instead of having it made for him by counsel.

We have been referred to *R.* v. *Maybury* (1) in which something was said by Cockburn, C.J., as to the necessity for clients to adopt one of two courses; they must decide either to conduct their cases in person or to place themselves in the hands of counsel. I find it difficult to derive much assistance from that observation of COCKBURN, C.J., which was made with reference to the facts of that case, because it appears that counsel desired to withdraw from the case, and he was allowed to withdraw from the case, and the client then addressed the court on his own behalf.

We think that the refusal of the Assistant Recorder to let the prisoner claim the right to make his own case was wrong, and it resulted in an injustice to the prisoner. In these circumstances, although there was a good deal of evidence against the prisoner, we think that it is impossible that his conviction should stand, and the conviction, therefore, will be quashed.

Conviction quashed.

Solicitors: *Registrar of the Court of Criminal Appeal* (for the appellant); *Beale & Co.* (for the Crown).

[*Reported by* R. BOSWELL, ESQ., *Barrister-at-Law.*]

MARSH *v.* COMMISSIONER OF POLICE AND McGEE.

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J., Macnaghten and Tucker, JJ.), **November 25, 1943.**]

Inns—Innkeeper's lien—Luggage—Ring handed to innkeeper as security for bill.

A guest came to a hotel on Nov. 24, 1942, and stayed there until Nov. 29, 1942. In these few days he incurred a considerable bill for food and lodging. The only possessions he brought with him were two suit cases, the value of which and their contents amounted only to £20, less than one-third of his bill. On Nov. 25, 1942, he obtained possession of a diamond and sapphire ring on approval from a firm of jewellers and, being unable to meet his bill, he handed the ring to the hotel proprietors as security for the payment of the bill. He was later arrested and convicted of larceny of the ring. The true owners claimed the ring back, but the proprietors claimed to exercise an innkeeper's lien upon it:—

HELD: since the hotel proprietors did not receive the ring as part of the guest's luggage, they were not entitled to exercise an innkeeper's lien upon it.

[**EDITORIAL NOTE.** The common law required an innkeeper to receive a guest and gave him a lien upon his luggage in respect of the expenses incurred in lodging and feeding the guest. The sole question here is whether the ring was received as part of the guest's luggage. While no doubt a guest may add to the luggage originally brought to the inn, it is held that the ring here in question was not part of the luggage, but a valuable thing handed over as security for the debt incurred.

AS TO INNKEEPER'S LIEN, see HALSBURY, Hailsham Edn., Vol. 18, pp. 160-164, paras. 222-230; and FOR CASES, see DIGEST, Vol. 29, p. 20, Nos. 252-255.]

Case referred to:

(1) *Cheesman* v. *Exall* (1851), 6 Exch. 341; 37 Digest 8, *36*; 20 L.J.Ex. 209.

APPEAL by way of case stated from a decision of the magistrates sitting at Feltham, Middlesex. The facts are fully set out in the judgment.

A. E. Beecroft for the appellant.

Horace C. Fenton for the respondents.

VISCOUNT CALDECOTE, L.C.J.: In the case stated, the Ritz Hotel is found to be an inn within the meaning of the Innkeepers Act, 1878. On Nov. 24, 1942, a guest came and stayed there until Nov. 29, running up a considerable bill for food and lodging. He brought two suit cases with him of which the value was less than one-third of his bill. On Nov. 25, he obtained possession of a diamond and sapphire ring on approval from the Goldsmiths and Silversmiths Co., the appellants, and on Nov. 28 this guest was asked to pay his bill. He was unable to do so, and he then produced and handed over the ring to the hotel as security for payment of the bill.

Some weeks later the guest was arrested and convicted of larceny of the ring. The true owners of the ring, the Goldsmiths and Silversmiths Co., then claimed the return of the ring to them. The hotel claimed to exercise the lien which it is said, in its character of innkeeper, it had upon the ring. There was no suggestion that the hotel knew of the circumstances under which the guest had come into possession of the ring.

The law as to an innkeeper's lien is not at all in doubt. An innkeeper is given a lien upon the luggage or property of the guest which the guest brings with him to the inn. I think that there is no distinction at all between personal luggage and luggage so far as the lien is concerned. If the guest brought a motor car with him, the lien would extend to that. The innkeeper is given this right or privilege at common law but it is limited, in my judgment, to the articles which the inkeeper receives and upon which he is in a position to put his hand. In this particular case there can be no doubt whatever that the lien extended to the two suit cases valued at £20. The question is whether it extended to the ring.

The special case finds that the guest produced and handed over the ring to the hotel as security for payment. I draw the inference from that statement that up till that moment the ring had not been in the custody of the innkeeper nor had it been received by him as part of the guest's luggage or property which he had brought with him to the inn. The case stated then adds this :

> . . . and the same was received and retained by the hotel in its character of innkeeper as a lien for the amount of such bill.

I think that statement is to a great extent an opinion on a matter of law, and, if it is to be treated as a finding of fact, it seems to me to be inconsistent with the facts found in the early part of that paragraph of the case. On the facts it is quite clear that the innkeeper did not exercise an innkeeper's lien upon this ring for the simple reason that he was never in a position to do so. The guest, owing a bill which he was unable to pay, merely handed over valuable security to the innkeeper for the purpose of the debt which he owed to the innkeeper.

Counsel for the appellant has relied, first of all, on the point that this was not an article upon which an innkeeper's lien could be exercised. I think that is wrong, and, if this had been part of the luggage which the guest brought with him —whether it was separated from the rest of the property or whether it was kept with the rest of the property, does not seem to me to matter—I think he might have exercised his lien upon it. But I base my judgment upon the view which I take that the ring had never been received as part of the guest's luggage and, therefore, the innkeeper was never in the position to exercise a lien.

If a man pledges property belonging to another person to somebody, even to an innkeeper, the latter cannot retain it against the real owner of the property who may interpose and claim delivery of that property. That is supported by what Pollock, C.B., said in *Cheeseman* v. *Exall* (1), at p. 343 :

> If a person pledges with another property to which he has no title, and which he has no right to pledge, the real owner may interpose, and get possession of the property.

and be the pledgee an innkeeper or ordinary person I think the rule of law is the same.

In this case I think that the article received was not part of the guest's luggage and that the opinion at which the magistrates arrived was wrong in point of law and that the appeal must be allowed.

Macnaghten, J. : I agree.

Tucker, J. : I agree.

Appeal allowed.

Solicitors : *McKenna & Co.* (for the appellant) ; *Leslie J. Griffin* (for the respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

CURZON OFFICES, LTD. *v.* INLAND REVENUE COMMISSIONERS.

[KING'S BENCH DIVISION (Macnaghten, J.), **October 19, 20, 21, 1943.**]

Revenue—Stamp duty—Transfer of leasehold property from one associated company to another—Repayment of purchase price guaranteed by third company—Share capital of transferee company acquired by third company—Whether consideration for transfer indirectly provided by third company—Finance Act, 1930 (*c.* 28), *s.* 42—*Finance Act,* 1938 (*c.* 46), *s.* 50.

A parent company transferred certain leasehold property to its subsidiary company, of which it owned the whole share capital, in accordance with an arrangement made with an investment company that part of the price should be paid in cash and the remainder left on mortgage and that the investment company should, on the day following this transaction, purchase the whole of the share capital of the transferee company. The investment company also guaranteed the repayment of a sum advanced by a bank to enable the transferee to repay to the transferor the cash portion of the purchase price of the property together with an existing debt. It was submitted by the Crown that the consideration for the transfer had been indirectly provided by the investment company and that the arrangement came within the restriction imposed by the Finance Act, 1938, s. 50, on relief from stamp duty on transfers from one associated company to another :—

HELD : under the arrangement made with the transferor the investment company had provided the consideration for the transfer of the property. The transfer was, therefore, chargeable with *ad valorem* stamp duty.

[**EDITORIAL NOTE.** The Finance Act, 1930, s. 42, gave relief in the matter of stamp duty in the case of transactions between associated companies. The Finance Act, 1938, s. 50, enacted that such relief was not to be given where the consideration for the transfer or conveyance was provided directly or indirectly by anyone other than the associated companies. The transaction here is a little complicated, but in effect it is held that, where a third party arranges credit for the consideration by a guarantee, it indirectly provides the consideration. Here in addition to the guarantee, the third party was purchasing the whole share capital of the transferee company, so that a default by the transferee in meeting its obligations would diminish the value of the purchased shares and this adds a further reason for holding that the consideration is provided by the third party.

AS TO TRANSFERS BETWEEN ASSOCIATED COMPANIES, see HALSBURY, Hailsham Edn., Vol. 5, p. 813, para. 1387.]

CASE STATED under the Stamp Act, 1891, s. 13, by the commissioners of inland revenue.

The facts are fully set out in the judgment.

Frederick Grant, K.C., and *M. L. Gedge* for the appellant.

The Attorney-General (*Sir Donald B. Somervell, K.C.*), *J. H. Stamp* and *Reginald P. Hills* for the respondents.

MACNAGHTEN, J. : The question for the opinion of the court is whether any, and, if any, what amount of stamp duty is chargeable on a transfer dated Mar. 30, 1942, whereby, in consideration of £568,078, Humphreys, Ltd., as beneficial owner transferred to the appellant, Curzon Offices, Ltd., certain leasehold property known as Chelsea Cloisters, Sloane Avenue, in the Metropolitan Borough of Chelsea.

Humphreys, Ltd. was registered on Dec. 9, 1891, under the Companies Act, 1862, as a company limited by shares. It has a fully paid share capital of £200,000, and at all material times has carried on the business of builders and contractors. At the date of the transfer, Mar. 30, 1942, Humphreys, Ltd. was the owner of Chelsea Cloisters subject to a legal charge dated July 26, 1937, in favour of the National Provincial Bank. On Nov. 3, 1938, the appellant, Curzon Offices, Ltd., was registered under the Companies Act, 1929, as a private company limited by shares, with a capital of £100, divided into 100 shares of £1 each. Humphreys, Ltd. subscribed for and took up the whole of that share capital. At the date of the transfer the appellant was the owner of certain leasehold property known as Curzon Street House in Curzon Street in the City of Westminster. Humphreys, Ltd., had built Curzon Street House for the appellant and £286,596 was owing by the appellant to Humphreys, Ltd., on that account. This debt was secured by a charge dated May 17, 1940. By a sub-charge of the same date Humphreys, Ltd., had transferred the benefit of that charge to the National Provincial Bank.

In 1941, Humphreys, Ltd., entered into negotiations with regard to these two properties with a company called Regis Property Co., Ltd., which had a subscribed capital of £725,000. In March, 1942, these negotiations resulted in the following arrangement between the parties, namely, that if Humphreys, Ltd., sold and transferred Chelsea Cloisters to the appellant on terms approved by the Regis company, and if Curzon House still remained the property of the appellant, then Humphreys, Ltd., should sell, and the Regis company should buy, the whole of the share capital of the appellant for £100. The Regis company approved the sale of Chelsea Cloisters by Humphreys, Ltd., to the appellant on the terms that the price should be £568,076, and that part of the price, £238,404, should be paid in cash and the remainder, £329,672, should be left on mortgage of both Curzon Street House and Chelsea Cloisters. Since the National Provincial Bank held a charge on the Chelsea Cloisters, the proposed transaction could not be carried out without its concurrence. The bank was willing to release its charges on both the properties and advance to the appellant the sum of £525,000, which the appellant needed to pay the debt of £286,596 which it owed to Humphreys, Ltd., for the erection of Curzon Street House, and £238,404, the amount of that part of the purchase price of Chelsea Cloisters which it was arranged should be paid in cash, provided that, immediately on the transfer of Chelsea Cloisters to the appellant, that company executed a legal charge on both the properties to secure repayment of the £525,000 and all other advances made to the appellant by the bank, and that both Humphreys, Ltd., and the Regis company guaranteed the repayment of the £525,000. The transaction was carried out in accordance with this arrangement.

On Mar. 30, 1942, Humphreys, Ltd., executed the transfer of that date and handed it to the appellant, the bank having released, in accordance with the arrangement, the charges which it held on that property and on Curzon Street House. Thereupon, the appellant immediately executed the following charges on the two properties, (1) a first charge in favour of the bank to secure all sums of money owing by the appellant to the bank on any account whatsoever; (2) a second charge in favour of Humphreys, Ltd., to secure £297,102, subject to the first charge; and (3) a third charge in favour of Humphreys to secure £50,000. On the same day, Mar. 30, the appellant drew a cheque on the National Provincial Bank in favour of Humphreys, Ltd., for £525,000. Humphreys, Ltd., cashed the cheque and in accordance with the arrangement applied £238,404 in part payment of the price of Chelsea Cloisters and took £286,596 as the amount due in respect of Curzon Street House.

The transfer is admittedly a conveyance on sale within the meaning of the Stamp Act and would have been chargeable with the *ad valorem* stamp duty of one per cent., but for the fact that Humphreys, Ltd., was the beneficial owner of the whole of the share capital of the appellant and that by the Finance Act, 1930, s. 42, the stamp duty under that heading is not chargeable on a conveyance from one limited company to another company, where one of the companies is the beneficial owner of not less than 90 per cent. of the issued share capital of the other company. However, by the Finance Act, 1938, s. 50, it was provided that sect. 42 of the Finance Act, 1930, should not apply to any such instrument unless it were shown to the satisfaction of the Commissioners of Inland Revenue that the instrument was not executed in pursuance of or in connection with an arrangement whereunder the consideration for the transfer or conveyance was to be provided directly or indirectly by a person other than the company, which, at the time of the execution of the instrument, was associated with either the transferor or the transferee, and there follows an explanation of what is an associated company.*

Admittedly the Regis Property Co., Ltd., was not, at the date of the transfer of Mar. 30, an "associated company" either with Humphreys, Ltd., or with the appellant, although under the arrangement which had been made between the parties it was to become an "associated company" with the appellant on the next day when the rest of the arrangement was carried out. The Regis company gave the bank a guarantee for the repayment of the £525,000 advanced by the bank to the appellant and an agreement was executed between Humphreys, Ltd., and the Regis company for the sale and purchase of the share capital of the appellant for £100. This agreement was duly implemented by the transfer of the shares to nominees of the Regis company, and thus the Regis Property Co., Ltd., became beneficial owners of all the shares in the appellant company. The Commissioners of Inland Revenue were not satisfied that the transfer was not executed in pursuance of or in connection with an arrangement whereby the consideration for the transfer of Chelsea Cloisters was to be provided directly or indirectly by the Regis company, and they accordingly held that the *ad valorem* stamp duty was payable on the transfer.

Counsel for the appellant submitted that on the facts as stated by the commissioners it was plain beyond all reasonable doubt that no part of the consideration was provided either directly or indirectly by the Regis company and that the decision of the commissioners was, therefore, erroneous. The Attorney-General in answer to that submission pointed out that the Regis company had to provide indirectly that part of the price which was paid in cash by reason of its guarantee of the repayment of the £525,000, out of which the cash portion of the purchase price was, in fact, paid. To that argument counsel for the appellant replied that the amount paid in cash was not the whole of the consideration, and that, in the Finance Act, 1938, s. 50, the word " consideration " ought to be read as meaning the whole of the consideration and that on the facts set out in the case it was clear that the value of Chelsea Cloisters and Curzon Street House was so great that the Regis company would never be required to implement its guarantee.

I do not think that either of these points is valid ; but in my opinion, on the facts stated by the commissioners, the Regis company had to provide, under the arrangement made with Humphreys, Ltd., the whole of the consideration for the transfer of Chelsea Cloisters to the appellant. The matter may be tested in this way. Part of the purchase price remained on mortgage. If and when Humphreys, Ltd., called upon the appellant to pay off the mortgage, who was going to provide the money ? The Regis Property Co. might, of course, provide it out of its own resources and in that case it would be providing the purchase price directly ; or it might provide the money out of the resources of the appellant. If it provided the mortgage money out of the resources of the appellant the result would necessarily be that the value of the shares of the appellant would, *pro tanto*, be diminished, and I think anyone, whether a lawyer or not, would say that in those circumstances the Regis Property Co., Ltd., indirectly provided the money required to pay off the mortgages.

One other matter seems to me relevant to this discussion. Under the arrangement between Humphreys, Ltd., and the Regis company, the price which Humphreys, Ltd., was to charge for the property to its subsidiary, the appellant, was to be approved by the Regis company. Why did the Regis company require that the price should be subject to its approval ? Because the price, whatever it might be, would diminish *pro tanto* the value of the assets of the appellant and, therefore, would, *pro tanto*, diminish the value of the shares which the Regis company was to buy. If that is a correct view of the transaction, as it seems to me it is, the opinion which the Commissioners of Inland Revenue formed is plainly right.

In my view, therefore, the answer to the question submitted to the court must be the same as that which the Commissioners of Inland Revenue gave, namely, that the transfer is chargeable with *ad valorem* stamp duty payable under the Stamp Act on a conveyance on sale, and the appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors : *Ashurst, Morris, Crisp & Co.* (for the appellant) ; *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* GWYNEDD LEWIS, *Barrister-at-Law.*]

Re LIABILITIES (WAR-TIME ADJUSTMENT) ACT, 1941. *Re* AFFAIRS OF KIRBY.

[Court of Appeal (Scott, MacKinnon and Goddard, L.JJ.), **November 2, 3, December 15, 1943.**]

Emergency Legislation—Adjustment order—Rent—Extension of tenant's term—No extension beyond contractual term—Continuance of term after forfeiture for non-payment of rent—Liabilities (War-Time Adjustment) Act, 1941 (*c.* 24), *s.* 8.

The debtor was the lessee of 4 houses at a total rent of £885 per annum, in which she carried on the business of a boarding-house keeper. On Apr. 26, 1940, the landlord obtained judgment for possession and arrears of rent. He did not ask for leave to proceed under the Courts (Emergency Powers) Acts until Apr. 23, 1942, when it was granted to him. The landlord did not take any further step to obtain possession and on Sept. 24, 1942, the debtor applied for an adjustment order and a protection order was at once made. The leases expired on Mar. 25, 1943, and on Mar. 23, 1943, the county court made an adjustment order in respect of the affairs of the debtor. The adjustment order made provision for the landlord obtaining possession of the premises on or after May 1, 1943, but made no provision for the payment of his arrears of rent as required by the Liabilities (War-Time Adjustment) Act, 1941, s. 8 (1):—

Held: provision should have been made in the adjustment order for the rent due from date of the protection order to the date of the expiry of the lease but not longer, and also for proof in respect of the rent and mesne profits recoverable under the judgment of Apr. 26, 1940.

[**EDITORIAL NOTE.** The Courts (Emergency Powers) Acts grant jurisdiction to stay a landlord taking possession of property during the currency of the lease, but they have not the effect of the Rents Acts in continuing the tenancy beyond its contractual term. After the determination of the tenancy, an action for possession would be an action in trespass to which the Emergency Acts do not apply. It is here held that the Liabilities (War-Time Adjustment) Act is similarly restricted and the county court has no power in an adjustment order to extend the term of a tenancy.

For the Liabilities (War-Time Adjustment) Act, 1941, s. 8, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 34, p. 34.]

Case referred to:

*(1) *Butcher* v. *Poole Corpn.*, [1943] 1 K.B. 48; [1942] 2 All E.R. 572.

Appeal from two orders of His Honour Judge Davies, K.C., made at Bloomsbury County Court, and dated Mar. 23 and May 4, 1943, respectively. The facts are fully set out in the judgment of Scott, L.J.

C. E. Rochford for the appellant.

Valentine Holmes for the respondent, the Liabilities Adjustment Officer.

Scott, L.J.: These two appeals, which we heard together, raise common questions of importance relating to the extent to which the rights and obligations of landlord and tenant are modified or subject to alteration under the Liabilities (War-Time Adjustment) Act, 1941. The respondent, Mrs. Kirby, is the debtor, and I will refer to her as that. The appellant is the 12th Duke of Bedford, to whom, with his predecessor the 11th Duke, I will refer as "the lessor." It is necessary to consider the general scheme of the Act and several of its sections, but the main question turns on the proper interpretation of sect. 8 (1) of the Act, the whole of which I shall read presently.

The debtor, a widow, was at the outbreak of war in possession, as lessee of the 11th Duke of Bedford, of two pieces of land, one carrying Nos. 12 and 13, Montague Street, W.C.1., and the other carrying Nos. 28 and 29 in the same street, each under a lease for fourteen years from Mar. 25, 1929, at £450 a year for Nos. 12 and 13, and at £435 a year for Nos. 28 and 29. On July 3, 1942, the 12th Duke of Bedford succeeded to the reversion of the leases which were then due to expire on Mar. 24, 1943. It is unnecessary to distinguish between the 11th and 12th Dukes. The contention of the lessor, both below and before us, was that the liability adjustment order made below ought to have included a provision for securing to him payment of his arrears of rent and mesne profits. He now asks us to insert that term in the order.

The debtor's business was that of a hotel or boarding-house keeper. The war impaired her business and she got into arrears *inter alia* with payment of her rents to the lessor. On Apr. 26, 1940, the lessor obtained judgment for possession under both leases and for arrears of rent and for the cost of work done to the premises; but the lessor made no attempt under the Courts (Emergency Powers) Acts to get leave to enforce the judgment and he continued thus to leave her for two years in undisturbed possession. On Apr. 23, 1942, he did obtain leave under those Acts and could, therefore, at any time thereafter have got his writ of possession under R.S.C., Ord. 47. Again, however, he did nothing and left the debtor in occupation. On Sept. 24, 1942, the debtor for the first time applied to the county court for a liabilities adjustment order, and on the same day the court made a protection order under the Liabilities (War-Time Adjustment) Act, 1941, s. 3, and directed the adjustment officer to report; but even after that the lessor made no attempt to terminate the debtor's occupation of the demised premises. On Jan. 23, 1943, the liabilities adjustment officer reported. On Mar. 23, 1943, two days before the two leases were due to expire, the court made a liabilities adjustment order. It included provisions for the realisation of certain assets of the debtor and also provided that, after May 1, 1943, the lessor should be at liberty to enforce his judgment for possession, to enforce which he had, nearly a year before, obtained leave under the Courts (Emergency Powers) Acts. This provision was intended to operate as an extension of the leases.

On Apr. 7, 1943, the lessor's solicitors gave notice to the debtor and the liabilities adjustment officer of an application to vary the liabilities adjustment order, and on Apr. 14 the court gave leave to amend the application, so as to include a claim by the lessor for mesne profits in respect of the demised premises from the date of the protection order until possession should be given up by the debtor. The court also stayed distribution of assets under the order of Mar. 23, and in effect allowed the debtor to remain in possession till May 4, and fixed that day to hear the amended application.

By the amended application delivered on Apr. 16, the lessor asked for mesne profits at the rate of the two rents, namely, £450 for Nos. 12 and 13, Montague Street, and £435 for Nos. 28 and 29. The lessor's grounds were set out almost as in a statement of claim. By paras. 4 and 5, it is said that, notwithstanding the order of Apr. 23, 1942, giving leave to enforce possession, the debtor had remained in possession of the said premises until the date of the protection order on Sept. 24, 1942; and also thereafter by virtue of the protection order until the liabilities adjustment order of Mar. 23, 1943, and again thereafter under and by virtue of that order: but had made no payment in respect of her occupation of the premises since the lessor's judgment for possession of Apr. 26, 1940.

On May 4 the court refused the lessor's application for mesne profits, although it stayed distribution of assets until further order and adjourned the hearing of the debtor's application for a liabilities adjustment order, pending the lessor's appeal to this court. The debtor finally gave up possession on June 24, 1943, everything being kept *in medio* till then.

Sect. 8 (1) of the Act is as follows:

> Where the court exercises its powers so as to allow the debtor to remain in possession of any property, or postpones the realisation of any property, it shall make provision in the liabilities adjustment order for securing the payment of any sums payable by the debtor in respect of the property after the date of the protection order, subject to any variation of any lease, contract or mortgage affecting the property made by or under this Part of this Act, and in particular for securing: (*a*) the payment of rent, rates and taxes; (*b*) the payment of mortgage interest and any sums payable in respect of the amount secured by a mortgage; (*c*) in a case where the property is an insurance policy, the payment of premiums on the policy.

Counsel for the appellant, both below and before us, contended (i) that the court had by the protection order so "exercised its powers" as to allow the debtor to remain in possession of all four houses from the date of the protection order until the date when she went out; or, alternatively (ii) that, by the liabilities adjustment order of Mar. 23 and later orders, it had done so; and (iii) that, under the above subsection, the court was compelled to direct payment to the lessor of the arrears of rent or mesne profits which had accrued due. In the course of the hearing a question was raised, I think by the court, as to whether the debtor should be regarded as having any title to the land or as being a mere trespasser, as from various alternative dates; and this suggestion involves a consideration of the Liabilities (War-Time Adjustment) Act as a whole.

Counsel for the respondent, appearing on the instructions of the Treasury Solicitor for the liabilities adjustment officer, who had been, with his consent, made a party to the appeal, I understood to support the orders of the court as made. The interpretation of the Act in its bearing on the present issues is far A from easy, and, although I have arrived at definite conclusions, I confess to a lingering doubt about one. I think the most helpful approach is to consider first the scope and application of the word "powers" in the subsection; and that throws one straight on to the whole conception of the functions of the court, as indicated in the Act.

It is common knowledge that the passing of the Act was due to the difficulty the courts felt in administering the "merciful" jurisdiction of the Courts B (Emergency Powers) Acts without causing unintended hardships to creditors and others not before the court, who were likely to be affected by the reliefs given by the courts to debtors needing protection or indulgence. It was often felt by the courts that bankruptcy was on balance the better form of relief, just because relief could there be given to the bankrupt without causing so much hardship to other sufferers from the debtor's impecunious position. The C Liabilities (War-Time Adjustment) Act, 1941, was intended to be a middle course allowing relief to debtors in alleviation of pecuniary misfortunes caused by the war, whilst observing that equality of consideration for creditors, which is characteristic of bankruptcy administration, without imposing the stigma of bankruptcy on the debtor.

The functions and powers under the Liabilities (War-Time Adjustment) Act, 1941, wisely intrusted to the county courts because of their bankruptcy D experience, are in many ways analogous to those in bankruptcy; but they also necessitate the exercise of the emergency powers of the High Court under the Courts (Emergency Powers) Acts; and in that I regard the provisions of sect. 3 (2) (c) and sect. 6 (1) as specially fundamental, as they give the county court all the powers of the High Court under those Acts. The essential features of bankruptcy jurisdiction are conferred by sects. 3 to 13 inclusive. In the former jurisdiction are two features of peculiar relevance to the present appeal. By E the Courts (Emergency Powers) Act, 1939, both legal proceedings and measures of self-help available to landlords for recovery of rent or of possession of land for non-payment of rent are forbidden without leave of the court; and the effect of that Act was to create in the tenant a *quasi*-right to possession, and to immunity from rent or mesne profits, which continued so long as the court did not give the landlord leave to proceed by either road—courts or self-help. F

By the Act of 1940 this resultant semi-title or semi-immunity was carried a little nearer towards the establishment of something like a real statutory right in the tenant; for the Courts (Emergency Powers) Amendment Act, 1940, s. 1 (1), was as follows:

> Where an application is made by the lessor . . . for leave to exercise any of the rights or remedies mentioned in sect. 1 (1), (2) or (3) of the [1939] Act, being a right or remedy arising in consequence of a default in the payment of rent or mesne profits . . . the G court . . . shall not make the leave conditional on any default in the payment of rent or mesne profits falling due after the date of the hearing of the application . . .

Subsect. (2) carried the aspect to which I am referring still further:

> Where the . . . court refuses leave . . . to enforce a judgment or order for the recovery of possession . . . in default of payment of rent . . . the lease shall be deemed not to have been forfeited and shall continue in force so long as the judgment or order H remains unenforceable, but no longer.

Whether those subsections apply to a tenancy agreement as well as a lease, it is, in the present case, unnecessary to inquire, as we are only concerned with leases. Now comes a very important link between the two branches of "relief" legislation which ties them together. As I have already said, the Liabilities (War-Time Adjustment) Act, 1941, s. 3 (2) (c) makes the Liabilities Adjustment Court the court for those Acts with all the powers of the court under those Acts.

But there are two further points. The refusal of leave under those Acts causes a lease to continue to exist as a lease, when, but for the act of the court, it would have ceased to operate. Secondly, mesne profits, though at common law mere damages for retaining unlawful possession, seem to be treated as a debt on a parity with contractual rent accrued or accruing due by reason of the statutory extension of the lease. And it should be observed that the Liabilities (War-Time Adjustment) Act, 1941, s. 3 (2) (*c*), is in a part of the section relating to the exercise of " powers " to make a protection order and to the legal results of such an order. This operative effect of a protection order is considered also in sect. 6 (1), which provides for its inclusion in a liability adjustment order ; and is there expressly applied not only to leases, but also to a " holding over " by virtue of either the Rent Restrictions Acts or the Courts (Emergency Powers) Acts.

The result is that the county court seems, at first sight, to be authorised to keep a debtor in possession after his contractual right to possession has ceased even by the expiration of the term of his lease. At first I was inclined to think that that inference was justified by the references to " mesne profits " and " holding over " ; but the judgment of GODDARD, L.J., has convinced me that the inference would be erroneous. I agree with him that the interference by the Courts (Emergency Powers) Act of 1939 with a landlord's contractual and common law powers is limited to the term during which but for the Act they could operate uncontrolled ; and that the court is given no power to convert a mere trespass into a rightful possession in the sense of making it cease to be tortious.

The Act expressly excludes proceedings in tort from its purview. This aspect of those Acts was emphasised by this court in *Butcher* v. *Poole Corpn.* (1). For these reasons, I think the court's order of Mar. 23, 1943, that the debtor might remain in possession was only valid for the two days to Mar. 25, when the lease came to an end by effluxion of time. From then onwards the court had no power to allow her to remain in possession. The consequence is that the duty imposed on the court by the Liabilities (War-Time Adjustment) Act, 1941, s. 8, to order payment of the rent extended only down to that date, for from then onwards the court had no power which it could exercise within the opening words of sect. 8 (1) :

> Where the court exercises its powers so as to allow the debtor to remain in possession of any property . . . [the exception or condition imposed by the words] . . . subject to any variation of any lease . . . made by or under this part of this Act . . .

refers, for instance, to sect. 6 (1), which permits a reduction of the contractual rent, in the discretion of the court, within certain limits. Had the rents of the demised premises been so reduced, the amount payable to the lessor under sect. 8 (1) would have been at the reduced rate. Apart from any such reduction or any postponement of payment under the Courts (Emergency Powers) Acts, or this Act, sect. 8 (1), in my view, makes it obligatory on the court to order payment of the contractual rent, including arrears at the rate of £450, and £435 per annum respectively as from Sept. 25, 1942.

In my opinion, the language of sect. 8 (1) is quite clear and unambiguous ; but, if there be any doubt, I should point to two supporting considerations. The first is the power conferred on the court by sect. 6 (1) to reduce the landlord's rent if fairness to other creditors or to the debtor requires it, although this power is limited to the case of the tenancy being preserved under the Courts (Emergency Powers) Acts, or by the Rent Restrictions Acts. The second is that, as a lessor is not technically a secured creditor, Parliament may well have thought it only fair to him, if he is by war-time legislation to be deprived of the special remedies that the ordinary law allows him, that he should be given the special consideration of sect. 8 (1) to mark the difference of his position from that of the really unsecured creditor. For these reasons I think sect. 8 (1) should be construed as I read it ; and that the appeal should, to that extent, succeed. The payment should only be down to Mar. 25, 1943. I would add that the court greatly welcomes the assistance of Treasury counsel in cases where the liabilities adjustment officer is a party to the appeal.

MACKINNON, L.J. : I agree with the judgment of SCOTT, L.J., and I also agree with the judgment of GODDARD, L.J., which I am about to read.

Goddard, L.J. [read by **MacKinnon, L.J.**]: The facts have been fully set out in the judgment of Scott, L.J., and I need not repeat them. But for convenience I will recapitulate the essential matters and dates. The judgments for possession, which were based on forfeiture for non-payment of rent, were given on Apr. 26, 1940. Leave to proceed on these judgments was given on Apr. 23, 1942. On Sept. 24, 1942, the debtor applied to the court for the adjustment and settlement of her affairs under the Act, and a protection order was made on the same day. The report of the liabilities adjustment officer was made on Jan. 23, 1943.

On Mar. 23, 1943, the court made an adjustment order and therein provided that the landlord might enforce his judgment for possession on or after May 1, 1943. On Mar. 25, the term for which the two leases had originally been granted, expired. On Apr. 7 the landlord applied to the court to stay the order of Mar. 23 on the ground that it made no provision for securing payment of the rent as required by sect. 8 (1) of the Act. At the same time the debtor applied for a further extension of time for giving possession. On May 4 both these applications were refused. The distribution of the debtor's assets and the further consideration of the whole matter of the adjustment order were stayed till after the hearing of this appeal by the landlord, who contends that the court was bound to provide in the order for payment of his rent or mesne profits.

I think it is necessary, and it will, at least, be of assistance, to consider in what capacity the debtor held over, or must be regarded as having held over after the judgment. The first period is from Apr. 26, 1940, to Sept. 24, 1942. During the whole of that period, in my opinion, she must be regarded as a tenant at sufferance. Had an application been made during that period for leave to proceed and leave had been refused, the lease would have been deemed to be continuing for so long as the judgment remained unenforceable: Courts (Emergency Powers) Act, 1940, sect. 1 (2), now replaced by Courts (Emergency Powers) Act, 1943, s. 3 (2). But, when application for leave to proceed was made, it was granted, so leave never was refused and consequently the leases were never during this period preserved by that Act.

From Apr. 23, 1942, to Sept. 24 of that year, the debtor was a tenant at will, or perhaps on sufferance; at any moment the landlord might have sued out a writ of possession and recovered the land. On the making of the protection order the tenant remained in possession by virtue of the Act, because the order automatically stayed execution; see sect. 3 (1). The effect of this seems to be that the parties were back into the same position as in Apr., 1940; the landlord had a judgment, but he could not proceed to execution without leave. The protection order contained no special reference to the leases, and at this time the debtor was not holding over by virtue of the Courts (Emergency Powers) Acts, so sect. 6 (1) of the adjustment Act did not apply to the position. But as the court did deal with the leases in the adjustment order that must, in my opinion, be regarded as operating retrospectively so that the lease must be deemed to have been continuing in force. I say this because the county court under sect. 3 (2) (c) becomes the court for the purpose of giving leave to proceed, and as on Mar. 23 it in effect refused leave to proceed till a later date, I think the leases must be considered to have remained in force by virtue of the section in the Courts (Emergency Powers) Act, to which I have referred above.

From Sept., 1942, therefore, the debtor remained in possession as a tenant under the leases which had become revived, the appropriate court having refused leave to enforce the judgment. It is curious that this situation should result simply because of the great consideration, indeed, generosity, shown by the landlord to the debtor. Had he proceeded to execute his judgment when he obtained leave in Apr., 1942 (and there is no reason to suppose that he might not have got leave, if he had asked for it, much earlier), the present state of affairs would not have arisen, and it may be that it will discourage landlords from behaving with such consideration in future, but with this we have nothing to do. The immediate question for our decision arises under sect. 8 (1), and the above analysis of the position seems to me to show that it was by reason of the court making the protection order that the debtor remained in possession of the property in question. I am unable to see anything that obliges us to read the words "exercises its powers" in the section as referring only to the making of the adjustment order. The court is not bound to make a protection order merely because it is asked to do so. The court has to be satisfied that a *prima facie* case for one is made out, but as soon as it does make the order the effect is to keep the debtor in possession unless and until the court otherwise orders. The court is then bound to make provision in the adjustment order for securing payment of sums payable by the debtor in respect of the property after the date of the protection order, and, in my opinion, those sums are rent because the leases were revived.

But now comes the question of the period for which, in this case, the sum is payable. It begins with the date of the protection order, Sept. 24, and, if the court had power to continue the debtor in possession till May 1, that would be the period. But whether the court had this power is, I think, one of considerable difficulty, because the term of the leases expired on Mar. 25.

First, let us consider the position under the Courts (Emergency Powers) Act. That Act does not give the court power to stay execution where a landlord obtains a judgment against a tenant whose term has expired by effluxion of time. It operates only, as far as recovery of land is concerned, where possession is claimed by reason of non-payment of rent. Suppose, then, an action brought in 1942 for the recovery of land based on forfeiture for non-payment of rent in the case of a lease, the term of which, but for the forfeiture, would expire on Mar. 25, 1943. (I am assuming, of course, that it is not a house to which the Rent Restrictions Acts apply). The landlord gets judgment, but the court refuses leave to proceed. The lease then is deemed not to have been forfeited and continues in force so long as the judgment remains unenforceable. But, in my opinion, this section is not intended to extend the lease beyond the term for which it was granted. It is not intended to create a statutory tenancy of the nature created by the Rent Restrictions Acts. If a tenant holds over after his lease has expired against the will of the landlord he is a mere trespasser; his possession is tortious, and the Courts (Emergency Powers) Acts would have no application to any judgment obtained in these circumstances. The whole scope of the Act is to deal with inability to pay money or perform obligations by reason of war conditions and circumstances. In this connection I would refer especially to *Butcher* v. *Poole Corpn.* (1)

In my opinion, the Courts (Emergency Powers) Act, 1939, s. 1 (2) must be read as meaning that the lease is to continue as though it had not been forfeited so long as the order refusing leave to proceed remains in force, but cannot be regarded as extending the term granted by the lease. Accordingly, when in the case supposed Mar. 25, 1943, arrived, in my opinion, the landlord could then issue a writ claiming possession, and it would be no objection to that action that leave to proceed in the previous action for forfeiture had been refused. To hold otherwise would be to increase the scope of the Act and make it applicable to judgments in actions for tort. Exactly the same considerations should apply, in my opinion, to the Liabilities Adjustment Act. Its title and its whole structure show that its object is the arrangement, adjustment and settlement of the affairs of persons financially affected by the war. Financial embarrassment cannot by any process of thought be said to have any relation to trespass on another's property, even where the trespass is the failure or refusal to go out on the expiration of a term of years. The scope of the Act is wider, no doubt, than the Courts (Emergency Powers) Act, because it operates to stay execution in respect of any judgment, and so would apply to a judgment for damages recovered in respect of a tort. Such a judgment would constitute a provable debt as it would in bankruptcy.

The words in sect. 3 (2) " for the recovery of possession of land " are immediately followed by " or of goods let under a hire-purchase agreement," and this seems to me strongly to point to the fact that what the legislature had in mind was recovery of possession of land for non-payment of rent. In respect of goods there is no prohibition against bringing an ordinary action of detinue; what is prohibited is the recovery of goods under a hire-purchase agreement, where the right to recover the goods usually, though admittedly not invariably, arises owing to the non-payment of money. Otherwise a financially embarrassed squatter could hold up proceedings taken against him by a dispossessed owner, at least temporarily, by going to the court *ex parte* and making out a case that his financial troubles were caused by the war, and getting a protection order which would stay the action of trespass.

Even if the section does effect a stay of proceedings against one who is a bare trespasser, in my opinion, the court, when making an adjustment order, has no jurisdiction to extend the debtor's occupation of the property beyond the term of the lease. It follows that the court ought not to have protected the debtor beyond Mar. 25. and consequently the order ought to be varied in that respect and provision ought to have been made for securing the rent from Sept. 24, 1942, to Mar. 25, 1943, but not for any longer period. For any period after that date during which the debtor remained in possession the landlord can pursue any remedy the law gives him. As the rent under the two leases amounted to £885 per annum it follows that the sum to be secured is about £445, as it is for a period of just over six months. This being the result, I think the whole case ought to be remitted to the county court judge for further consideration, because, as an adjustment order will have to provide for this payment to one creditor in addition to the amount of his provable debt for arrears of rent and mesne profits under the judgment, and for rent during the time the debtor was a tenant on sufferance, it may be that he will consider that it is not practicable or proper to make an order. I do not mean to indicate any opinion whatever as to whether he should or not, but I think counsel for the respondent was justified in saying that this was a possibility that we ought not to ignore, and that, therefore, the case should be sent back for further consideration in the light of the judgment of this court. A B C

Case remitted to county court for further consideration in accordance with these judgments.

Solicitors: *Taylor & Humbert* (for the appellant); *The Treasury Solicitor* (for the respondent).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

D

BROWN *v.* STAFFORD.

[Court of Appeal (Lord Greene, M.R., MacKinnon and Goddard, L.JJ.). **December 20, 1943.**]

Emergency Legislation—Discovery in aid of execution—Examination as to means—Jurisdiction to make order for examination while suspension order is operative—"Party entitled to enforce the judgment"—Courts (Emergency Powers) Act, 1939 (*c.* 67), *s.* 1—*R.S.C., Ord.* 42, *r.* 32 E

By a deed of compromise, dated Feb. 20, 1940, the respondent agreed to pay to the appellant £7,000, of which £200 was to be paid on Feb. 20, 1940, and the balance of £6,800 by monthly instalments of £25 each, the whole sum to become payable in default of payment of any instalment. F The parties further agreed that the deed was to be treated as having become due under a pre-war contract, with the result that the Courts (Emergency Powers) Acts then in force applied to it. The respondent paid £200 but made no further payment and on Jan. 13, 1941, the appellant issued a writ to recover the balance of £6,800, and on Feb. 24, 1941, obtained judgment by default. He then applied for leave to issue execution and on May 21, 1941, the master gave leave to enforce the judgment but suspended G it so long as the respondent should pay £100 a month beginning on June 2, 1941. On appeal the order was varied by substituting £25 a month for the £100. That sum was regularly paid. Application was made in 1943, under R.S.C., Ord. 42, r. 32, for the examination of the respondent as to his means. The respondent contended (i) that the appellant could only obtain an order under R.S.C., Ord. 42, r. 32, while he was "entitled to enforce judgment," and that so long as the suspension order remained in operation the appellant H was not entitled to enforce judgment: and (ii) that the rules made under the Courts (Emergency Powers) Acts made their own provision for review of orders made under the Acts and that, therefore, the court had no jurisdiction to make an order under R.S.C., Ord. 42, r. 32:—

Held: (i) a plaintiff who, whether under the terms of the Courts (Emergency Powers) Acts or a suspension order, is for the time being restrained from proceeding to execution is nevertheless "a party entitled to enforce the judgment" within the meaning of R.S.C., Ord. 42, r. 32.

(ii) there is nothing in the Courts (Emergency Powers) Acts to prevent the operation of R.S.C., Ord. 42, r. 32. A plaintiff is entitled under this rule to the order for examination unless clear circumstances are shown to take that right away from him. On the facts of the case there were no such circumstances.

Fagot v. *Gaches* (2) *followed.*

[**EDITORIAL NOTE.** This decision turns upon the meaning of the words " party entitled to enforce the judgment " in R.S.C., Ord. 42, r. 32. It was argued that, where the right to enforce a judgment has been suspended by an order under the Courts (Emergency Powers) Acts, the plaintiff is not a party entitled to enforce judgment within the meaning of the rule. The court has rejected this contention on the ground that the word " entitled " means a party who could proceed to take the necessary steps to enforce a judgment and an application under the Courts (Emergency Powers) Acts is only one of those steps.

As to Discovery in Aid of Execution, see HALSBURY, Hailsham Edn., Vol. 14, pp. 149, 150, para. 231 ; and for Cases, see DIGEST, Vol. 21, pp. 674-676, Nos. 2537-2552. See also YEARLY PRACTICE OF THE SUPREME COURT, 1940, pp. 780-782.]

Cases referred to :

*(1) *Galbraith* v. *MacKenna*, [1941] Ch. 137 ; [1940] 4 All E.R. 303 ; Digest Supp.
*(2) *Fagot* v. *Gaches*, [1943] 1 K.B. 10 ; [1942] 2 All E.R. 476.
(3) *Sturges* v. *Warwick (Countess)* (1913), 30 T.L.R. 112 ; 21 Digest 674, *2538*.

Appeal by the plaintiff from an order of Cassels, J., in chambers, dated Oct. 22, 1943. The facts are fully set out in the judgment of Lord Greene, M.R.

F. W. Beney, K.C., and *P. B. Morle* for the appellant.

F. A. Sellers, K.C., and *Harold Simmons* (*G. F. Kingham* with them) for the respondent.

Lord Greene, M.R. : This appeal raises a point of some general importance. The respondent appears to be what, for the sake of convenience, may be called a company promoter. He is interested in gold mines and the formation of companies to exploit them. The present appellant brought an action against him in 1940, claiming to recover a sum of £7,000 as damages, or as money had and received in circumstances which, according to the plaintiff, gave him a right to recover that sum. The action never came to trial because on Feb. 20, 1940, a deed of compromise between the parties was entered into. Under that deed the respondent agreed to pay to the appellant £7,000, £200 to be paid on Feb. 20, 1940, and the balance of £6,800 by monthly instalments of £25 each, the whole to become payable in the event of default of payment of any instalment. By agreement between the parties the deed was to be treated as having become due under a pre-war contract with the result that the Courts (Emergency Powers) Act then in force applied to it. The respondent paid £200 but made no further payments and on Jan. 13, 1941, the appellant issued a writ to recover the balance of £6,800. There was no defence to the action, and on Feb. 24, 1941, the appellant obtained judgment by default. He then applied for leave to issue execution and on May 21, 1941, the master gave leave to enforce the judgment but suspended it so long as the respondent should pay £100 a month beginning on June 2, 1941. The respondent appealed from that order and on June 27, 1941, Asquith, J., varied it by substituting £25 a month for £100 a month. That sum has been regularly paid. The respondent, of course, was alleging that he was unable to pay these instalments under the deed on the ground of war circumstances. He had defaulted under his covenant and the result of that part of the litigation was that the court held that he was well able to pay £25 a month notwithstanding war circumstances. That was the covenanted amount. He was, therefore, in the view of the court a person who was quite unjustifiably evading his obligation to pay £25 a month which he could all the time have paid. That took place two years before the application, out of which the present appeal arises, was made. We are informed, with what truth we do not know, that the appellant had some reason to suppose that the respondent's financial position had improved and accordingly he applied under R.S.C., Ord. 42, r. 32, for an order for the examination of the respondent as to his means. To that examination the respondent was not anxious to submit himself and he succeeded in obtaining from a master the dismissal of the application. The appellant then appealed to Cassels, J., who affirmed the order of the master and this appeal results.

The first question that arises in logical order is as to the jurisdiction of the court in the circumstances of the case to make an order under R.S.C., Ord. 42, r. 32. Under the Courts (Emergency Powers) Act itself, a successful plaintiff is prohibited from proceeding to execution under his judgment without the leave of the court. The order in this case gave leave but suspended it. On the application under the Courts (Emergency Powers) Act, the burden of satisfying the court that leave to proceed should not be given or should only be given on terms or subject to qualifications was upon the respondent and he succeeded in satisfying the court to the extent that I have mentioned because he got the order suspended on terms that it should remain suspended so long as he paid £25 a month. It is argued that R.S.C., Ord. 42, r. 32, cannot be enforced so long as there is in existence an order suspending the right of the creditor to proceed to execution. It is pointed out that the phrase under the rule is "the party entitled to enforce the judgment," and it is said that, so long as such a suspension order remains in operation, the plaintiff has no right to enforce judgment and, therefore, obtain an order for examination of the defendant as to his means under the rule.

In my opinion that is a misconception of the rule. The phrase "the party entitled to enforce the judgment," is, in my opinion, one which accurately describes the position of the plaintiff who, whether under the terms of the Courts (Emergency Powers) Act itself, or under the terms of a suspension order such as we have in the present case, is for the time being prevented from proceeding to execution. A person in that position is, in my opinion, properly described as "a party entitled to enforce the judgment." He can always proceed to take the necessary steps towards enforcing it. For instance, at this moment, if the appellant could produce the necessary evidence, he could apply to have the suspension repealed and for the immediate right to enforce the judgment. The phrase in the rule in my opinion was framed not for the purpose of laying any particular emphasis on the word "entitled" in the sense in which counsel for the respondent would have us interpret it, but in order to have a comprehensive phrase which would cover not only a successful litigant, but an assignee or his legal personal representative or anybody claiming through him. That appears to me to be the reason why those words are used.

It is to be noticed that in *Galbraith* v. *MacKenna* (1) the plaintiffs who were applying for an order under r. 32 had obtained a judgment which was subject to the terms of the Act but did not obtain leave to proceed. By the very language of the Act itself, therefore, they were persons who were not entitled to proceed to execution without an order of the court and they were in that respect in just as bad a position as the present applicant.

It is perfectly true that SIMONDS, J., decided that case against the plaintiff, because, in his view, an application for an order under r. 32 was the taking of a step in the execution or enforcement of a judgment. It was not suggested before him, nor does he suggest in his judgment, that apart from that point the plaintiffs were not persons entitled to enforce the judgment within the meaning of the rule. That case was overruled by this court in *Fagot* v. *Gaches* (2). It is perfectly true again that this court in overruling SIMONDS, J., overruled him on the specific point upon which he had decided, namely, the true interpretation of the Courts (Emergency Powers) Act, 1939, s. 1, with regard to proceeding to execution or otherwise for the enforcement of the judgment.

Nevertheless, if the present argument of counsel for the respondent be correct, this court ought not to have overruled SIMONDS, J., However that may be and quite apart from authority, the argument, in my opinion, fails on the construction of the rule for the reasons that I have mentioned.

It was further argued against the jurisdiction in the circumstances to make an order under the rule that the Courts (Emergency Powers) Rules, 1939, make their own provision for review of orders made under the Act. It is perfectly true that the plaintiff who wishes to have an order reviewed must himself show that the circumstances have altered since the original order was made so as to disentitle the defendant from the indulgence which he previously obtained. The Courts (Emergency Powers) Rules, 1939, say nothing about R.S.C., Ord. 42, r. 32, nor do they make any express provision for examining the defendant who is claiming to hold the benefit of an order he has obtained which suspends or qualifies the right to levy execution.

I cannot help thinking that the reason why the Courts (Emergency Powers) Rules are silent on that matter is that there is already R.S.C., Ord. 42, r. 32, which enables the plaintiff to discover by examination of the defendant what he could not discover except by some piece of good luck without such examination. The position would be, if there is no jurisdiction under the rule to make an order, that the defendant in such a case as this would be in a position of great security. His obligation to discharge the burden of proof is discharged when the first application under the Courts (Emergency Powers) Act is made. He can then rest on the order he has there obtained and he will be entitled to rest on it forever, however much the circumstances have changed for the better, unless the plaintiff, under the Act, can come to the court with some evidence he has succeeded in obtaining to justify a modification of the order which was made originally.

The joint operation of the Courts (Emergency Powers) Act and r. 32 appear to produce an eminently beneficent and just result because the defendant who is protected can now be made to come out in the open and be examined so as to provide the plaintiff with material he could not otherwise get, upon which he can base a subsequent application to have the order made under the Courts (Emergency Powers) Act altered in his favour. In my opinion the question of jurisdiction is one which must be decided against the respondent.

Coming now to the facts of this particular case it is said that the power under the rule is discretionary, that the judge has exercised his discretion and that this court ought not to interfere with it. We have not the advantage of any reasoned judgment from the judge. I certainly would not assume that the judge misdirected himself in the sense that he held that he had no jurisdiction to entertain the application; and he seems to have made the order upon the view that it was proper in the case before him to refuse to make it. The point put before him to induce him to act in that way appears to have been this. It was said: Two years ago when the original order under the Courts (Emergency Powers) Act was applied for the respondent was closely examined as to his means and that examination having taken place it would be wrong now to submit him to a further examination. The judge must have accepted that view, it was said, because he said that in this case he would not make the order and, therefore, we ought not to interfere with that discretion.

It is perfectly true that when the language of r. 32 is looked at it is couched like many other rules, in discretionary form. The word used is "may," but if any one chooses to search through the Rules of the Supreme Court he will find that many rules used the word "may," when nobody would suggest that the court has any real discretion to refuse to exercise the powers conferred; and in the present case counsel for the respondent was, I think, quite fairly and rightly constrained to admit that in the ordinary case, apart from the Courts (Emergency Powers) Act, the order for examination of a debtor is made practically as of course. That does not mean that in very special circumstances there may not be a discretionary power to refuse, but such a refusal would be quite out of accordance with the universal practice under the rule.

In the present case, therefore, *prima facie*, the appellant would be entitled to come to the court and say, "I am entitled to this order practically as of right," and in the absence of special circumstances the judge would have been wrong in refusing it. What then are the special circumstances which are said to deprive him of that right? These are nothing more than the fact that two years ago the respondent was fully examined as to his means. A great deal may happen in the case of a gentleman whose finances are made and unmade in the particular way in which he earns his living; but to say that the appellant, before he can get an order under this rule in such circumstances as these, must himself produce affirmative evidence, merely because two years ago the defendant was examined, appears to me to be taking the wrong view of the scope of the order.

As I read it, a plaintiff under this rule is entitled to the order unless clear circumstances are shown to take away that right from him. I quite accede to the view that, if after a full examination under the Courts (Emergency Powers) Act the plaintiff came a week or two afterwards and said, "I want a further examination under that rule," the court might very well say, and I think would unquestionably have power to say, "This is grossly oppressive, you the plaintiff have discovered everything you wanted to discover a month ago, and to make another order for another examination now would be oppressive." That would be a sufficient reason for departing from the normal practice of making an order as of course.

However, the facts in the present case seem to me to be widely different. Two years have elapsed during which anything might have happened and it seems to me to be a very unjust result if it can be said to a plaintiff in those circumstances: "You cannot get any information by any procedure under the Courts (Emergency Powers) Act, you cannot get any information under this A rule and, therefore, unless you happen to pick up by good fortune a piece of information, you will never be able to get the order altered in your favour however wealthy the defendant may have become in the meantime."

In my opinion the judge could not have had these considerations fully in his mind when he refused this order and in the circumstances the appeal ought to be allowed and the appropriate order made.

B

MacKinnon, L.J.: I agree.

Goddard, L.J.: I agree that the plaintiff is entitled to enforce the judgment within the meaning of R.S.C., Ord. 42, r. 32, and I do not wish to add anything to what Lord Greene, M.R., has said on that point.

That rule, in my opinion, gives a party entitled to enforce the judgment a right when the circumstances justify it to an order for the examination of the C judgment debtor. There is nothing in that rule to say that that is a right which can only be exercised at once, nor is there any decision which obliges us to say that. I think the note in the Annual Practice referring to the *Countess of Warwick's* case (3) is much too wide. The majority of the court in that case did not pronounce in favour of any such binding rule as appears there to be stated. But, of course, the court can always prevent an abuse of its own procedure, and if, as soon as an examination is held, the judgment creditor comes and asks D for a second examination without showing that some new fact has come to his knowledge which he could not put at the first examination, or if the creditor is harassing an impecunious debtor by asking in another month that he should be examined again, the court could say that is an abuse of its own procedure, and refuse to make an order. But I can see no reason whatever why after a decent interval has elapsed in which it is quite possible that the circumstances of the debtor may have changed, a debtor should not be required to submit E himself to a second examination. That is quite apart from the Courts (Emergency Powers) Act. There is no doubt in a case in which that Act applies, that it is right to take into account that there has been an examination of the debtor on the judgment creditor's application for leave to proceed and I think the same consideration should apply if the application is made afterwards under this rule; that is to say that, if the application is made almost immediately F after the examination has taken place, the court should not grant an order unless it can be shown that there is some real reason such as the discovery of further evidence. Otherwise it seems to me both reasonable and desirable that the creditor should have the right of finding out if his debtor's circumstances have improved; and unless he can examine the debtor or cross-examine him, it is only by pure luck or chance that he could get the necessary evidence to enable him to discharge the burden which would lie on him, the judgment creditor, G if he applied for a variation of the order.

After all, the Courts (Emergency Powers) Act is only to protect a man who, in war circumstances, is unable immediately to pay his debts. It is not to give him an unlimited *moratorium* in all circumstances to protect him if he can but will not pay his debts; and, even if this case were regarded as a mere matter of discretion, I should say that there was no ground here upon which the discretion to refuse an order could have been exercised. H

I agree that the appeal should be allowed.

Appeal allowed with costs.

Solicitors: *Kenneth Brown, Baker, Baker* (for the appellant); *Bernard Schaffer* (for the respondent).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

KENNEDY *v.* WALKER.

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and du Parcq, L.JJ.), **January 14, 1944.**]

Workmen's Compensation—Election—Claim for damages at common law—Failure of claim—Workmen's compensation assessed but no certificate issued—Whether election made—Workmen's Compensation Act, 1925 (*c.* 84), *s.* 29 (2).

The appellant, an employee in the Ministry of Supply, brought an unsuccessful action at common law for damages against the respondent in respect of personal injuries received in an accident which arose out of and in the course of her employment. The respondent was also a servant of the Crown, but for the purposes of the action it was agreed that he should be treated as the appellant's employer. On the failure of the action in the county court, the appellant exercised the right under the Workmen's Compensation Act, 1925, s. 29 (2) of asking for an assessment of compensation to be made. The county court judge made the assessment, but no certificate was drawn up. The appellant then appealed against the dismissal of her action and also claimed that the county court judge had no jurisdiction to make the assessment since the appellant was a servant of the Crown and could therefore only make a claim against the head of her department. It was contended as a preliminary objection that the appellant had lost her right of appeal by exercising her option to have compensation assessed.

HELD : (i) the appellant had exercised her option to receive workmen's compensation under the Workmen's Compensation Act, 1925, s. 29 (2), and the fact that the certificate had not been issued was immaterial.

(ii) the agreement that the respondent should be treated as employer applied not only to the common law claim but to any consequential application under the Workmen's Compensation Act.

[**EDITORIAL NOTE.** The point here is a narrow one. It was argued that, since the certificate was equivalent to an award, there was no completed election by the appellant. The question was, however, whether the appellant had exercised an option and it is held that consenting to an assessment of the compensation is a complete exercise of the option.

AS TO RIGHT OF ELECTION, see HALSBURY, Hailsham Edn., Vol. 34, pp. 964-966, paras. 1320-1325 ; and FOR CASES, see DIGEST, Vol. 34, pp. 492-494, Nos. 4072-4082.]

Case referred to :

*(1) *Neale* v. *Electric & Ordnance Accessories Co., Ltd.*, [1906] 2 K.B. 558 ; 28 Digest 308, *1698* ; 34 Digest 493, *4074* ; 75 L.J.K.B. 974 ; 95 L.T. 592 ; 8 W.C.C. 6.

APPEAL by the plaintiff from an order of His Honour JUDGE HURST, K.C., made at Westminster County Court, and dated Sept. 24, 1943. The facts are fully set out in the judgment of LORD GREENE, M.R.

J. Platts Mills for the appellant.

B. J. MacKenna for the respondent.

LORD GREENE, M.R. : The appellant in this case was the unsuccessful plaintiff in a claim at common law for damages against Walker, who, it was agreed, should be treated as the employer of the plaintiff. In point of fact, Walker was a servant of the Crown, as was the plaintiff, but for the purposes of this dispute and this claim he was to be regarded as the employer. At the conclusion of those proceedings which ended unsuccessfully in the county court, counsel for the plaintiff, in exercise of the right given by the Workmen's Compensation Act, 1925, s. 29 (2), asked to have an assessment of compensation made. The judge thereupon assessed the compensation, but did not in fact at that moment draw up a certificate, nor has that certificate been drawn up to this day. In those circumstances, the plaintiff proceeds to appeal to this court against the dismissal of the common law action, and the point is taken that that course is not open to her because by asking for compensation to be assessed under subsect. (2), she had exercised her option as to the particular remedy which she would pursue.

In my opinion, that preliminary objection prevails. Under the earlier provisions the only court that could assess compensation under what is now subsect. (2) was the court in which the common law claim was tried. The well-known hardships to which that exposed the workman were remedied (perhaps only partially remedied, but that is immaterial) by the alteration which is now to be found in subsect. (2), under which not merely the trial court but an appellate tribunal can assess and award compensation. That enables the workman to postpone his election until he gets to the appellate court. Therefore, his right of appeal is to that extent safeguarded. It was settled in *Neale's* case (1) under the old law, that a workman who had exercised his option by asking the trial judge to assess compensation could not then appeal.

In the present case the plaintiff, instead of waiting until she got to this court and availing herself of the better position offered to her under subsect. (2) under the present law, chose to make an application in the county court itself and obtained an assessment. It seems to me quite impossible to say that, on the facts of this case the option to proceed under the workmen's compensation Act has not been exercised. Indeed, the only point on this branch of the argument relied on by counsel for the appellant was the fact that the appellant had not actually obtained a certificate. It is the certificate which has the force of the award. But the question is not whether she has obtained a certificate, but whether she has exercised her option, and it seems to me quite impossible to say that the fact that she has not chosen to take up a certificate embodying the assessment for which she applied is something which shows that she has not elected. In point of fact, what she wishes to do is to get the best of both worlds, to be able to say in this court : "I have not elected to pursue my Workmen's Compensation remedy under subsect. (2)," and then, if she fails in her appeal on the common law claim, to be able to fall back on that certificate. I cannot imagine a stronger case of a perfectly clear continuing election than the present one. What the position might have been if, before the assessment was made, she had changed her mind and said to the judge : "I no longer require an assessment," whether that would have been regarded as an election is a totally different question. If she had taken that course, it may very well be that she would not have been regarded as having elected ; in the same way as in a case in this court it was held that, where an action had been discontinued in the circumstances of the case that was not an election to pursue the common law remedy. That sufficiently disposes of that argument.

There is another argument the object of which is to suggest that the assessment is void, that the judge had no jurisdiction to make it, and that the certificate would be void if it were given. That is based on the point that this plaintiff was in fact a servant of the Crown, and the only way in which a servant of the Crown can obtain compensation against the Crown is by making a claim under Workmen's Compensation Rules, 1926, r. 95, against the head of the department, who in this case would be the Minister of Supply.

That seems to me to be quite beside the point. What happened here is that Walker agreed to accept the position of employer, and that agreement, in my opinion, on its true meaning, means employer for all circumstances relevant to the proceedings, and it must include the consequential application under sect. 29 (2), which everybody must have realised was likely to be made in the event of the action failing. To say that the agreement to be treated as the employer is to be limited to the common law claim and is to exclude any consequential application under the Workmen's Compensation Act would, in my opinion, be putting an entirely unbusinesslike construction on what was a very sensible arrangement. Nobody suggested at the time that any such limited construction could be put upon it and, in my opinion, there is nothing whatever in the point. Walker is a private individual for this purpose, and, if and when execution had to be levied under a judgment or under a certificate it would be against him as an individual. The Crown, no doubt, would according to its usual practice indemnify him because he is the Crown's servant. As a matter of law, it is a pure claim against an individual alleged and admitted to be the employer and accepted as the employer for all purposes relevant to these proceedings.

In my opinion, there is nothing in that point, and the appeal must be dismissed with costs on the preliminary point.

MacKinnon, L.J. : I agree.

du Parcq, L.J. : I agree.

Appeal dismissed with costs on preliminary point.

Solicitors : *White & Co.* (for the appellant) ; *Treasury Solicitor* (for the respondent). [*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

R. v. ARCHBISHOP OF CANTERBURY.

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and du Parcq, L.JJ.), **January 11, 12, 1944.**]

Ecclesiastical Law—Right of presentation to a benefice—Objection raised by parochial church council to the presentation—Duty of the Archbishop to review the Bishop's refusal is administrative and not judicial—Benefices (Exercise of the Rights of Presentation) Measure, 1931, *s.* 3.

The appellant was a clerk in Holy Orders and also the owner of the advowson of Batcombe cum Upton Noble. In his capacity of patron he presented himself for the living, but the parochial church council passed a resolution disapproving of the presentation and the matter came before the Bishop of the diocese under the provisions of the Benefices (Exercise of Rights of Presentation) Measure, 1931. The Bishop refused to approve the patron's presentation and the latter asked the Archbishop of Canterbury to review the decision of the Bishop. The Archbishop considered the matter privately and did not communicate to the patron material which was relevant to the question of the suitability of the applicant. The decision of the Bishop was approved by the Archbishop. The patron contended that the function of the Archbishop under sect. 3 of the Measure was in the nature of a person conducting a *lis inter partes.* It was further contended that, since the Archbishop had been given a power to deprive an owner of property of his rights, or some of his rights, there was an obligation upon the Archbishop to act in a quasi-judicial manner :—

HELD : the function of the Archbishop under sect. 3 of the Measure was not analogous to the function of a person conducting a *lis inter partes,* and upon the true construction of sect. 3 of the Measure, the Archbishop was not required to arrive at his decision by conducting a quasi-judicial inquiry.

Decision of the King's Bench Divisional Court ([1943] 2 All E.R. 791) *affirmed.*

[**EDITORIAL NOTE.** The Court of Appeal have affirmed the decision of the Divisional Court upon similar grounds. The function of the Archbishop, it is said, is not to try any issue but merely to authorise or refuse to authorise the presentation.

AS TO PRESENTATION TO LIVING, see HALSBURY, Hailsham Edn., Vol. 11, pp. 701-707, paras. 1265-1272 ; and FOR CASES, see DIGEST, Vol. 19, pp. 400-405, Nos. 2300-2367.]

Cases referred to :

(1) *General Medical Council* v. *Spackman,* [1943] A.C. 627 ; [1943] 2 All E.R. 337.
(2) *R.* v. *Archbishop of Canterbury and Bishop of London* (1812), 15 East 117 ; 19 Digest 366, *1846.*
(3) *R.* v. *Electricity Comrs., Ex p. London Electricity Joint Committee Co.* (1920), *Ltd.,* [1924] 1 K.B. 171 ; 20 Digest 197, *1* ; 93 L.J.K.B. 390 ; 130 L.T. 164.
(4) *Allcroft* v. *London (Lord Bp.), Lighton* v. *London (Lord Bp.),* [1891] A.C. 666 ; 19 Digest 343, *1555* ; 61 L.J.Q.B. 62 ; 65 L.T. 92.
(5) *R.* v. *Woodhouse,* [1906] 2 K.B. 501 ; 16 Digest 398, *2421* ; 75 L.J.K.B. 745 ; 95 L.T. 367, 399.
(6) *Local Government Board* v. *Arlidge,* [1915] A.C. 120 ; 22 Digest 300, *2280* ; 84 L.J.K.B. 72 ; 111 L.T. 905.
(7) *Errington* v. *Minister of Health,* [1935] 1 K.B. 249 ; Digest Supp. ; 104 L.J.K.B. 49 ; 152 L.T. 154.

APPEAL by the patron of a benefice from a judgment of the Divisional Court of the King's Bench Division (VISCOUNT CALDECOTE, L.C.J., CHARLES and HALLETT, JJ.), dated Nov. 5, 1943, and reported [1943] 2 All E.R. 791, where the facts are fully set out.

J. D. Casswell, K.C., and *L. MacLaren* for the appellant.

A. T. Denning, K.C., and *W. S. Wigglesworth* for the respondent.

Casswell, K.C. : An advowson has always been regarded as a valuable right and when a person, or a body of persons, is dealing with a question which affects the rights of individuals both sides must be given an opportunity of being heard and the person whose right is affected is entitled to know what the allegations are. The present case differed from *R.* v. *Archbishop of Canterbury and the Bishop of London* (2) in that in the latter case the man was seeking employment but he had no vested right. The giving or withholding of approval by the

Archbishop is the doing of something which affects the right of one of the parties. The principle for which I am contending is shown most clearly in *R.* v. *Electricity Comrs.* (3). If the decision of the Archbishop would affect the patron's right the Archbishop must act in a quasi-judicial capacity. [Counsel referred to *Allcroft* v. *Bishop of London* (4), *R.* v. *Woodhouse* (5), *Local Government Board* v. *Arlidge* (6), *Errington* v. *Minister of Health* (7), and *General Medical Council* v. *Spackman* (1).]

MacLaren followed on the same side.

Counsel for the respondents were not called upon.

Lord Greene, M.R. : The substantial question which is submitted to us for decision relates to the nature of the functions of the Archbishop under the Benefices (Exercise of Rights of Presentation) Measure, 1931, s. 3 (2) (ii) prov. (*b*). Under that proviso, to which I shall return presently, the Archbishop is given power to review the decisions of the Bishop where the Bishop has withheld his approval of the clerk presented by the patron to a benefice. Originally the right of the patron to present was subject only to very limited restrictions. By the Benefices Act, 1898, power was given to the Bishop to refuse to institute or admit a presentee to a benefice in certain carefully defined circumstances. It is to be observed that that power did not in terms interfere with the power of the patron, but it did so indirectly by enabling the Bishop to refuse to admit the presentee. Sect. 3 of the Act gave a special right of appeal against the refusal of the Bishop to institute or admit the presentee, and that right was given both to the patron and to the presentee ; a special court was constituted for the purpose and directions were contained in the section as to the procedure which was to be followed. Up to that point in the history of advowsons the wishes of the parish had no place, but in 1931 an entirely new departure was taken. It is obvious from the language of the Measure, and, indeed, it is a matter of common knowledge, that some dissatisfaction existed by reason of the fact that a clerk might be presented to a benefice who was in every way suitable for the performance of spiritual duties and who was not affected by any of the special matters of disqualification mentioned in the Benefices Act, 1898, but might not be the right man for the particular parish. Parishes have very often strong views as to what their needs and traditions require in the matter of a pastor, and in the Measure of 1931 provision was contained of a novel character for giving the parochial church council the right to make its voice heard. The Measure is entitled : " A Measure to regulate the Exercise of Rights of Presentation to Benefices." It is, therefore, one which, on the face of it, proposes to interfere with the right of the patron at common law to exercise the rights inherent in the property which he owns, namely, the advowson. The machinery provided by the Measure is as follows. Under sect. 1 vacancies are to be notified by the Bishop to the patron and to the parochial church council. Under sect. 2, when such a notification is made, the council is entitled to make written representations to the patron as to the conditions, needs and traditions of the parish, but in those representations they are not to mention the name of any particular clerk. The next matter of machinery that is provided, which is not in any way dependent on that set out in sect. 2, is found in sect. 3, and it is with regard to the operation of that machinery in sect. 3 that the present question arises. Under sect. 3 the first step in subsect. (1) is to confer upon the parochial church council the power to pass a particular resolution the effect of which is to suspend the right of the patron to present a clerk to a vacant benefice. Once that resolution is passed (and it must be notified by the council both to the Bishop and to the patron) the right is suspended, but it can become exercisable if either of two things happen. The first is in sect. 3 (2) ( ), and it is the obtaining of the consent of the churchwardens acting as the representatives of the parochial church council. That is to be obtained after a conference of the nature indicated. Accordingly, down to that stage, if the council has passed a resolution, the right of the patron to present is suspended, but it becomes again operative when the consent of the churchwardens is obtained. The subsection then goes on to make provision for the case where the consent has not been obtained. It was obviously not thought desirable that the parochial church council should have the final right of veto, and accordingly provision was made for what is to happen if a deadlock occurs between the patron and the council. In that event the provision is as follows :

> The patron shall be entitled to exercise his right of presentation after obtaining the bishop's approval of the clerk presented as being suitable for the duties attaching to the cure of souls in the particular benefice concerned.

Accordingly, the Bishop, if I may use the language of paraphrase, is given the right to override the refusal of the churchwardens to consent to the exercise of the right of presentation. In doing that, and in considering whether he will or will not give his approval, the particular matter to which he must direct A his mind is the suitability of the presentee for the duties attaching to the cure of souls in the particular benefice. The legislature, it is clear, realised, or rather, I think, it is not too much to suppose that it realised what, indeed, is obvious, that the responsibility placed upon the Bishop in those circumstances, namely, that of deciding whether to override or not to override the wishes of the parish, was a serious one in respect of which it would be very convenient for him to have outside advice. It must also have been realised that, from the point of B view of the parish, and possibly other persons, it would not be desirable to have it said that the Bishop was put in an autocratic position. Accordingly, the legislature provided that a body of advisers should be set up in every diocese. I need not refer to its constitution, but it is obviously an eminently suitable body for tendering advice to the Bishop in the discharge of a very delicate duty; and, accordingly, the subsection goes on to provide that the Bishop, before C giving or withholding his approval, may and shall, if the patron or parochial church council so requires, consult the body of advisers established by this Measure. That, then, is the machinery down to the stage when the matter is in the hands of the Bishop.

The legislature was not content to stop even there, because it provides a further recourse to the Archbishop in the case, and the case only, where the Bishop finally withholds his approval. No right is given to the parochial D church council or to anybody else to refer the matter to the Archbishop if the Bishop has given his approval. The only person who can act where the Bishop withholds his approval is the patron; and proviso (*b*) says:

> If the bishop finally withholds his approval, the patron may bring his decision before the archbishop for review, and may lawfully present the clerk concerned if the archbishop shall authorise such presentation.

It is the nature of the Archbishop's function under that proviso which is in E controversy in this appeal.

The substantial matter of complaint against the Archbishop's action is that he did not regard himself, as it was said he ought to have done, as a person exercising a quasi-judicial function, and he did not—and here I take the most important matter of complaint that was put before us—communicate to the patron the material suspected to be derogatory to the appointee, who happened F in this case to be the same person as the patron; but that is a purely fortuitous circumstance. He did not communicate to the patron the matter alleged to be derogatory, if that is not too strong a word, to the suitability of the appointee in order that the patron might have an opportunity of dealing with the matter there contained. There was a particular confidential letter which had been received, which had been before the Bishop and which had been before the body of advisers whose assistance had been called in when the matter was before the G Bishop. When the matter was before the Archbishop that particular letter was shown, in confidence, to Mr. Vaisey (as he then was), who was acting as the friend, and not technically as the counsel, of the patron in his application to the Archbishop. The letter was never shown to the patron himself, and, indeed, in the circumstances, as it was only shown confidentially to Mr. Vaisey, it was obviously not proper that Mr. Vaisey should in any way communicate its contents to the patron. If this had been a matter in which the Archbishop was H exercising quasi-judicial functions and had to act in accordance with the rules of what is commonly and loosely called natural justice, it would be open to the comment and, I am disposed to think, successful comment, that a tribunal or an authority exercising such functions cannot perform its duty unless it gives the person concerned a real and effective opportunity of meeting any relevant allegations which may be made against him. Merely to show a letter of that kind under the seal of secrecy to counsel or the friend of the person concerned obviously does not enable that person, who is precluded from seeing it, effectively to deal with its contents. I refer particularly to that letter because it was very conveniently made the peg, if I may so call it, on which the argument was hung.

The case was presented before us in two aspects. First of all, it was said that the Archbishop's function was in the nature of or analogous to the function of a person conducting a *lis inter partes* in the sense that the question that he had to decide was a question between the parochial church council, as opposing the presentation, and the patron, who desired to present the clerk. I am not quite sure how far counsel for the appellant desired to press that argument, but he did lay particular emphasis on the word " review " as indicating that the Archbishop was in some sense acting as a person having some sort of appellate jurisdiction. In my opinion, the analogy of a *lis inter partes*, however vaguely and remotely it may be attempted to apply it to the present case, is completely erroneous. There is no suggestion on the face of these provisions that the Archbishop is concerned with anything of the kind. All that the proviso does is to give the patron the right to ask the Archbishop to review the decision of the Bishop. There are no provisions for notifying the church council ; there is no direction to the Archbishop or to the patron to bring the church council there ; and it is to be observed that the matter with which the Bishop, in the first instance, and later the Archbishop, is concerned may have no real relation to any objection that the church council has put forward. I can find no shadow of a justification for regarding the matter when it comes before the Archbishop as in any sense, or by any remote analogy, a *lis inter partes*. In point of fact, in examining the functions of the Archbishop, the first step, in my opinion, is to ascertain exactly what was the action of the Bishop which he is to review. It seems to me quite impossible to suggest that the whole nature of the transaction is changed when it passes from the Bishop to the Archbishop ; and the first thing to do in order to ascertain exactly what the Archbishop is to do is to look and see what the Bishop has to do. I cannot imagine any language less suitable than that used in the case of the Bishop, unless, indeed, it be that used in the case of the Archbishop, to describe something in the nature of a contest at which parties are to be heard in opposition to one another. The only function of the Bishop is to give his approval of the clerk presented as being suitable for the purposes indicated. Counsel for the appellant felt himself constrained by force of logic to argue that the position before the Bishop was precisely the same as he said it was before the Archbishop, namely, that it was in the nature of a contest or something of that kind in which the parties were to be informed as to their respective contentions and so forth. In my opinion, that is completely wrong. The approval of the Bishop is merely one of the two methods laid down by the subsection for getting rid of the statutory suspension of the patron's right of presentation contained in subsection (1), nothing more ; and it is a pendant to the other method of getting rid of that statutory suspension, namely, the consent of the churchwardens. So far as the argument rests on this suggestion of a *lis*, or a contest, or something of that kind, in my opinion it falls to the ground.

The second way in which the case was presented did not depend on the existence of some such contest or *lis*, or whatever it may be called, and was framed along these lines. It was said : Here is a piece of legislation with statutory force which deprives or may deprive the owner of property, to wit the patron, of his rights, or some of his rights, in respect of that property, and wherever a person or body of persons is given power to deprive a person of his rights or to affect his rights, there is a statutory obligation to act in a quasi-judicial manner and with all the consequences which that implies. In support of that proposition a number of well-known authorities were cited relating to such matters as closing orders, clearance orders, and things of that kind, with the principles of which we are all very familiar ; but, in my opinion, none of those authorities is of any assistance in this case. The question that we have to decide is not some general or abstract question of principle, but the construction of a particular piece of legislation dealing with a very special subject-matter. The right of presentation to an ecclesiastical benefice is one which it is perfectly obvious on the face of this Measure is not to be regarded merely as a piece of private property, but is to be one the exercise of which is to be subject to curtailment in the interests of the persons whose spiritual welfare will depend on the proper exercise of the right. That is the policy of this Measure, and the language that is used in relation to the restriction of the patron's right is quite different in tone and emphasis from the language which is used in the case where a man is having his house made subject to a demolition order, or something of that kind. The method which I always endeavour to adopt in considering the language of an Act of Parliament is, first of all, to endeavour to construe the language of the Act in relation to the particular subject-matter with which it is dealing and, having done that, to see to what extent, if any (and very often it is to no extent at all) decisions on different Acts of Parliament differently worded and relating to different subject-matters may be of assistance in that they may contain some statement of principle which will be applicable.

In the present case I find quite sufficient on the face of this Measure to enable me to place what I conceive to be the true construction upon it without obtaining any assistance from the authorities which have been quoted to us. As I have said, in order to find out what the function of the Archbishop is, it is necessary to look at the function of the Bishop. The two functions, in my opinion, are precisely the same. What the Archbishop is to give is his approval. It is perfectly true that the language used in the case of the Archbishop is "to authorise the presentation," whereas the language in the case of the Bishop is "approval of the clerk"; but, in my judgment, that difference in language does not indicate any difference in the substantial functions which they are performing. The difference, of course, is that, when the matter comes to the Archbishop, the Archbishop has before him the decision of the Bishop and he, in considering whether or not he will authorise the presentation, must, of course, and will, give due weight to the fact that the Bishop, after his own consideration with or without the help of the body of advisers, has formed a view upon the matter. But I cannot find here that what the Archbishop does on a review is anything more than what the Bishop himself might have done, namely, approve the clerk presented as being suitable for the duties. It is, in my view, giving a wrong emphasis to the whole structure and language of this section to regard the function of the Bishop and, after him, the function of the Archbishop as being that of depriving a person of his right of property, or limiting his right to exercise it. A true analysis of the provisions seems to me to be rather of this nature. It is the legislation itself which says that, once the resolution is passed by the council (which merely means that the council is indicating a desire to take a hand in the matter and to be consulted) the right of presentation is suspended by the very force of the section itself, and the function of the Bishop, like the function of the churchwardens acting as representatives of the council, is to remove that suspension and enable the right to be exercised.

That seems to me to be one matter which differentiates this from many of the cases to which we were referred, but a closer examination of the language seems to me to show the intention of the legislature to place the action of the Bishop entirely outside that category. Remembering once again what, in my opinion, is of vital importance in the consideration of this case, the nature of the subject-matter with which the Measure deals, and remembering that the power given to the Bishop to give or withhold his approval of an individual is one which at any rate in a great many cases may require the very nicest tact and consideration and the utmost exercise of discretion, and may involve a consideration of matter, the publication of which would be not the slightest use to anybody, and, indeed, might do an infinity of harm, and might possibly wreck the peace of a parish for a generation, the task of the Bishop in deciding whether to give or withhold his approval of an individual is, I imagine, one of the most delicate decisions that can be submitted to a person in authority. It is a task in the exercise of which three parties are going to be affected; the patron, perhaps the least important of the three; the clerk, who may, as the result of the action of the Bishop, find in his after-life some kind of criticism being raised against him from the mere fact that the Bishop has refused his approval; and the parish, which stands the risk, according as the Archbishop may act, of having put upon it a clerk whom the Bishop, for good reasons, or, indeed, it may be, for bad reasons, may not approve. One can perfectly well imagine a case of a clerk not merely suited in a general way to perform spiritual duties in a parish, but one who is eminently suited for the performance of those duties in that particular parish, and it may be that the objection of the council to that particular man may be based on some gross unreasoning prejudice or some complete misinformation which it is quite impossible to get out of their heads. If the Bishop is to say: "I am going to decide that this presentation may be made," the presentee may find himself opposed by that mass of prejudice; and many cases can be thought of to illustrate the extreme delicacy of the task which the Bishop has to perform. The legislature, no doubt realising the difficulty of that task, has relieved him of part of the responsibility of the decision in this sense, that it has provided him with a body of advisers to whom he may refer, or to whom he may be required to refer, a matter on which he feels unable to come to a decision or on which it is felt he ought not to come to a decision without receiving some additional advice. A The fact that that body of advisers is set up appears to me to be the strongest possible indication that the function of the Bishop in this case is one to be exercised on special lines of its own with the assistance of the body of advisers, and having obtained or not obtained, as the case may be, the assistance of that body, all that the Bishop has to do is to give his approval.

That appears to me to mean nothing more nor less than that the Bishop, B availing himself of such sources of information as he, as an honest and conscientious leader of the church, may think proper, and dealing with that information in such way as he thinks suitable, is to perform the act, which is essentially an act of conscience and judgment, of giving or withholding his approval. To say that the material which comes to his hand is material which he is bound to disclose to the patron seems to me to be a view which would make it quite impossible for the Bishop satisfactorily to perform the very delicate duties C which he has to perform. His function is, in my opinion, what I have said, and there is no more right to question that act of approval than there is in many cases where approval of a person is required to the validity of an act. I do not pause to look for instances in legislation, but I am sure a good many could be found. It must not be taken that I am allowing myself to be influenced in any way by what would be quite insufficient as an analogy, but merely as an illustration I refer to the very common case where directors are given a power D to approve a transferee of shares. One thing which is as certain as anything can be is that directors who give or withhold their refusal are not to be questioned: they are not bound to give their reasons. They have merely to decide on such material as they think suitable, and nobody can complain of their action. One does not want a more striking example of a power to interfere with property rights than the right of directors to prevent a shareholder disposing of part of E his shares. However, I only mention that in passing, not because it is of any real help, but just to give an illustration of the kind of idea which I have in mind as to the meaning which is to be given to the word "approval." As to the Bishop's approval of a clerk, just picking those words out, I cannot imagine any function more personal, more intimate, and more delicate than that, and to endeavour to limit the power of the Bishop by the sort of rules that are applicable where a local authority is minded to clear a clearance area, or some- F thing of that kind, seems to me to be comparing two things which are as unlike one another as they can possibly be. As I have said, once the function of the Bishop is ascertained, it is, in my opinion, quite impossible to say that, when the matter comes before the Archbishop, the nature of the act to be performed by the Archbishop suffers some kind of fundamental change and becomes totally different from that which is to be exercised by the Bishop. Why should it? Why in the world should the Archbishop have to treat the matter when it is G before him as a different question, to be dealt with on different lines by different procedure and according to different principles, from the very same highly delicate matter when it is before the Bishop for his approval?

In my opinion, the claim of the appellant in the present case is misconceived, and the appeal must be dismissed.

MacKinnon, L.J.: I agree. The hopelessness of this appeal is shown by H the fact that counsel for the appellant sought to rely upon cases like *General Medical Council* v. *Spackman* (1) as authorities supposed to be relevant. That case concerned a statute which provided that the council may erase the name of a practitioner from the register "if he shall, after due inquiry, be judged by the council to have been guilty of infamous conduct." Such a duty to judge after due inquiry obviously imports the obligation of quasi-judicial investigation with all that is thereby implied. In the Measure with which we are concerned there is nothing remotely resembling a similar provision. It merely provides for the Bishop to express his approval or disapproval of a presented clerk and, if he disapproves, for the patron being able to bring his decision before the Archbishop for review, whereupon the Archbishop is empowered to authorise the presentation. The function exercised by the Bishop and, in his turn, by the Archbishop under those directions cannot possibly be alleged to be the carrying out of a quasi-judicial inquiry such as was involved in *Spackman's* case (1). Indeed, if I had not heard counsel for the appellant achieve the feat with so much appearance of plausibility, I should have thought his appeal was unarguable.

I agree that it should be dismissed.

DU PARCQ, L.J.: I also agree, and for the same reasons, and I do not find it possible usefully to add anything.

Appeal dismissed with costs.

Solicitors: *Evill & Coleman* (for the appellant); *Lee, Bolton & Lee* (for the respondent).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

OSTIME (INSPECTOR OF TAXES) *v.* PONTYPRIDD AND RHONDDA JOINT WATER BOARD.

[KING'S BENCH DIVISION (Macnaghten, J.), **October 25, 26, December 20, 1943.**]

Income Tax—Trade receipt—Sums received by water board under precepts issued to constituent authorities—Sums provided out of general rate—Whether trade receipt—Income Tax Act, 1918 (*c.* 40), *Sched. D, Case I.*

Income Tax—Trade expenses—Sums paid by water board to body of which it is constituent member—Sums part of price payable for water supplied to board's own consumers—Whether allowable as deductions—Income Tax Act, 1918 (*c.* 40), *Sched. D, Case I.*

The respondent board was a joint water board which was authorised by statute to supply water direct to consumers in the districts of its 2 constituent authorities and to sell water in bulk to the water undertakings in 2 more districts. In the event of an estimated deficit in its net revenue for any year the board was authorised to issue precepts to its 2 constituent authorities apportioning between them the sum needed to meet the deficit and requiring them to pay out of their general rate funds the amounts so apportioned. In the event of either authority making default in payment, the respondent board was empowered to meet the deficiency by itself levying a rate in the district of such authority. The respondent board itself was required year by year to pay an amount similarly apportioned to it under precept to the T.F. board of which it was a constituent authority and from which it purchased in bulk some of the water from which it supplied its own consumers. It was contended for the Crown that, in the computation of the profits of the board for the purposes of income tax, the amounts received under precepts and the amounts paid under precepts should be included as trading receipts and trading expenses respectively, or, alternatively, that, if the receipts under precepts were not to be included, then the sums paid by the board pursuant to the precepts issued to it ought also to be excluded from computation:—

HELD: (i) the sums received by the board under precepts were not trading receipts and should, therefore, be excluded from computation.

(ii) the sums paid by the board under precepts, being part of the price which the board was obliged to pay in order to obtain the water which it required to carry on its trade of supplying water should be deducted as a trading expense in the computation of the board's profits for the purposes of income tax.

[**EDITORIAL NOTE.** Sums received by a water board for the supply of water under precepts issued to constituent local bodies are by authority not subject to income tax. On the other hand, it is here held that sums payable by the board to such constituent bodies for water supplied to the board's own consumers are allowable as deductions in computing the taxable income.

AS TO PROFITS ARISING FROM A SUPPLY OF WATER, see HALSBURY, Hailsham Edn., Vol. 17, p. 105, para. 199; and FOR CASES, see DIGEST, Vol. 28, p. 21, Nos. 1071-1070

Cases referred to:

*(1) *Mersey Docks and Harbour Board* v. *Lucas* (1883), 8 App. Cas. 891; 28 Digest 21, *104*; 53 L.J.Q.B. 4; 49 L.T. 781; 2 Tax Cas. 25.

*(2) *Re Glasgow Corpn. Waterworks* (1875), 1 Tax Cas. 28; 28 Digest 21, *1070*.

*(3) *Glasgow Corpn. Water Comrs.* v. *Miller* (*Surveyor of Taxes*) (1886), 2 Tax Cas. 131; 28 Digest 21, *107 m*.

*(4) *Forth Conservancy Board* v. *Inland Revenue Comrs.*, [1931] A.C. 540; Digest Supp.; 100 L.J.P.C. 193; 145 L.T. 121; *sub nom. Inland Revenue Comrs.* v. *Forth Conservancy Board*, 16 Tax Cas. 103. A

(5) *Harris* v. *Irvine Corpn.* (1900), 65 J.P. 663; 28 Digest 21, *107 n*.

(6) *Humber Conservancy Board* v. *Bater*, [1914] 3 K.B. 449; 28 Digest 9, *37*; 83 L.J.K.B. 1745; 111 L.T. 856; 6 Tax Cas. 555.

(7) *Dublin Corpn.* v. *M'Adam* (*Surveyor of Taxes*) (1887), 2 Tax Cas. 387; 28 Digest 21, *107 l*.

(8) *Allan* (*Surveyor of Taxes*) v. *Hamilton Waterworks Comrs.* (1887), 51 J.P. 727; 28 Digest 21, *107 p*.

(9) *Usher's Wiltshire Brewery, Ltd.* v. *Bruce*, [1915] A.C. 433; 28 Digest 57, *287*; 84 L.J.K.B. 417; 112 L.T. 651; 6 Tax Cas. 399. B

(10) *Hughes* v. *Bank of New Zealand*, [1938] A.C. 366; [1938] 1 All E.R. 778; Digest Supp.; 107 L.J.K.B. 306; 158 L.T. 463; 21 Tax Cas. 472.

(11) *New York Life Insurance Co.* v. *Styles* (1889), 14 App. Cas. 381; 28 Digest 59, *300*; 59 L.J.Q.B. 291; 61 L.T. 201; *sub nom. Styles* v. *New York Life Insurance Co.*, 2 Tax Cas. 460.

(12) *Pretoria-Pietersberg Ry. Co., Ltd.* v. *Elwood* (1906), 98 L.T. 741; 28 Digest 40, *207*; 6 Tax Cas. 508. C

(13) *Seaham Harbour Dock Co.* v. *Crook* (1931, 16 Tax Cas. 333; Digest Supp.

(14) *Lincolnshire Sugar Co., Ltd.* v. *Smart*, [1937] A.C. 697; [1937] 1 All E.R. 413; Digest Supp.; 106 L.J.K.B. 185; 156 L.T. 215.

Appeal by the Crown by way of case stated from a decision of the General Commissioners for the Division of Miskin in the county of Glamorgan varying an assessment to income tax made upon the respondents in respect of the profits D of trade. The facts are fully set out in the judgment.

The Attorney-General (*Rt. Hon. Sir Donald B. Somervell, K.C.*), and *Reginald P. Hills* for the appellant.

J. Millard Tucker, K.C., and *Terence Donovan* for the respondents.

The Attorney-General: It was held in *Harris* v. *Irvine Corpn.* (5) that even the proceeds of a compulsory rate were assessable if the rate was levied outside the local authority's own area. E The fact that a sum was receivable as a compulsory rate did not of itself prevent it from being a trading profit (*Re Glasgow Corpn. Waterworks* (2)). The outgoings to the T.F. board should be considered on the same basis as the incomings from local authorities. [Counsel also referred to *Mersey Docks and Harbour Board* v. *Lucas* (1), *Glasgow Corpn. Water Comrs.* v. *Miller* (3), *Forth Conservancy Board* v. *Inland Revenue Comrs.* (4), and *Humber Conservancy Board* v. *Bater* (6).]

F *Tucker, K.C.:* The second *Glasgow* case (3) decided that profits derived from the supply of water were taxable as trading receipts only so far as people outside the boundary were concerned, and in *Dublin Corpn.* v. *M'Adam* (7), it was held that profits arising from extra-municipal supply were chargeable. It was held in *Allan* v. *Hamilton Waterworks Comrs.* (8) that the proceeds of a compulsory rate were not trading receipts. In the case of *Harris* v. *Irvine Corpn.* (5), the corporation was selling to 2 bodies outside its boundaries and the contract G price had nothing to do with the rate. The precepts stand on the same footing as rates and fall within the definition of rates in the Rating and Valuation Act, 1925, s. 68 (1). Therefore, the sums received by the board are really rates. The receipts did not arise from the sale of water, because water was not supplied to the constituent bodies but to individual consumers.

In *Usher's Wiltshire Brewery, Ltd.* v. *Bruce* (9), the House of Lords laid down that the company were entitled to include as deductions all payments except H capital expenditure and those payments which by r. 3 of Sched. D, case I, were expressly disallowed. Even if the payments to the T.F. board were considered as rates they should be deducted, since a trader is allowed to deduct rates on business premises as trading expenses. In *Hughes* v. *Bank of New Zealand* (10), a contention similar to the Crown's alternative submission in this case (that both the receipts and the sums paid under precept should be excluded) was rejected. [Counsel also referred to *Re Glasgow Corpn. Waterworks* (2), *New York Life Insurance Co.* v. *Styles* (11), *Forth Conservancy Board* v. *Inland Revenue*

Comrs. (4), *Pretoria-Pietersberg Ry. Co., Ltd.* v. *Elwood* (12), and *Seaham Harbour Dock Co.* v. *Crook* (13).]

Hills, in reply: If the true relationship between the respondent board and the T.F. board was that of a principal providing an agent with money to get water for itself, then the expenses would not be deductible—but this was not the position because there was no mutuality. The receipts of the board under precepts were really subsidies, not from all the people supplied, but from part of a part of those people. The principle of mutual trading applies only where there is coincidence between the people subsidising and the people supplying. *Smart* v. *Lincolnshire Sugar Co.* (14) is an illustration of a case where a subsidy was treated as a trading receipt. [Counsel also referred to *Dublin Corpn.* v. *M'Adam* (7), and to *Forth Conservancy Board* v. *Inland Revenue Comrs.* (4), *per* LORD BUCKMASTER, at p. 117.]

MACNAGHTEN, J.: The Pontypridd and Rhondda Joint Water Board is a body corporate established by the Pontypridd and Rhondda Water Act, 1910, for the purpose of acquiring and carrying on the then existing undertaking of the Pontypridd Water Co. and of supplying water within the urban districts of Pontypridd, Rhondda and Caerphilly and the rural district of Llantrisant and Llanwit Fardre, all in the county of Glamorgan. By that Act, after reciting, *inter alia*, that it was expedient to establish a joint water board consisting of representatives of the Rhondda Urban District Council and the Pontypridd Urban District Council, which are therein described as the constituent authorities, it was provided that the board thereby established should consist of the chairmen of the two constituent authorities and six members appointed by the Rhondda council and four members appointed by the Pontypridd council. Under the provisions of the 1910 Act, as amended by the Pontypridd and Rhondda Water Act, 1913, the board's limits of supply were restricted to the Pontypridd urban district and part of the Rhondda urban district, and the board was given a statutory right to sell water in bulk to the water undertakers in the rural district of Llantrisant and Llanwit Fardre and in part of the Caerphilly urban district.

The revenue of the board consists mainly of (i) payments made by the consumers of water in the Pontypridd and Rhondda districts, and (ii) payments made for water supplied in bulk to the Llantrisant and Llanwit Fardre rural district and part of the Caerphilly urban district. For the water supplied to the consumers in the Pontypridd and Rhondda districts, the board has at all material times levied the maximum charges permitted by law.

It is admitted that, in accordance with the principle laid down by the House of Lords in *Mersey Docks and Harbour Board* v. *Lucas* (1), the board is assessable to income tax under Sched. D, case I, upon the excess of its trading receipts over its expenses computed in accordance with income tax principles; and that the payments which I have mentioned are trading receipts which must be included in the computation.

Those payments, however, do not constitute the whole of the annual income of the board. The Act of 1910 contemplated that they might not be sufficient to cover the expenses of the board; and it was, accordingly, provided by sect. 91 that in or about the month of April of each year the board should make an estimate of its probable net revenue for the financial year, commencing on Apr. 1; and, in the event of the estimate showing that there would be a deficiency in the net revenue for the year, the board was authorised and required to apportion the sum required to meet the deficiency between its two constituent authorities in the proportion which the rateable value of the Pontypridd urban district bore to the rateable value of the part of the Rhondda urban district which was within the board's limits of supply. The board was to issue precepts to the constituent authorities, who were to find the money out of their respective general rate funds, and were authorised and required to make and levy any rate which might be necessary to enable them to comply with the board's precepts. If a constituent authority made default in payment of the amount apportioned to it, the board might sue the defaulting authority, or itself might cause a rate to be levied in the district of such authority in order to secure payment of the amount of the precept. During the year ended Mar. 31, 1939, the board received the sum of £9,930 from precepts issued by it to its constituent authorities.

The main question at issue on this appeal is whether, in the computation of the profits of the board for the purpose of its assessment to income tax, the payments received under precepts issued by the board to its constituent authorities ought or ought not to be included as trading receipts. The General Commissioners held that those payments ought not to be included as trading receipts; and that they should, therefore, be excluded from the computation. The Crown contends that this decision was erroneous in law and that the payments ought to be included in the computation.

Where a local authority is authorised to supply water to the inhabitants in its district and to defray the cost of so doing out of the rates, it seems clear A that the authority could not be said to be making any profits assessable to income tax. In such a case, the supply of the water would, as it seems to me, be on the same footing as the supply of sewerage or public lighting, or any other of the public services of a local authority which are paid for out of the rates. From this it would seem to follow that, if a local authority is authorised and required to supply water and to obtain payment from the persons to whom the water is supplied, but such payment is by law restricted to an amount B which is insufficient to meet the cost of supplying the water, and the authority is empowered to meet the deficiency by levying a general rate, the revenue obtained in that way ought not to be considered as a trading receipt. The decision in *The Mersey Docks and Harbour Board* v. *Lucas* (1) does not, if I rightly apprehend it, require that it should be so considered.

Apart from that, there is, as it seems to me, authority on this question which I ought to follow. In the case of *Re Glasgow Corpn. Waterworks* (2), the C expense of supplying water to the inhabitants of Glasgow was met by means of (i) a rate on the occupiers of all dwellinghouses within the municipal boundary; and (ii) by a public water rate. The Crown claimed that the surplus of receipts over expenses was assessable to income tax; but the claim was rejected by the Court of Session. The leading judgment in that case was delivered by LORD PRESIDENT INGLIS. It so happened that in that case the water commissioners D supplied water to consumers who were outside their limits of compulsory supply, and the LORD PRESIDENT pointed out that any surplus income derived from that source might be assessable to income tax; but that, since the parties had treated such surplus as being on the same footing as the income derived from rates, the court made no distinction between those different sources of income.

That case was decided before the decision of the *Mersey Docks and Harbour Board* v. *Lucas* (1) in the English courts, but, in *Glasgow Corpn. Water Comrs.* v. E *Miller* (3), the question left open in the first *Glasgow* water case (2) came up for decision; and it was then held that surplus revenue derived from the supply of water beyond the limits of compulsory supply and from the sale of water within those limits for trade purposes was assessable as profits under Sched. D, case I. That case fell to be decided after the decision in *Mersey Docks and Harbour Board* v. *Lucas* (1); and the LORD PRESIDENT expressed the view that the decision in the English case did not affect the decision of the court in F the previous case.

I think it is relevant here to refer to the observations of VISCOUNT DUNEDIN in *Forth Conservancy Board* v. *Inland Revenue Comrs.* (4), at p. 549. The headnote in that case is:

> A conservancy board was established by statute to preserve and improve a river and firth and to control the navigation therein. Its members were appointed or elected by local authorities, Government departments, railway companies, and shipowners. G It possessed wide powers to dredge, light, buoy and otherwise improve the navigation of the river, and it was empowered to levy dues on vessels entering the river or firth. These dues constituted its sole revenue, and were directed by statute to be applied to the purposes of the undertaking as the Board might determine: Held: that the board was assessable to income tax on the surplus revenue arising from these dues under Case VI of Sched. D of the Income Tax Act, 1918.

In that case LORD DUNEDIN felt himself compelled with the greatest reluctance H to concur in the decision of the House; but, after expressing with great force and cogency his view as to the public mischief which arose from the decision in the *Mersey Docks and Harbour Board* case (1), he made, at p. 549, these observations on the first *Glasgow* water case (2):

> There is, I think, no question that the same line of reasoning which appeals to me appealed to LORD PRESIDENT INGLIS in the first *Glasgow* case (2). It is possible to doubt the soundness of that decision in the light of the *Mersey Docks* case (1), which was subsequent and of higher authority

I think the decision can be saved by considering the supply of water, not in the light of supplying a commodity, but of rendering a public service, just as lighting or cleaning are public services, and this view is helped by the fact that you could not escape the water rate by offering to prove you had used no water. That LORD PRESIDENT INGLIS had to consider whether the judgment would stand after the *Mersey* case (1) is, I think, shown by the ground on which the second *Glasgow* case (3) was distinguished from the first, and indeed in that case he distinctly said that he had reconsidered his first judgment and still remained of the same opinion.

There should also be mentioned *Harris* v. *Corpn. of Irvine* (5), where it was admitted by the Crown that surplus derived from the produce of a compulsory rate levied within the municipality was not assessable to income tax. I think, therefore, that, on principle and authority, the decision of the General Commissioners was correct; and the claim put forward by the Crown must be rejected. The fact that the rate is levied on all the occupiers in the Rhondda urban district, though part of that district is outside the board's limits of supply, is not, in my opinion, of any materiality. It often happens that ratepayers have to contribute to a rate from which they personally get no benefit whatsoever.

A further question arises with regard to sums paid by the board to the Taf Fechan Water Supply Board, which had been established by the Taf Fechan Water Supply Act, 1921, for the purpose, *inter alia*, of supplying water in bulk to its 5 constituent authorities, namely, the Merthyr Tydfil Corporation, the Rhymney Valley Water Board, the respondent board, Llantrisant and Llanwit Fardre Rural District Council, and the Aberdare Urban District Council.

The respondent board, as a constituent authority of the Taf Fechan board, was bound to take, or pay for as taken, a minimum quantity of 270,000 gallons of water per day at the price of 1*s*. per 1,000 gallons, and the Taf Fechan board was bound to reserve for the respondent board a further 330,000 gallons per day, in case it should require more than 270,000 gallons per day. Such further quantity was also to be supplied at the price of 1*s*. per 1,000 gallons.

Parliament conferred upon the Taf Fechan Board the right to issue precepts to its constituent authorities similar to the right conferred upon the respondent board, requiring the constituent authorities to pay out of their respective revenues such sums as might be necessary to meet any estimated deficiency in its revenue. The respondent board, accordingly, is bound to pay to the Taf Fechan board year by year the amount of any such estimated deficiency which is apportioned to it by that board. In the year ended Mar. 31, 1939, the Taf Fechan board issued a precept requiring the respondent board to pay £964 5*s*. 9*d*. The respondent board also pays to the Taf Fechan board a fixed contribution under the provisions of sect. 4 (1) (*c*) of the Taf Fechan Water Supply Act, 1937, namely, three-quarters of the product of a penny rate in the Pontypridd urban district and so much of the Rhondda urban district as is comprised within the limits of supply of water by the board.

The case put forward by the Crown was that, in the computation of the profits of the board for the purposes of income tax, the sums received by the board under the precepts should be included as trading receipts; and that, in like manner, the sums paid by the board under the precepts should be included as trading expenses. However, if, as I hold, the sums received by the board under the precepts are not to be included as trading receipts, then the Crown contends the sums paid by the board pursuant to the precepts issued by the Taf Fechan Board ought also to be excluded from the computation. It seems to me that this contention cannot be sustained. The sums which are received by the board under precepts and are provided out of a general rate are excluded from the computation on the grounds which I have ventured to set forth. The sums paid by the board under precepts issued by the Taf Fechan Board are part of the price which the board is by law compelled to pay in order to obtain the water required by it to carry on its trade of supplying water; and must, therefore, be allowed as a trading expense in the computation of the board's profits for the purposes of income tax.

Therefore, in my opinion, the appeal fails and must be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the appellant); *Smith, Rundell, Dods & Bockett*, agents for *Morgan, Bruce & Nicholas*, Pontypridd (for the respondents).

[*Reported by* GWYNEDD LEWIS, *Barrister-at-Law.*]

UTOL, LTD. *v.* INLAND REVENUE COMMISSIONERS.

[King's Bench Division (Macnaghten, J.), **November 3, December 20, 1943.**]

Income Tax—Annual payment—Agreement between 2 companies for sharing of profits and losses—Payment of share of profits under agreement—Whether dividend—Income Tax Act, 1918 (*c.* 40), *Sched. D, case III, All Schedules Rules, rr.* 20, 21—*Finance Act,* 1931 (*c.* 28), *s.* 7 (1).

The appellant company entered into an agreement with another company that each year the profits and losses of the 2 companies should be added together and shared between them in an agreed proportion. In the years 1935 to 1939, the profits of the appellant company exceeded the proportion of the combined profits which it was entitled to retain under the agreement, although, since it had losses, incurred in previous years, to offset against the profits, those profits were not brought into charge. It was contended for the Crown that the payments of profits which were accordingly made by the appellant company were annual payments within the meaning of the All Schedules Rules, r. 21, and that the company was rightly assessed to income tax in respect of those payments. It was contended for the appellant that the share of profits paid by the appellant company under the agreement was a dividend and, as such, not assessable to tax:—

Held: since the word "dividend" in All Schedules Rules, r. 20, must be interpreted as including a share of profits payable under contract, the appellant company was entitled, under that rule, to deduct tax from the payments made by it under the agreement with the other company, and was not accountable to the Crown for the amount so deducted.

[**EDITORIAL NOTE.** The word "dividend" in its ordinary use has a well-defined meaning and would not extend to the payment by one company to another of a share of its profits. In *Last* v. *London Assurance Corpn.* (3), however, after much difference of judicial opinion, it was decided in the House of Lords that "dividend" in the legislation then the equivalent of All Schedules Rules, r. 20, included a share of profits paid to a person in pursuance of a contract and irrespective of the holding of any share or shares in the company and the court has felt bound to follow that decision.

As to Deduction of Tax from Dividends, see HALSBURY, Hailsham Edn., Vol. 17, pp. 229, 230, paras. 464, 465: and for Cases, see DIGEST, Supp., Income Tax, Nos. 674aa-674ff.]

Cases referred to:

(1) *Moss' Empires, Ltd.* v. *Inland Revenue Comrs.*, [1937] A.C. 785; [1937] 3 All E.R. 381; Digest Supp.; 106 L.J.P.C. 138; 157 L.T. 396; 21 Tax Cas. 264.

(2) *Neumann* v. *Inland Revenue Comrs.*, [1934] A.C. 215; Digest Supp.; 103 L.J.K.B. 210; 150 L.T. 481; 18 Tax Cas. 332.

*(3) *Last* v. *London Assurance Corpn.* (1885), 10 App. Cas. 438; 28 Digest 58, *297*; 55 L.J.Q.B. 92; 53 L.T. 634; 2 Tax Cas. 100.

Appeal by the taxpayer from a decision of the Special Commissioners confirming assessments to income tax under the All Schedules Rules, r. 21, in respect of payments made by the taxpayer to another company. The facts are fully stated in the judgment.

Terence N. Donovan for the appellant company.

The Solicitor-General (*Sir David Maxwell Fyfe, K.C.*), and *Reginald P. Hills* for the respondents.

Macnaghten, J.: This is an appeal by Utol, Ltd., a company incorporated under the Companies Act, 1929, against a decision of the Special Commissioners confirming assessments to income tax for the 5 years ended Apr. 5, 1936 to 1940, under r. 21 of the All Schedules Rules, in respect of payments made in each of those 5 years by the appellant to another company, called the Climax Manufacturing Co., Ltd.

Both the Utol company and the Climax company are private companies limited by shares; they both deal in germicides and other products, those of the Utol company being specially suitable for use by brewers, publicans and dairymen, and those of the Climax company by shipowners.

In 1930 the Utol company entered into negotiations with the Climax company with a view, as the case states, "to some form of pooling of interests of the two companies": and these negotiations resulted in an agreement between them.

dated Sept. 5, 1933. By cll. 2 and 3 of the agreement it was provided as follows :

> 2. Each company shall (save as herein provided) continue to trade and carry on business as heretofore and the profit of each company being the balance shown on the revenue account prepared in the usual manner resulting from such trading and carrying on business for each financial year shall be ascertained by the auditors of the respective companies who shall certify in writing each year the amount of such profits.
>
> 3. The profits so ascertained shall not be distributed among the shareholders of the respective companies as dividends in the first instance but shall be added together and shall be shared between the companies in the following proportion that is to say : Utol, Ltd. shall receive 60 per cent. of such total profits and Climax Manufacturing Co., Ltd. shall receive 40 per cent. of such total profits. Any loss of either company shall be dealt with in the same way.

By cl. 5 of the agreement, the Climax company undertook to provide offices and works suitable for the business of the Utol company in the building then occupied by the Climax company at Harrow Green, Leytonstone, and the two companies agreed to co-operate with their respective staffs so far as it was reasonably practicable to do so. It was further provided by the agreement that the financial year of each company should terminate on Dec. 31 ; that all receipts and payments by each company, except the rent payable by the Utol company for certain premises in Chancery Lane, should be brought into the revenue account mentioned in cl. 2 of the agreement, and that the agreement should remain in force for 7 years and thereafter from year to year until determined by notice by either company.

In each of the 5 calendar years ended Dec. 31, 1935 to 1939, the profits of the Utol company as certified by the auditors, exceeded three-fifths of the combined profits of the two companies, and the Climax company became, therefore, entitled, under cl. 3 of the agreement, to receive from the Utol company payment of the amount of the excess. The Utol company, accordingly, made such payments to the Climax company under deduction of tax in each of the tax years ended Apr. 5, 1936 to 1940, namely : in the year 1935-6, £656 ; in the year 1936-7, £732 ; in the year 1937-8, £588 15*s.* ; in the year 1938-9, £745 ; and in the year 1939-40, £1,051. The assessments under appeal were made upon the Utol company in respect of those payments under r. 21 of the All Schedules Rules. The balance of the profits of the Utol company in each of those years, after making the payments to the Climax company, that is to say, 60 per cent., or three-fifths of the combined profits of the two companies, were, under cl. 3 of the agreement of Sept. 5, 1933, available for distribution amongst the shareholders of the Utol company by way of dividend.

By r. 21 of the All Schedules Rules it is provided that, upon payment of " any interest of money, annuity, or other annual payment charged with tax under Sched. D " which is not payable out of " profits or gains brought into charge " the person by whom such payment is made shall deduct tax thereout and deliver to the Commissioners of Inland Revenue an account of the payment and of the tax so deducted, and the Special Commissioners shall assess and charge the payment on that person. The case for the Crown was that the payments of the excess profits made by the Utol company to the Climax company during those 5 years were " annual payments " within the meaning of r. 21, charged to tax under Sched. D, and not payable out of profits or gains brought into charge, and that the Special Commissioners were, therefore, bound to assess and charge the payments on the Utol company. The Special Commissioners upheld this view and confirmed the assessments and the Utol company has brought this appeal.

It is not easy to define what is or what is not an " annual payment " within r. 21, but it seems clear that such a payment must, like interest of money or an annuity, have the " quality of recurrence " (*Moss Empires, Ltd.* v. *Inland Revenue Comrs.* (1)). The payments to be made under cl. 3 of the agreement have, no doubt, the quality of recurrence, since in every year during the currency of the agreement a payment must be made by one company or the other. The peculiarity of this case is that the company receiving the " annual payment " one year may have to make the " annual payment " in the next, and it seems to me doubtful whether such payments can be considered to be " annual payments " within the meaning of r. 21. They plainly differ from the payments of " interest " or of an " annuity," where year by year the person making the payment and the person receiving the payment remain the same and never change places.

The payments in question were not paid out of "profits or gains brought into charge." They were, indeed, paid out of profits which would in due course be "assessed" to tax in the following year; but it so happened that, during the relevant years none of the profits of the Utol company were brought into charge, because it had in previous years suffered losses which entitled it, under the provisions of the Finance Act, 1926, s. 23, to set off those losses against the assessments. I apprehend that, if the profits of the Utol company had been "charged" as well as "assessed" to tax, the Crown could not have put forward the present claim.

Then there is the question: Were the payments charged with tax under Sched. D? That schedule imposes the tax on "all interest of money, annuities and other annual profits or gains" and such profits or gains are chargeable under case III of that schedule.

Since the agreement of Sept. 5, 1933, was made for the purpose of enabling the companies to carry on their respective businesses more advantageously and thereby increase the profits of each of them, the auditors of the two companies put forward the view that payments made under cl. 3 of the agreement should be treated as trading expenses of the company which made the payments and as trading receipts of the company which received them. If that course had been adopted, the questions at issue on this appeal would not have arisen. The inspector of taxes, however, rejected that view of the matter, and the payments were excluded from the computation of the profits of both companies.

The main contention, however, put forward by counsel for the appellant in support of the appeal was that the share of the profits which the Utol company paid to the Climax company under cl. 3 of the agreement for each of the years in question was a "dividend" and, as such, was not assessable to income tax under r. 21 or otherwise, and, therefore, the fact that it so happened that the profits out of which the payments were made, though assessed to tax, had not been brought into charge was irrelevant.

By r. 20 of the All Schedules Rules, which reproduces sect. 54 of the Income Tax Act, 1842, it is provided that:

> The profits or gains to be charged on any body of persons shall be computed in accordance with the provisions of this Act on the full amount of the same before any dividend thereof is made in respect of any share, right or title thereto, and the body of persons paying such dividend shall be entitled to deduct the tax appropriate thereto.

By the Finance Act, 1927, s. 39 (1), the "appropriate" rate means the "standard rate" for the year in which the payment fell due. By the Finance Act, 1931, s. 7 (1), it is provided that r. 20 is to be construed as authorising the deduction of tax from a dividend paid by any body of persons out of the profits or gains:

> . . . which have been charged to tax or which, under the provisions of the Income Tax Acts, would fall to be included in computing the liability of the said body to assessment to tax for any year if the said provisions required the computation to be made by reference to the profits or gains of that year and not by reference to those of any other year or period.

that is to say that, on the payment of a dividend the company may deduct tax if the profits or gains out of which the dividend is paid have already been charged to tax or would be included in computing the liability of the company to assessment to tax for that year, if the provisions of the income tax Acts had required the computation to be made by reference to the profits of that year. The Utol company is admittedly a "body of persons" within the meaning of r. 20, and it deducted tax from its payments to the Climax company at the rate in force at the time they fell due, and those payments, although they were not made out of profits which had been charged to tax, were made out of profits which were in due course included in the computation of the liability of the company in the following year and would have been included in computing the liability of the company for the year in which the payment fell due, if the income tax Acts had required the computation to be made by reference to the profits of that year.

If the payments in question had been made by the Utol company to its shareholders by way of dividends on their shares, the company would have been entitled, under r. 20, to deduct tax thereon and would not have been accountable to the Crown for the tax so deducted. As to that there can be no doubt or dispute (*Neumann's* case (2)). Does the same result follow when profits available for distribution among the shareholders under deduction of tax are, in fact, paid to some person who is not a shareholder pursuant to a contract which the company has entered into with that person ? The answer to that question depends, as it seems to me, on the meaning of the word "dividend" in r. 20. A In *Last* v. *London Assurance* (3), the question arose as to the meaning of the word "dividend" in the Income Tax Act, 1842, s. 54. In that case the London Assurance, a proprietary company carrying on business of marine, life and fire assurance, had issued policies of life insurance which entitled the holders to participate in its profits. The company claimed that the share of the profits to which the policy holders were entitled under their policies ought to be treated as trading expenses in computing the profits of the company for the purposes B of income tax ; and the Crown resisted that claim. The case led to a remarkable difference of judicial opinion. In the court of first instance, consisting of DAY, J., and A. L. SMITH, J., DAY, J., held that the claim of the company was well-founded. A. L. SMITH, J., held the contrary view, but he as junior judge, in accordance with custom, withdrew his judgment. In the Court of Appeal, consisting of BRETT, M.R., and COTTON and LINDLEY, L.JJ., BRETT, M.R., and C COTTON, L.J., agreed with DAY, J., and LINDLEY, L.J., dissented ; he thought that the decision of the lower court should be reversed. In the House of Lords, LORD BLACKBURN and LORD FITZGERALD held the view that the judgments of A. L. SMITH, J., and LINDLEY, L.J., were correct, and LORD BRAMWELL took the contrary view. So, in the end, the contention put forward by the company was rejected and judgment was entered for the Crown. In the Court of Appeal, COTTON, L.J., expressed the view that the word "dividend" in the Income D Tax Act, 1842, s. 54, meant :

> . . that which is to be divided between those who claim it, not by their contract with the company but by their position as shareholders.

LORD BLACKBURN, however, dissented emphatically from that view. He held that the word "dividend" in the Income Tax Act, 1842, s. 54, included profits to be divided between those who claimed by contract as well as those who claimed E as shareholders. LORD FITZGERALD agreed with LORD BLACKBURN.

Since r. 20 merely reproduces sect. 54 of the earlier Act, I think I am bound to give the same meaning to the word "dividend" in r. 20 as the House of Lords gave to it in the earlier Act : that it is not confined to a share of profits paid to shareholders, but includes a share of profits payable under contract. It follows from this that the Utol company was entitled, under r. 20, to deduct tax from the payments made by it under cl. 3 of the agreement, and is not accountable F to the Crown for the amount so deducted.

Counsel for the appellant raised the further point, that the assessments in question were entirely misconceived ; that the agreement of Sept. 5, 1933, constituted an agreement of partnership between the two companies, and that the only assessment that could have been properly made would have been upon the two companies as partners. It is unnecessary for me, in view of the decision that I have arrived at on his main point, to express a concluded opinion G upon that question, but it appears to me to be extremely difficult, in view of the provisions of cl. 2 of the agreement, that :

> Each company shall continue to trade and carry on business as heretofore and the profit of each company being the balance shown on the revenue account prepared in the usual manner resulting from such trading and carrying on business for each financial year shall be ascertained by the auditors of the respective companies . . .

H to maintain the view suggested by counsel for the appellant.

The conclusion that I come to is that the appeal must be allowed and the assessments discharged.

Appeal allowed with costs. Assessments discharged.

Solicitors : *Blyth, Dutton, Hartley & Blyth* (for the appellant) ; *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* GWYNEDD LEWIS, *Barrister-at-Law.*]

INLAND REVENUE COMMISSIONERS *v.* F.P.H. FINANCE TRUST, LTD. *(in liquidation).*

[Court of Appeal (Scott, MacKinnon and du Parcq, L.JJ.), **November 22, 23, 24, 25, 26, December 14, 1943.**]

Income Tax—Sur-tax—Undistributed income—Preference shareholders entitled to surplus assets on winding up—Direction and apportionment by commissioners—Limitation of time for direction—Interests of the members—Interest in capital assets—Finance Act, 1922 (c. 17), *s.* 21 (1), (7), *Sched. 1, para.* 8—*Finance Act,* 1928 (c. 17), *s.* 18.

At the material time the appellant company had a paid-up capital of £11,000, divided into 1,000 £1 ordinary shares and 10,000 £1 preference shares. The preference shareholders were entitled to a fixed preference dividend of 5 per cent., and the ordinary shareholders to such dividend as the company in general meeting might resolve. On a winding up the ordinary shareholders were entitled to be repaid the amount paid up in respect of their shares, *i.e.*, £1,000, and the preference shareholders were entitled to the surplus assets. The ordinary shares were held by the National Mining Corpn., Ltd., of which H. G. Latilla was in effective control. The preference shares were held in equal shares by the wife and two daughters of H. G. Latilla. On Oct. 12, 1937, the appellant company adopted the accounts for the period Apr. 1, 1935, to Dec. 31, 1936, which showed a profit of £645,192 11*s.* 6*d.*, and authorised the payment of a 5 per cent. dividend to the preference shareholders for the period from Nov. 27, 1936, to Dec. 31, 1936, amounting to £46 11*s.* 6*d.*, and a 10 per cent. dividend to the ordinary shareholders for the year, amounting to £100. On Feb. 8, 1938, the company in reply to a request from the Special Commissioners under the Finance Act, 1922, Sched. I., para. 4, gave the above facts. On Apr. 1, 1938, the company went into voluntary liquidation. On May 16, 1941, the Special Commissioners issued a direction to the company under the Finance Act, 1922, s. 1, that its undistributed income should be deemed to be the income of its members for the purpose of sur-tax, and, having computed the undistributed income at £858,817, they apportioned, under Sched. I, para. 8, the liability of the members as being, National Mining Corpn., Ltd., £100, the wife and two daughters of H. G. Latilla £286,296 5*s.*, £286,210 7*s.* 6*d.*, and £286,210 7*s.* 6*d.* respectively. The company appealed against both direction and apportionment on the grounds: (i) that the direction made by the commissioners was invalid by reason of their failure to make the direction within the time limited by the Finance Act, 1922, s. 18, and consequently that the apportionment was a nullity or, alternatively, (ii) with respect to the apportionment, that "the respective interests of the members" in Sched. I, para. 8, of the 1922 Act meant their interests as measured solely by their rights to dividends:—

Held: (i) in order to claim the protection of the Finance Act, 1922, s. 18, the company must give the commissioners notice that it is supplying the information in pursuance of the section.

(ii) it is immaterial that the failure to distribute is due to an exercise of discretion by the company in general meeting or to a provision in the articles which forbids distribution. That no reasonable distribution has in fact taken place is enough to justify a direction under sect. 21.

(iii) the word "members" in Sched. I, para. 8, bears the meaning of the same word in sect. 21 (7). "Interests of members," therefore, includes "interests in capital or profits or income," and the preference shareholders had such an interest.

[**EDITORIAL NOTE.** The aim of the taxpayer in this case was to have as much as possible of the undistributed income apportioned to the shareholder which was a company, since a company does not pay sur-tax. For this purpose it was contended that the interests of the members was to be measured only by their right to receive the income of the company and that the right to share in capital assets on a winding up should be excluded. The court has rejected this view and has further decided that the limitation of time for making a direction does not run until the company has supplied the commissioners with all the relevant details for an apportionment in a document or documents in which they expressly state that they are supplying details in pursuance of sect. 18 of the 1922 Act.

AS TO UNDISTRIBUTED PROFITS OF COMPANIES, see HALSBURY, Hailsham Edn., Vol. 17, pp. 289, 290, paras. 574, 575, p. 297, para. 590; and FOR CASES, see DIGEST, Supp., Income Tax, Nos. 674g-674s.]

Cases referred to:

(1) *Lysons* v. *Knowles* (*Andrews & Sons, Ltd.*), *Stuart* v. *Nixon & Bruce*, [1901] A.C. 79; 34 Digest 423, *3433*; 70 L.J.K.B. 170; 84 L.T. 65.

(2) *Drew* (*Alexander*) *and Sons, Ltd.* v. *Inland Revenue Comrs.* (1932), 17 Tax Cas. 140; Digest Supp.

A (3) *Penang and General Investment Trust, Ltd., and Another* v. *Inland Revenue Comrs.*, [1943] A.C. 486; [1943] 1 All E.R. 514.

(4) *Inland Revenue Comrs.* v. *Blott*, *Inland Revenue Comrs.* v. *Greenwood*, [1921] 2 A.C. 171; 28 Digest 107, *663*; 90 L.J.K.B. 1028; 125 L.T. 497; 8 Tax Cas. 101.

(5) *Inland Revenue Comrs.* v. *Bunell*, [1924] 2 K.B. 52; 28 Digest 108, *665*; 93 L.J.K.B. 709; 131 L.T. 727; 9 Tax Cas. 27.

B (6) *Inland Revenue Comrs.* v. *Sansom*, [1921] 2 K.B. 492; 28 Digest 101, *612*; 90 L.J.K.B. 627; 125 L.T. 37; 8 Tax Cas. 20.

(7) *Fattorini, Ltd.* v. *Inland Revenue Comrs.*, [1943] A.C. 643; [1943] 1 All E.R. 619.

(8) *Latilla* v. *Inland Revenue Comrs.*, [1942] A.C. 377; [1942] 1 All E.R. 265.

(9) *Inland Revenue Comrs.* v. *Tring Investments, Ltd.*, *Inland Revenue Comrs.* v. *Peverell Trust, Ltd.*, [1939] 2 K.B. 503; [1939] 2 All E.R. 105; Digest Supp.; 108 L.J.K.B. 363; 160 L.T. 343; 22 Tax Cas. 679.

APPEAL by the taxpayer from a decision of WROTTESLEY, J., dated Oct. 26, C 1942. The facts are fully set out in the judgment of SCOTT, L.J.

J. Millard Tucker, K.C., *H. Wynn-Parry, K.C.*, *Terence Donovan*, and *Heyworth Talbot* for the appellant company.

Solicitor-General (*Sir David Maxwell Fyfe, K.C.*), *J. H. Stamp*, and *Reginald P. Hills* for the Inland Revenue Commissioners.

SCOTT, L.J.: This is an appeal by a company from a judgment of WROTTESLEY, J., D in a case arising out of a sur-tax apportionment under the Finance Act, 1922, s. 21. The Special Commissioners in their executive office had made a direction upon the company in respect of the year 1935-6 and followed it up with an apportionment between the shareholders under para. 8 of Sched. I to the Act. The company appealed to the Special Commissioners in their judicial capacity against both direction and apportionment. The company took a preliminary point that sur-tax proceedings were totally barred by reason E of the failure of the executive commissioners to act within the time limits of the Finance Act, 1928, s. 18, which it claimed to have brought into operation by certain letters addressed to the Special Commissioners in 1937-38. The judicial commissioners rejected this contention, and WROTTESLEY, J., agreed with them. So do I; but as the point was again strenuously argued before us, I will explain my reasons after I have stated very shortly the facts material to F the substantive appeal. On that, the main issue, the Special Commissioners (acting judicially) were doubtful as to whether there had been a valid "direction"; but it was agreed before WROTTESLEY, J., that the special case should be amended so as to confirm the direction. On the issue of apportionment the Commissioners definitely held that the Crown failed, but WROTTESLEY, J., reversed them and decided in the Crown's favour. The appeal of the company before us is on both points.

G The company, which assumed its present name in 1927, has since then been a trading company dealing in the shares of gold mining and mining development companies. The company held a leading position in the group and H. G. Latilla was the chief person in the group. In March, 1934, its issued capital of 10,000 £1 shares was in the beneficial ownership of Mrs. H. G. Latilla. In that year she sold her shares to M.T., Ltd., a company incorporated in Southern Rhodesia, in exchange for £100,000 of debentures in that company; all the shares in H M.T., Ltd., being owned by her and her two daughters, Mrs. Mayo and Mrs. Campbell. M.T., Ltd., declared no dividends, but the company, all of whose shares M.T., Ltd., owned, was making large profits, which by the end of 1936 had accumulated to £293,000. On Dec. 15, 1936, M.T., Ltd., went into liquidation and on Dec. 23, 1936, its liquidators transferred M.T., Ltd.'s, 10,000 shares in the company in equal thirds to Mrs. Latilla and her two daughters in their right as shareholders in the winding up of M.T., Ltd. This action was evidently believed to have been rendered safe from the depredations of the tax-gatherer by reason of the following steps previously taken on their behalf.

On Nov. 27, 1936, the company changed its 10,000 ordinary shares into 5 per cent. cumulative preference shares, with no further dividend rights, but with the exclusive right in a winding up to all surplus assets after paying off the 1,000 new £1 ordinary shares then created. These new ordinary shares became, under the special resolution effecting the change, entitled to get the whole of any dividend declared beyond the 5 per cent. due on the preference shares.

The three Latilla ladies thus, as preference shareholders, became entitled as from Nov. 27, 1936, to receive in a future winding up of the company, the whole benefit of all profits of the company (i) accumulated up to that date, and (ii) to be earned thereafter ; save only such amount as might be declared in dividend on the ordinary shares and in repaying the nominal capital of the 1,000 ordinary shares.

At this point it becomes relevant to see what was done with the 1,000 new ordinary shares. They were allotted to a public company the National Mining Corpn., Ltd. (to whom I will refer as the corporation), whose shares were officially quoted on the Stock Exchange. Therefore, whatever dividend might thereafter be declared by the company beyond the 5 per cent. on the preference shares, would *prima facie* be outside the present picture ; but the Special Commissioners find as a fact that Latilla was in effective control of the corporation. In fact what happened was this. The general meeting of the company to consider the accounts of the company for the period ending on Dec. 31, 1936 (which, as an irrelevant matter of fact, was from Apr. 1, 1935, was held on Oct. 12, 1937. The period of 21 months showed a profit of £645,192 11*s.* 6*d.* Payment of £146 11*s.* 6*d.* was authorised. It was made up as follows : £100 as a 10 per cent. dividend on the 1,000 ordinaries down to Dec. 31, 1936 ; and £46 11*s.* 6*d.* as 5 per cent. on the 1,000 preference shares for the five weeks from Nov. 27 to Dec. 31, 1936. The balance was carried forward. On Apr. 1, 1938, the company went into voluntary liquidation.

The only other relevant facts are that on May 7, 1937, the Special Commissioners (in their executive office) gave notice to the company under para. 4 of Sched. I of the 1922 Act requiring the company to furnish them with the information specified in the paragraph ; that on Oct. 5, 1937, the company's accountants forwarded all the information asked for except about the dividend ; in regard to which they said that the general meeting was to be held a week later. On Feb. 3, 1938, the same Commissioners enquired about the general meeting, and on Feb. 8 the company's accountants replied giving the facts which I have already stated.

In the special case the judicial commissioners purport to make certain vague findings about the transaction between the company and the corporation which resulted in the latter taking up the 1,000 ordinary shares ; in particular they say there was an " understanding " or even " an arrangement " between the company and the corporation about the latter assenting to a low rate of dividend on its shares in consideration of the company promising it a 25 per cent. share of future underwriting business ; but the findings fall short of an agreement, and I disregard them in reaching my conclusions.

The company relies on two contentions, (i) a preliminary objection : namely, that the Special Commissioners had lost the executive power conferred on them by sect. 21 of the 1922 Act by reason of their failure to take action within the time limited by the Finance Act, 1928, s. 18 : and that, consequently, the " apportionment " under para. 8 of Sched. I to the 1922 Act was a nullity ; (ii) the substantive objection that the apportionment to the three Latilla ladies was not within the terms of para. 8. Both contentions raise questions of importance.

For the purpose of the preliminary point the company contends that the Finance Act, 1928, s. 18, had been brought by it into operation and that the Special Commissioners, having failed to act within the time allowed, had lost their power to make either direction or apportionment under the sur-tax code, because that power had " ceased and determined " in the words of subsect. (3) (*a*) of that section. The Special Commissioners, who, the company contended, might under the section have taken such action, would have been primarily acting in their executive capacity which might equally be called administrative or ministerial. It is only when Special Commissioners hear an appeal from something done by the Special Commissioners acting ministerially, that they act in a judicial and not an executive capacity. It is one of the anomalies of our constitution that both functions should seem to be assigned to the same body of persons; but in practice they are, as is right, kept quite separate and the same person does not act in both capacities, at any rate, in the same matter.

The Special Commissioners (acting in their judicial capacity) held that sect. 18 had no application in the present case, and WROTTESLEY, J., affirmed their decision. I agree. I think that he decided rightly, on the facts found on the correspondence included in the special case, that the section had never been brought into operation at all. I should have been content merely to adopt his judgment on the preliminary point as my own, but for the thoughtful arguments of counsel for the company, which are entitled to further consideration. Sect. 21 of the 1922 Act (which for brevity I will call the basic section) leaves it open to the Special Commissioners to take action at any time within the general limit of six years permitted by the Income Tax Acts. Consequently, any company, of the kind within the section, is left exposed to the liability of a charge of sur-tax avoidance within the code for years after it has passed and dealt with its income for any given year. It may have distributed some part in dividend so as to constitute it its members' income for sur-tax purposes; or it may have distributed no part in dividend to members, and yet years later it may be shot at under the code. Sect. 18 of the 1928 Act gave to such a company a certain measure of protection. It was obviously designed to cut down the liberty of the Commissioners of Inland Revenue to hold on to their right of postponed attack, without showing their hand; and, conversely, to alleviate the hardship of suspense resting on such companies and their members, by putting a weapon of defence in their hands. Parliament in effect says to each such company: "We realise that the long duration of this power of the Inland Revenue to pounce on your past profits may cause you anxiety; we, therefore, enable you to end your suspense; let the Special Commissioners know that you on your side demand to know where you stand, and what action, if any, they propose to take." That this is the intention of the section appears to me clear. In the first place para. 4 of Sched. I to the 1922 Act enables the Special Commissioners at any time to require full information on practically everything relevant to the code, including "the manner in which the company's income has been dealt with." In the second place sect. 18 of the 1928 Act is expressed not to operate at all, until after the adoption of the company's accounts in general meeting, when normally the company's income will have been dealt with. By then the Special Commissioners may be expected already to have received all information to which the Special Commissioners have a right under para. 4 of Sched. I; and sect. 18 presumably contemplates something more than a mere repetition of information already furnished pursuant to a requisition under para. 4, or, as is often the case, voluntarily. For that reason, if the company wants to take the statutory action authorised by sect. 18, with its drastic limitations upon the duration of the Special Commissioners' powers, I think the company must somehow bring it to the mind of the Special Commissioners that it is taking action under sect. 18. The easiest way to do that is to say so frankly in the letter forwarding the information; but somehow that notice must be given; it is, I think, either a condition precedent or a duty, implied by the section. It is not a self-acting statute of limitation: it is for the company to let the Special Commissioners know that it has set the machinery in motion.

In the present case the company had been already, on May 7, 1937, required by the Special Commissioners to send all the information specified in para. 4 Sched. I of the 1922 Act; and on Oct. 5, 1937, the company had complied with the notice, except as to the manner in which the company's income had been dealt with. On that topic they said that the general meeting was to take place a week later. On Feb. 3, 1938, the Special Commissioners write to ask what has been done at the meeting, and the company, on Feb. 8, duly replied. In those circumstances I agree with the finding of the (judicial) Special Commissioners, and with WROTTESLEY, J., that sect. 18 never operated because the company never put it into operation. An alternative way of putting that conclusion, which is, for the reasons I have given, in my view, equally valid, is that the company never satisfied the condition precedent to the insistence by them on their statutory rights under sect. 18 of making it clear to the Special Commissioners that they were taking the initial step under the section. For these reasons the preliminary point fails.

On the substantive issue, one thing is clear beyond doubt. The whole and sole object of the company's elaborate arrangements described in the findings of the Commissioners in the special case was to avoid sur-tax, the very thing against which the preamble of sect. 21 was directed: the only question is whether Parliament has, in cases like the present, succeeded in "preventing" such "avoidance." The Special Commissioners acting judicially thought that Parliament had not succeeded. The learned judge thought Parliament had succeeded. So do I, and I am tempted merely to adopt the judgment of Wrottesley, J.; but counsel for the company gave us the benefit of a careful and detailed argument, which on this issue alone occupied altogether two whole days; and he is entitled to a reasoned judgment from this court, although I do not propose to travel over all his ground.

It is conceded by him that the direction under sect. 21 was validly given; but the reasons why he could not help making that concession throw light on the question about apportionment, on which the appeal turns. Let me explain. Suppose a company within the section, having only one class of shareholders, in fact earns large profits, which it does not need for any one of the capital purposes excepted by the section (as amended in 1927 and 1936), but distributes nothing in dividends; in such a case it makes no difference to the Commissioners' power to give a direction, whether the failure to distribute is due to an exercise of discretion by the company in general meeting, or to a provision in the articles which forbids distribution. It is enough to justify a direction, that in fact no distribution takes place. If in the present case the company had created and issued no new ordinary shares, but had merely converted its 10,000 ordinary shares into 5 per cent. preference shares, with no rights to distribution except in a winding up, the members of the company, by that step, taken in advance, would have deprived themselves (unless they amended the articles) of the power of distributing current profits by way of dividend; but, even so, it would not have been open to the company to contend that the failure to distribute dividend was not a failure within the section; simply because the section judges by results. So in the present case the fact, if it be the fact, that the company might have distributed the whole of the £645,192 in a dividend on the 1,000 ordinary shares owned by the corporation does not alter the position. The company simply did not distribute a "reasonable" amount; and, therefore, what the company could have done did not matter; it did not in any way affect the ministerial freedom of the Special Commissioners to give their directions. Even if the preference shareholders had, at the instance of the board, joined with the ordinary shareholders in voting a 1,000 per cent. dividend on the ordinary shares, it would not have prevented the ministerial commissioners from taking the view that even £10,000 was an unreasonably small distribution. The section looks at the actual facts of each case. But in considering what amount of income is to be treated as available for distribution the section is imperative in its limitation of the right of the company to appropriate to capital purposes. As amended in 1927 (sect. 31 (1)) and 1936 (sect. 19 (4)) it forbids a company taking into account any appropriation of income to capital uses except for certain specified purposes. If the total available for distribution is depleted by other appropriations to capital uses, with the result that the residue of profits available for distribution falls plainly below the "reasonable" figure, and *a fortiori* if there is no distribution, there is, *ipso facto*, a default within the section, and the penal consequence, that a "direction" can be given, follows automatically.

This question of the appropriation of income to capital uses has a general bearing upon the fiscal duty of companies within the code and is directly involved both in the right of the Special Commissioners to give a direction and in the procedure for apportionment; although the relevant provisions in regard to the latter stand on a rather different footing. In one sense the process of apportionment is subsidiary and supplementary to direction; but the main object of protecting the Exchequer in accordance with the preamble is as directly concerned at the stage of apportionment as at the stage of direction; and the prevention of escape at the second stage by the "capital" loophole is just as necessary, and I think, just as clearly expressed in the section. It will serve no fiscal purpose to direct the company, if its members are to escape. It is, therefore, natural to look for suitable provision at the stage of apportionment for stopping up the loopholes of escape by means of conversion of income into capital both for members of the company and for others standing in such a relationship to the company as to be able to get a share in the fruits of the company's undertaking.

In my opinion, that is what one does find in sect. 21 (7), and I think its language is unambiguous. The natural meaning of the word "capital" includes capital assets; and the burden must be solely on the party which seeks to limit the meaning to share capital. One object of the subsection is to extend the category of members proper so as to include those, who, whilst not being members, are in a position to enjoy the fruits of the company's working. But another object is to describe the kind of interest in the company possessed by each such member in a way which will afford a basis of comparative valuation for apportionment under para. 8 of the schedule. The primary objective of the whole of sect. 21 is to divide up the income of a company, which has failed to distribute reasonably, in such a way that each member (in the extended sense) will have attributed to him notionally a share of the sur-tax burden proportionate to his real or resultant interest in the company's actual income from all sources. In a case like the present the only way in which those proportions can be ascertained is by measuring the interest of each in the assets available for distribution in the winding up. That, I think, is what is clearly enacted by the words of subsect. (7) and para. 8. The appellants and respondents, it is true, urge upon us radically opposite interpretations of the relevant provision—subsect. (7)—and to that extent seem to raise some doubt upon its meaning; but difficulty of interpretation is not the same thing as ambiguity of expression. Para. 8 of the schedule is addressed primarily to the ratios in which the total of the putative dividend is deemed to be distributed amongst the "members." For that purpose it is the reality of their interests in the company and its fruits with which the statute is concerned. In order to find the basis of apportionment, or in other words, the ratio of burden which each "member" is to bear to the other "members," a value has to be put on the "interest" of each "member"; and I cannot imagine why any form of proprietary or pecuniary interest, direct or indirect, should be left out of account by Parliament. The individual valuation may involve difficulties of detail in order to get all on a comparable plane; but that is no reason for cutting out altogether "members" who get the benefit of the company's profits in a capital form. The relation of the machinery of apportionment to the principal enactment, upon which the Revenue's right of direction is founded, raises a somewhat similar question of statute interpretation as that considered by the House of Lords in *Lysons* v. *Knowles* (1), where the House held that the substantive enactment in the Workmen's Compensation Act, 1897, s. 1, imposing the obligation on the employer to pay compensation could not be treated as excluded by the provisions in the schedule for ascertaining the *quantum* of compensation as the Court of Appeal had held. The application of the principle in the present case is less extreme, but the principle has some bearing.

Sect. 21 (7), in my opinion, construed in accordance with its natural English sense, gives to the word "member" wherever used in the section that width of meaning which seems to me essential for the purpose of para. 8. The three lady shareholders clearly had an interest in the capital of the company, as I construe the word "capital"; but I go further; I think that they had an "interest" in the income of the company, or, at any rate, in its "profits," although their interest, as long as the company was a going concern, was indirect, or only realisable upon the happening of a future event, namely, the winding up of the company or a change in the articles—either of which was within their power to bring about. That their interest was future or contingent, in my opinion, makes no difference; for one object of subsect. (7) was to bring into the same position as members of the company presently entitled to participate in a declared dividend all persons who possess, directly or indirectly, an equivalent power of enjoying the fruits of the company, whatever form that power may take. It follows from these premises that the three preference shareholders in the present case were "members" within para. 8; and that their interest in the company's assets in the winding up affords a proper comparative basis for assessing their interest.

As an alternative to his first argument on the construction of subsect. (7) and para. 8 taken together, counsel for the company wants us to read into para. 8 an implication restricting its application to such " members " as are entitled during the life of the company to participate in dividends. I can see no justification whatever for implying any such limitation. In the first place the wording of the subsection is as wide as it could possibly be. In the second place there is no reason for limiting the category of members on whom the sur-tax burden is to be cast to those who, during the life of the company, have been entitled to participate in dividends. The reasons are all the other way. If an artificial company has been created for the purpose of avoiding sur-tax, to whom should the legislature naturally look as the probable artificer ? Obviously, to the person or persons who have an interest which gives control over the company, whatever be the form—capital or income—which that interest may have taken. The implied condition of counsel for the company may well be the only ground on which he could succeed in this appeal ; but that is no justification for making the implication ; on the contrary, if there be any ambiguity at all in either subsect. (7) or para. 8 of the schedule, there is ample reason in the whole section for rejecting his construction and for adopting a wide interpretation as did WROTTESLEY, J. Counsel for the company relied for support on one or two chance phrases in the judgment of FINLAY, J., in *Drew and Sons, Ltd.* v. *Commissioners of Inland Revenue* (2), and clung to them as to the proverbial straw. But they could keep no such argument afloat. In *Drew's case* (2), the problem with which we have to deal, of the persons most deeply interested in the company and its earnings being debarred, by a change in the articles of association of the company, from direct dividend rights, was wholly absent. The life tenant under the settlement whose position was discussed had, through his trustee, in whose name the shares were registered, an absolute right before the winding up, to enjoy the company's dividends : and it is that fact in that case to which the phraseology of FINLAY, J., upon which counsel for the company relies so much, is attributable. The decision is no authority on the present case.

There is, however, authority in the House of Lords which is, in my view, amply sufficient to justify the judgment of WROTTESLEY, J., and our dismissal of the appeal. The principles laid down by their Lordships in *Penang and General Investment Trust* (3), even if not so directly in point as to constitute authority binding on us, are germane to much of the argument on this appeal ; and give us direct guidance in the interpretation of subsect. (7). After referring to *Blott's* case (4), *Inland Revenue Comrs.* v. *Bunell* (5), and *Sansom's* case (6), where " capital " questions in relation to income tax were considered, VISCOUNT SIMON, L.C., added, at p. 494 ([1943] 1 All E.R., at p. 515) : " It is not without significance that those cases arose before the 1922 Act was passed." It is inconceivable that the " capital " loophole for sur-tax escape should not have been prominently present to the mind of Parliament in 1922, when it passed subsect. (7) in its present form ; and LORD MACMILLAN in effect said so.

There is only one further argument advanced on behalf of the company to which I must refer. It was that sections of a very drastic order were passed in later Finance Acts, which contained detailed provisions for dealing with particular devices for tax-avoidance, such as the 1927 Act, s. 31 (4) ; the 1936 Act, s. 20 (4) (*a*), (6) (*a*) and (7) ; and the 1937 Act, s. 14 (3). These, counsel for the company said, would, at any rate in part, not have been necessary, if the arguments for the Crown in the present appeal are sound : but that is not enough, even if well founded. In any event, I feel there is much danger in such retrospective interpretation. It proceeds on the hypothesis that (i) Parliament knew and understood the law as it stood previously, and was acting on the implied basis of recognising the validity of judicial decisions previously given ; and (ii) that such particular later provisions, passed by Parliament in order to meet newly discovered evils, may be consulted in order to get light on the true meaning of earlier general provisions. There may be exceptional instances where some light may be got in that way, but it must be very rarely permissible to put an artificial construction on an earlier statutory provision ; and, if its ordinary English meaning is clear, nothing short of deliberate amendment can suffice. As VISCOUNT SIMON, L.C., said in *Fattorini* v. *Commissioners of Inland Revenue* (7), at p. 652 ([1942] 1 All E.R., at p. 621) :

> . . . it must not be assumed as a matter of statutory construction that earlier provisions have a particular meaning because, if so interpreted, the need for the later enactment is elucidated.

In the present case, subsect. (7) is and always was clear, so far as concerns present questions.

In the result I entirely agree with the judgment of WROTTESLEY, J. The appeal must be dismissed with costs.

MACKINNON, L.J. : At the material time F.P.H. Finance Trust, Ltd., was a company with a paid up capital of £11,000, divided into 1,000 ordinary shares of £1 and 10,000 preference shares of £1. While the company remained a going concern the preference shareholders were entitled to a fixed cumulative preference dividend of 5 per cent., and the ordinary shareholders were entitled to such dividend as the company in general meeting might resolve. On a winding up the holders of the ordinary shares were entitled to be paid £1,000, while the preference shareholders were entitled to have all the rest of the assets distributed among them. The 10,000 preference shares were held as to 3,334 by Mrs. Latilla, as to 3,333 by Mrs. Mayo, and as to 3,333 by Mrs. Campbell. These ladies were the wife and two daughters of H. G. Latilla. That they were not for the first time assisting Latilla in his financial devices is apparent from the report of *Latilla* v. *Commissioners of Inland Revenue* (8). The 1,000 ordinary shares were held by the National Mining Corpn., Ltd. H. G. Latilla was a director of that company, and in the special case the Commissioners say :

> We were satisfied on the evidence before us that Mr. H. G. Latilla was in effective control of it . . .

that is, of the National Mining Corpn. The special case further finds that, as between the preference shareholders and the National Mining Corpn., there was :

> . . . an understanding that any dividend declared on the ordinary shares [of the F.P.H. Finance Trust, Ltd.,] should be so limited as to be ludicrously incommensurate with the amount of the income available for distribution.

But, having regard to their findings as to the relation of Latilla to the corporation and his relationship to the preference shareholders any such finding as to an "understanding" appears to be superfluous.

Paras. 10 and 11 of the special case are as follows :

> 10. On Oct. 12, 1937, the respondent company considered and adopted the accounts for the period Apr. 1, 1935, to Dec. 31, 1936. These accounts showed a profit for the period of £645,192 11*s*. 6*d*. Payment of £146 11*s*. 6*d*. by way of dividend was authorised. This amount was apportioned as follows : As to £46 11*s*. 6*d*. in payment of a dividend on the preference shares at the rate of £5 per cent. per annum from Nov. 27, 1936, to Dec. 31, 1936, and as to £100 in payment of a dividend of 10 per cent. on the ordinary shares for the period to Dec. 31, 1936. The balance of the profits was carried forward.
>
> 11. The respondent company went into liquidation on Apr. 1, 1938. The corporation were repaid £1,000, the amount subscribed for their holding of ordinary shares, and the balance of the assets were distributed to Mrs. Latilla and her daughters, the preference shareholders.

These being the material facts the Special Commissioners were concerned to consider the duty laid upon them by the Finance Act, 1922, s. 21, and sect. 8 of Sched. I of that Act. On May 16, 1941, they issued a direction to the company under sect. 21 that its undistributed income should be deemed to be the income of its members for the purpose of assessment to sur-tax, and, having computed such undistributed income at £858,817, apportioned the liability of the members as being : National Mining Corpn. £100, Mrs. Latilla £286,296 5*s*., Mrs. Mayo £286,210 7*s*. 6*d*., and Mrs. Campbell £286,210 7*s*. 6*d*.

The company appealed to the Special Commissioners against this direction and apportionment. The Special Commissioners upheld the direction to the company, but discharged the above apportionment to the members, and stated a special case on which the Commissioners of Inland Revenue appealed. WROTTESLEY, J., on Oct. 26, 1942, allowed their appeal, holding that both the direction to the company and the apportionment to its members were rightly made by the Commissioners under their statutory duty, and remitted the case to the Special Commissioners. From this decision the company appeals to this court.

The first point made by the appellants was by way of reliance upon the Finance Act, 1928, s. 18. That provides by subsect. (1) that a company to whom sect. 21

of the Act of 1922 applies may make a certain communication to the Special Commissioners, and by subsect. (3) that, unless the Commissioners, within three months of the receipt of that communication, intimate to the company their intention to take steps under the said section 21, the power of the Commissioners to take any further action thereunder shall cease and determine. The whole question is whether this company can predicate that it fulfilled the requirements of sect. 18 (1) of the Act of 1928. There is no pretence that they expressly purported to act under that subsection, nor can it be said that literally they complied with its terms. The most that can be said is that, in certain correspondence between the company and the Commissioners, the company conveyed to them most of the information that would have been afforded if it had expressly and precisely complied with the terms of the subsection, and that the remainder of such information was both unimportant and could be assumed or guessed by the Commissioners. I do not think this can avail. It is enough to say that the company failed to establish any compliance on its part with subsect. (1), and as a result is not entitled to the benefit of subsect. (3).

Upon the main question, the appellants contended that the apportionment above mentioned was not justified by the provisions of the Act of 1922. Sect. 21 (8) of that Act directs that the provisions in Sched. I shall have effect as to the apportionment (of the actual income of the company) among the members of the company. Sched. I, para. 8, says that :

> The apportionment of the actual income of the company shall be made by the Special Commissioners in accordance with the respective interests of the members . . .

It is a melancholy consideration that we had to listen for the best part of four days to arguments as to the effect of those few simple words.

It is argued for the appellants that "the respective interests of the members" must be ascertained by reflection of their shareholding and the rights to dividends upon such shares, and only by that consideration. If so, it is said that the rights of the three ladies would only be to receive £500 (being 5 per cent. on £10,000), and the right to all the rest would be that of the National Mining Corpn., which is not subject to sur-tax. The Commissioners, it was said, are given no power to take into account the fact that, on a winding up the corporation would only get the return of the nominal amount of the ordinary shares, while the three preference shareholders would share the enormous balance.

This argument that "respective interests of the members" can only mean their interests as measured by their rights to dividends seems to me to leave out of account another material provision, that is, sect. 21 (7) of the Act. That provides that :

> The expression member shall include any person having a share or interest in the capital or profits or income of a company.

In the *Penang* case (3), Lord Macmillan, having quoted this subsection (7), says, at p. 501 ([1943] 1 All E.R., at p. 519) :

> A company can distribute its profits only among its registered shareholders [and he might have added "according to their shareholding rights] but the Special Commissioners in their apportionment are not so restricted.

In Sched. I, para. 8, "member" must have the same meaning. So that when that directs an apportionment "in accordance with the respective interests of the members" that means "in accordance with the respective interests of persons who have any share or interest in the capital or profits or income of the company." It seems to me impossible to limit such an interest to the right to receive dividends. And a person who is in a position to wind up a company, and who, on such winding up, is entitled to practically all of its accumulated and undistributed profits, appears to be clearly a person who has "a share or interest in the capital or profits or income of the company."

As a mere matter of the construction of the Act of 1922, therefore, I think the impugned apportionment was justified.

Much reliance was placed upon the decision of Finlay, J., in *Drew's* case (3). It is true that, upon the particular facts of that case, it was held that the apportionment of the undistributed income of the company should be to those members who would have received it, and as they would have received it if it had been distributed by the company. But Finlay, J., did not purport to lay down any general rule as to the effect of sects. 21 (7) and (8) and Sched. I.

A further argument was based upon the provision in the Finance Act, 1937, s. 14 (3). That enacts that, where a direction is given under sect. 21 of the Act of 1922 with respect to an investment company, the Special Commissioners in determining the respective interests of the members under Sched. I, para. 8 :

> . . . may . . . attribute to each member an interest corresponding to his interest in the assets of the company available for distribution among the members in the event of a winding up.

It is argued that this indicates that, before this was enacted, the Special Commissioners had no such power. I do not think this is a tenable argument. I have said that, on the true construction of the Act of 1922, I think they had such a power. The very fact that counsel for the company could, at such length and with such plausibility, argue that they had not, may in itself indicate a reason why Parliament thought it desirable in 1937 to make it clear that the argument was not to be open. That the clarification was limited to investment companies and not extended to a trading company may well be, as the Solicitor-General suggested, because an investment company is almost certain to have income coming in after a winding up has begun, whereas in the case of a trading company that is not so likely.

I think the judgment of Wrottesley, J., was correct, and this appeal should be dismissed with costs.

du Parcq, L.J. : I agree that this appeal should be dismissed. I wish to add one observation with regard to the Finance Act, 1928, s. 18. Counsel for the company suggested that, if his contention were rejected, it would follow that, if the Special Commissioners were first in the field with a request for a copy of the accounts of a company and of the report of the directors, the company, by complying with the request, would lose its rights under the section. It is as well that it should be stated that no such result will follow from our judgment. If a company is asked to furnish copies of these documents, it is no doubt open to it, when it furnishes them, to make it plain that it is forwarding them, not solely by reason of the request, but in pursuance of sect. 18. What is essential is that it should be brought clearly to the notice of the Special Commissioners that the documents are being forwarded with a view to compelling them to perform the duty which is imposed upon them by the section, namely, the duty of proceeding to consider the position of the company in relation to the Finance Act, 1922, s. 21.

The decision of the main point in the case depends ultimately on the construction of the Finance Act, 1922, s. 21 (7). This court has already decided that the word " interest " in the subsection must be given, not a restricted, but a wide meaning : *Inland Revenue Comrs.* v. *Tring* (9), at p. 513 ([1939] 2 All E.R., at p. 108). Speaking for myself, I do not find it necessary to decide whether Mrs. Latilla and her daughters can be said to have had an interest in the capital of the respondent company. In the case which I have just cited, Macnaghten, J. (at p. 510), expressed the opinion that the word " capital " in the context might cover " not only share capital, but also the pecuniary capital of a company, its capital assets." This may be so, but on the other hand it is, I think, undoubtedly true to say that, in common parlance, the " capital " of a company means " the total sum of the contributions of the shareholders." I take this definition from the Oxford English Dictionary. I prefer to rest my decision on the fact, which seems to me to be almost beyond dispute, that the ladies concerned had an interest in the profits of the company. They have in fact shared in its accumulated profits, and, in my opinion, they most clearly had a real financial interest in those profits at the material date, although, as Scott, L.J., has said, the interest was " only realisable upon the happening of a future event."

In my judgment, Wrottesley, J., came to a right conclusion.

Appeal dismissed with costs. Leave to appeal to the House of Lords granted.

Solicitors : *Birkbeck, Julius, Edwards & Co.* (for the appellants) ; *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

INLAND REVENUE COMMISSIONERS *v.* BAGNALL, LTD.

[King's Bench Division (Macnaghten, J.), **October 29, November 1, 2, 1943.**]

Revenue—Excess profits tax—Capital employed in standard period—Sum offered in settlement of excess profits duty liability—Whether deductable as debt before accepted—Finance Act, 1926 (*c.* 22), *s.* 38 (1) (6)—*Finance* (*No.* 2) *Act*, 1939 (*c.* 109), *Sched. VII, Pt. II, r.* 2.

As a result of investigations made in the years 1932 to 1935, it was found that the respondent company had underpaid excess profits duty to the amount of £14,449 11*s.* Since the case was not an undetermined case within the meaning of the Finance Act, 1926, s. 38 (1), no claim for the unpaid sum could be sustained unless it were established that there had been fraud or wilful default on the part of the respondent company. On Sept. 22, 1937, the Board of Inland Revenue accepted an offer of £10,000 made by the company's accountants in settlement of the liability. The respondent company, which had selected the years 1935 to 1937 as its standard period for the purposes of excess profits tax, contended that the sum of £10,000 was a debt due from the respondent to the Inland Revenue as from Jan. 1, 1935; and that, in computing the company's capital, it should be deducted from that date, since an admission before the Special Commissioners that its managing director had been guilty of wilful default during the relevant years satisfied the conditions imposed by the Finance Act, 1926, s. 38 (6). It was contended by the appellants that, even if there was a liability on Jan. 1, 1935, that liability did not become a debt within the meaning of Sched. VII of the Finance (No. 2) Act, 1939, until it was quantified :—

Held : apart from the admission made before the Special Commissioners no fraud or wilful default by the company was ever proved or admitted. Moreover, the word "debt" in the Finance (No. 2) Act, 1939, Sched. VII, was used in its proper sense of an ascertained sum. There was, therefore, no liability on the part of the respondent company until its offer to pay £10,000 was accepted on Sept. 22, 1937.

[**EDITORIAL NOTE.** The question here is the meaning of the word "debt" in Sched. VII, and it is held that it does not refer to a mere liability the amount of which is unascertained but refers only to an ascertained sum, that is a liability which has been quantified.

For the Finance (No. 2) Act, 1939, Sched. VII, r. 2, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, p. 1222.]

Cases referred to :

(1) *Absalom* v. *Talbot*, [1943] 1 All E.R. 589.
(2) *Cockerline & Co.* v. *Inland Revenue Comrs.* (1930), 144 L.T. 84 ; Digest Supp.
(3) *Port of London Authority* v. *Inland Revenue Comrs.*, [1923] A.C. 507.
(4) *Holden (Isaac) & Sons, Ltd.* v. *Inland Revenue Comrs.* (1924), 12 Tax Cas. 768 ; Digest Supp.
(5) *Newcastle Breweries, Ltd.* v. *Inland Revenue Comrs.* (1927), 96 L.J.K.B. 735 ; Digest Supp. ; 137 L.T. 426 ; 12 Tax Cas. 927.

Appeal by the Crown against a decision of the Special Commissioners reducing an assessment to excess profits tax made on the respondent company. The facts are fully set out in the judgment.

Sect. 38 of the Finance Act, 1926, provides as follows :

(1) After Sept. 30, 1926, no assessment or additional assessment of duty shall be made, and no claim for relief from or for reduction or repayment of duty shall be entertained or allowed, except in a case which is an undetermined case within the meaning of this section, and the Finance Act, 1921, s. 39, shall have effect accordingly.

(6) Notwithstanding anything in this section, the Commissioners may at any time make an assessment in respect of any excess profits duty which appears to them not to have been assessed by reason of any fraud or wilful default on the part of the person liable to be assessed and recover the duty chargeable on the assessment, and any person aggrieved by any such assessment shall have the same right of appealing against it as he would have had of appealing against any assessment to duty if this Act had not passed.

The Attorney-General (*Sir Donald B. Somervell, K.C.*), and *Reginald P. Hills* for the appellants.

Frederick Grant, K.C., and *J. W. P. Clements* for the respondent.

The Attorney-General : The expression "debt" signifies more than liability. This is pointed out by Viscount Finlay in *Port of London Authority* v. *Inland Revenue Comrs.* (3), at p. 514. It means a quantified sum, something which is due even though it is payable *in futuro.* The company's offer to pay £10,000 could always have been withdrawn. [Counsel referred to *Absalom* v. *Talbot* (1), *Cockerline & Co.* v. *I.R.C.* (2), and to the Finance Act, 1926, *s.* 39 (1) and the Finance (No. 2) Act, 1915, s. 45 (1) (3).]

Grant, K.C. : Holden (Isaac) & Sons, Ltd. v. *I.R.C.* (4) and *Newcastle Breweries, Ltd.* v. *I.R.C.* (5) are two cases where it is shown that a taxpayer may be compelled to bring in sums not yet quantified. [Counsel also referred to *Absalom* v. *Talbot* (1) and to *Cockerline & Co.* v. *I.R.C.* (2).]

The Attorney-General in reply : The cases of *Holden & Sons. Ltd.* v. *I.R.C.* (4) and *Newcastle Breweries, Ltd.* v. *I.R.C.* (5) merely decided that, where after assessment something unforeseeable happened, any additional sum received must be brought into the assessment for the year when the transaction took place. The Crown relied on the proviso to r. 2 of Sched. VII, Pt. II of the Finance (No. 2) Act, 1939, in construing the word "debt."

Macnaghten, J. : This is an appeal from a decision of the Special Commissioners with regard to the assessment to excess profits tax made upon the respondent, W. G. Bagnall, Ltd., for the chargeable accounting period Apr. 1, 1939, to Dec. 31 of that year.

The respondent was incorporated as a private company, limited by shares, under the Companies' Act, 1862, so long ago as the year 1887. It selected the years 1935 and 1937 as its standard period for the purposes of the excess profits tax. The excess profits tax was imposed by the Finance (No. 2) Act, 1939, and Pt. II of the seventh schedule to that Act contains the rules for computing the capital employed in a trade or business the profits whereof are subject to that tax. The second of those rules provides that, in the computation of the capital, "debts" are to be deducted from the capital employed in the trade or business during both the standard period and any chargeable accounting period.

The question at issue on this appeal is whether a debt of £10,000 due from the respondent to the Inland Revenue ought to be deducted as at Sept. 22, 1937, as the appellants contend, or as the respondent contends, at Jan. 1, 1935. The Special Commissioners decided that question in favour of the respondent.

The debt was due in respect of unpaid excess profits duty for the years 1918, 1919 and 1920. As a result of investigations by the Inland Revenue authorities in the years 1932 to 1935 it transpired that the respondent had underpaid a net sum of £14,449 11*s*. But the case was as from Sept. 30, 1926, a "determined case" under the Finance Act, 1926, s. 38 (1), and, therefore, no claim for this unpaid sum could be sustained unless it could be established that there had been fraud or wilful default on the part of the respondent. On Nov. 20, 1936, the respondent's accountants wrote a letter to the Chief Inspector of Taxes, in the following terms :

> Dear Sir,
>
> W. G. Bagnall, Ltd.
>
> Referring to our recent interviews and negotiations with you, we have now conferred with, and been instructed by, the various parties interested to make, without prejudice, an offer in settlement of the taxation affairs of this company.
>
> In doing so, our clients and ourselves have been guided by the opinion of counsel that assessments to excess profits duty are problematical, and that, if assessments were competent the amount of such assessments is still more in doubt owing to the provisions of sect. 38 (6) of the Finance Act, 1926 [that is a reference to the provision about need to prove fraud or wilful default], and the death in 1932 of Mr. J. G. Gifford, the governing director and controlling shareholder during the material years.
>
> Further doubt arises as regards the company, inasmuch as no fraud or wilful neglect can be alleged against the present managing director, Mr. W. S. Edwards.
>
> Whilst not admitting any liability on the part of the company or individuals connected therewith, we have been authorised by our clients to offer the sum of £10,000 in full and final settlement of any claim against the company or its directors in respect of any excess profits duty, corporation profits tax, income tax, super and sur-tax, interest or penalties which may or may not be exigible up to and including Apr. 5, 1935.

By a letter dated Sept. 22, 1937, the Board of Inland Revenue accepted this offer.

The Special Commissioners have expressed their decision thus :

> In our view there was at 1st Jan., 1935, and prior thereto a sum in respect of unpaid

excess profits duty which the revenue could recover: the fact that this sum was not quantified at the time was immaterial. The failure to quantify this sum was due to the imperfect way in which the respondent company's accounts had been produced for the purposes of excess profits duty. When the matter was taken up by the revenue authorities it became clear, and it was admitted on both sides, that something had escaped assessment. We held that the sum of £10,000 was a debt within the meaning of the Finance (No. 2) Act, 1939, Sched. VII, Pt. II, r. 2, and that the appeal succeeded.

Counsel on behalf of the respondent submitted that this decision of the Special Commissioners necessarily implied that they were satisfied that there had been fraud or wilful neglect on the part of the respondent, or else they could not have come to the conclusion that there was, on Jan. 1, 1935, a sum in respect of unpaid excess profits tax which the revenue could recover, since the revenue could not recover the £14,449 11*s.* or any part of it unless it were proved, or admitted, that the underpayment was due to the fraud or wilful default of the respondent. There is great force in what counsel for the respondent said, but it is somewhat curious that, if the Special Commissioners really held that view, they should have omitted to say so. Unless there was a sum due in respect of unpaid excess profits tax at Jan. 1, 1935, the appeal must necessarily be successful. Counsel for the respondent submitted that, at that date, the liability of the respondent had been established, that the amount of the liability had been ascertained as £14,449 11*s.*, and that the true view of the matter was that, when the settlement of £10,000 was made, that established liability was reduced from the larger to the smaller sum. If, however, the Special Commissioners did hold that it was established before Jan. 1, 1935, that the respondent had been guilty of fraud or wilful default the question then arises: Was there any evidence on which they could come to that conclusion? No doubt it was established before the commissioners that the respondent had been guilty of fraud or wilful default. They had the advantage of hearing counsel for the respondent, and he admitted before them that the deceased Gifford, who was the managing director and controlled the company during the relevant years, had been guilty either of fraud or, at least, of wilful default; but there was no evidence before them of any other such admission. So far as the facts are stated in the case, it was not until counsel for the respondent admitted it before the Special Commissioners that any such admission was made. Counsel for the respondent, of course, in view of the acceptance of the offer of £10,000 in settlement, could make the admission as safely as the prisoner who has been acquitted can then inform the jury that he, in fact, had committed the crime.

Not only was there no evidence on which the Special Commissioners could find that there had been any admission of liability on or before Jan. 1, 1935, but, as a matter of fact, except for the admission made by counsel for the respondent before the Special Commissioners, the fact that there was fraud or wilful default on the part of the respondent has never been either proved or admitted by anyone. The letter of Nov. 20, 1936, which I have read, makes it perfectly plain that the respondent had not admitted, and did not then admit, even when making the offer of £10,000, that there had been any fraud or wilful default. It is pointed out in that letter that the fact that Gifford was dead would, anyhow, put some difficulty in the way of the Inland Revenue if they sought to establish a claim.

In my view, there was no liability on the part of the respondent on Jan. 1, 1935. There was merely a claim. There was no liability, and there never was, in my view, in this case any liability, until the "without prejudice" offer made by the accountants was accepted on Sept. 22, 1937.

There was a further point raised by the Attorney-General, that, assuming that there was a liability on Jan. 1, 1935, that liability did not become a "debt" within the meaning of that word as used in the Finance (No. 2) Act, 1939, Sched. VII, until the liability was quantified. It is true that the word "debt" may, in certain connections, be used so as to cover a mere liability, but I think that in this Act it is used in the proper sense of an ascertained sum and that the contention of the Attorney-General is well founded. For these reasons, I think that the appeal must be allowed with costs.

Appeal allowed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the appellants); *Woodbridge & Sons* (for the respondent).

[*Reported by* Gwynedd Lewis, *Barrister-at-Law.*]

JAMES A. JOBLING & CO., LTD. v. THE SUNDERLAND COUNTY BOROUGH ASSESSMENT COMMITTEE.

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J., Macnaghten and Atkinson, JJ.), **December 21, 1943.**]

Rates and Rating—Derating—Industrial hereditament—Building close to but not attached to main factory—"Contiguous"—Building used for storage and distribution—Rating and Valuation (Apportionment) Act, 1928 (*c.* 44), *s.* 3 (1), (3).

The appellant company were manufacturers of glassware. Close to, but not connected with, the manufacturing premises the appellants also owned a building which was used for the purpose of storing and distributing the finished goods except for a small proportion thereof which underwent a finishing process. The question was whether this building was an industrial hereditament within the Rating and Valuation (Apportionment) Act, 1928. The appellants contended (i) that the building was contiguous to the main factory within s. 3 (3) of the Act; and (ii) alternatively, that the building was primarily occupied and used for processes which formed part of the train of manufacture and, therefore, did not come within the proviso to s. 3 (1) of the Act:—

HELD: (i) the building was not contiguous, within the meaning of s. 3 (3) of the Act, to the main factory.

(ii) storage and distribution were the primary purposes of the building, therefore, the premises were used primarily for purposes not those of a factory or workshop within the proviso to s. 3 (1).

[**EDITORIAL NOTE.** Holding that they are bound by the decision in *Spillers, Ltd.* v. *Cardiff Assessment Committee* (1) to construe the word "contiguous" narrowly as meaning "touching," the Divisional Court have decided that the building here in question was not contiguous to the main building. It is, however, mentioned that some dictionaries give a wider meaning to this word and that a court not bound by the above decision may feel itself free to adopt a more liberal construction.

AS TO RATING RELIEF FOR FACTORIES AND WORKSHOPS, see HALSBURY, Hailsham Edn., Vol. 27, pp. 439-445, paras. 876-886: and FOR CASES, see DIGEST, Supp., Rates and Rating, Nos. 226a-226ff.]

Cases referred to:

*(1) *Spillers, Ltd.* v. *Cardiff Assessment Committee*, [1931] 2 K.B. 21; Digest Supp.; 100 L.J.K.B. 233; 144 L.T. 503.

*(2) *Sedgwick* (*Camberwell Revenue Officer*) v. *Camberwell Assessment Committee and Watney, Combe, Reid & Co.*, [1931] A.C. 447; Digest Supp.; 100 L.J.K.B. 271; 145 L.T. 73.

APPEAL by the company on the question of whether certain premises occupied and used by them were an industrial hereditament within the meaning of the Rating and Valuation (Apportionment) Act, 1928, s. 3.

Harold B. Williams for the appellant company.

W. Craig Henderson, K.C., Dr. J. Charlesworth and *E. M. Hoy* for the respondents.

ATKINSON, J. [delivering the judgment of the court]: This is an appeal by James A. Jobling & Co., Ltd., by way of special case stated against a decision of the Deputy Recorder of Sunderland affirming a decision of the Sunderland County Borough Assessment Committee to the effect that a certain hereditament in Leopold Street, Sunderland, was not an industrial hereditament and was not, therefore, entitled to the benefit of the derating provisions.

The appellants are manufacturers of glassware. Until 1920 they conducted the whole of their business at the Weir Glass Works, Millfield. The main works became too small for their business and the appellants purchased the site of the hereditament in question and erected a building thereon. It is close to the main factory. Leopold Street runs at right angles into Back Alfred Street, in which is the main factory. The building is 241ft. long and 84ft. wide. It is built on a slope. There are five floors. The three upper floors cover the full site area, while the remaining two floors are below the level of Leopold Street and cover about one half and one quarter of the area respectively.

The manufacturers' glassware is brought from the main works to the hereditament in trucks carrying bogies on trailers. The loaded bogies are picked up on a conveyor belt and conveyed to the fourth floor with the exception of certain unfinished glassware, which is subject to certain finishing processes. A very small proportion of the glassware brought into the building is subjected to these processes. The great bulk of the glassware comes packed in cardboard cartons.

The appellants make about 120 different types of goods, but only a dozen lines can be made on any one day, with the result that articles are produced in excess of existing orders and storage space has to be found for them. The cartons are sorted into their appropriate classes and placed in racks, from which an appropriate selection is made when orders are received. The fourth and fifth floors are used solely for sorting and stacking in this way. When orders are received goods are selected and sent to the third floor, where they are packed into crates and sent below, where they are labelled and prepared for loading into railway trucks on an adjoining siding. Except for the finishing processes, to which a very small proportion of the goods are subjected, nothing is done to the glassware to adapt it for sale or delivery other than as described.

The question is whether this building is an industrial hereditament. Inasmuch as there is a finishing process carried on in the building, the building is within the definition of a factory or workshop as defined in the Factory and Workshop Act, 1901.

There remains the question whether the hereditament falls within the proviso in sect. 3 (1) of the Act of 1928, which is as follows :

> In this Act the expression " industrial hereditament " means a hereditament . . . occupied and used . . . as a factory or workshop : Provided that the expression " industrial hereditament " does not include a hereditament occupied and used as a factory or workshop if it is primarily occupied and used for the following purposes or for any combination of such purposes, that is to say . . . (*c*) the purposes of distributive wholesale business ; (*d*) purposes of storage ; (*f*) any other purposes, whether or not similar to any of the foregoing, which are not those of a factory or workshop.

Both the committee and the Deputy Recorder have taken the view that the hereditament, although a factory, comes within this proviso, in that it is primarily used for a combination of two purposes, namely, " for purposes of storage " and for purposes " which are not those of a factory or workshop." They have also held that the building was not contiguous to the main building so as to form part thereof. If it were contiguous to the main building, then, by sect. 3 (3), it would be treated as if it and the main building formed parts of a single hereditament and, by the Factory and Workshop Act, 1901, s. 149 (4), would be deemed to form part of the main factory unless it were used solely for some purpose other than the manufacturing process carried on in the main factory. As the building was used to some extent, albeit a small extent, for the manufacturing process carried on in the main factory, it could not be said to be used solely for other purposes and would, therefore, bear the characteristic of the main building, namely, that of an industrial hereditament.

The appellants contend, first, that the new building is contiguous to the old building and is, therefore, within sect. 3 (3) of the Act of 1928. Secondly, they contend that, even if not within that subsection, it does not come within the proviso to sect. 3, in that the building is primarily occupied and used for processes which form part of the chain of manufacture.

As to the first point, it was held by this court in *Spillers, Ltd.* v. *Cardiff Assessment Committee* (1), that the word " contiguous " meant " touching." We think that we are bound by that decision, and must, therefore, hold that the appellants fail on that point. It may be that a higher court will take a wider view of the meaning of the word which is defined, at any rate, in some standard dictionaries as including " adjacent," " near," and " neighbouring."

As to the second contention, all that is done to the great bulk of the goods is to distribute them to convenient places for storage in the classes to which they belong, and to send them down to lower floors where they are packed and dispatched. In our view neither the storage nor handling is a factory or workshop purpose within the definition of " factory or workshop." Except for the trifling quantity subjected to some finishing process, the premises are not used for the purposes of a factory or workshop. It is a place where the appellants' goods are kept in orderly arrangement. It is a place where goods are packed for distribution, but at no stage, with the exception mentioned, is anything done to alter the goods or to fit them for sale or use. The glassware goes out as it comes in. Storage and distribution are the primary purposes of the building. Even the storage is not within sect. 3 (1) (*d*), in view of what was said in *Sedgwick's* case (2) by LORD DUNEDIN, at p. 485, namely :

> I am of opinion that "storage" in sect. 3 (1) (*d*) means storage as a purpose and end in itself, and such storage as is merely a necessary transitory incident of the manufacturing process which is being carried on does not fall within the definition.

we have no doubt that it, as well as the distribution, is within heading (*f*) and, therefore, that the building is not an industrial hereditament.

The appeal will be dismissed with costs.

Appeal dismissed with costs. Leave to appeal granted.

Solicitors: *Tamlin & Co.*, agents for *Wilkinson & Marshall*, Newcastle-on-Tyne (for the appellant company); *Isadore Goldman & Son*, agents for *R. R. Crute & Son*, Sunderland (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

WILLIS v. NEW HUCKNALL COLLIERY CO., LTD.

[HOUSE OF LORDS (Viscount Maugham, Lord Thankerton, Lord Russell of Killowen, Lord Macmillan and Lord Wright), **November 12, 15, 16, December 21, 1943.**]

Workmen's Compensation—Review of compensation—Claims based on rises of more than 20 per cent. in rates of remuneration—"The twelve months immediately preceding the review"—Whether the date at which "review" takes place is date of right accruing or date of application for variation—Workmen's Compensation Act, 1925 (c. 84), *s.* 11 (2), (3).

The appellant workman was employed at the respondents' colliery and on May 25, 1928, suffered an accident. Compensation was paid for total incapacity from that date until Mar., 1929, when he obtained light work with the respondents and thereafter was given compensation for partial incapacity. On Sept. 22, 1941, the workman wrote to the respondents claiming a review of the compensation paid to him under the Act. On Jan. 30, 1942, the workman issued a formal application in the county court for three reviews under the Workmen's Compensation Act, 1925, s. 11 (1) and (3), on the ground that there had been in each of the years 1937, 1940 and 1942, a period of twelve consecutive months when the rates of remuneration for the class of employment in which he was engaged at the time of the accident had increased to the extent required by the Act. It was contended for the workman that in the words "the twelve months immediately preceding the review," in sect. 11 (3), the word "review" connoted the point of time when the wages for the class of employment in which the workman was engaged at the time of the accident had increased to the extent required by the Act, and not the date of the claim for the hearing of the arbitration :—

HELD [LORD RUSSELL OF KILLOWEN and LORD WRIGHT *dissenting*]: (i) the word "review" in sect. 11 (3) indicates a proceeding, not necessarily of a legal character, in which specified facts will be alleged and proved.

(ii) the review commences where there is an unequivocal, though not necessarily formal, claim for a variation.

(iii) on the facts of the case the date of the review was Sept. 22, 1941, and the compensation should be varied as from that date solely on the claim based on the rates of wages for the twelve months preceding Sept. 22, 1941.

Judgment of the Court of Appeal ([1943] 1 All E.R., p. 444) *affirmed with alteration as to the date from which the variation in compensation was to be made.*

[**EDITORIAL NOTE.** The question here is purely one of the construction of the subsection and the difference of opinion in the Court of Appeal is repeated in the House of Lords. The matter is complicated by the fact that it has often been determined that Workmen's Compensation Acts are to receive a popular construction and that questions of compensation are often settled by agreements between the parties without any application to the court. The result arrived at will certainly be a convenient one, since, if the retrospective effect argued for were given to the section, the employer's liability at any given time might be very uncertain.

As to Review in Fluctuation of Wages Rates, see HALSBURY, Hailsham Edn., Vol. 34, p. 955, para. 1306: and for Cases, see DIGEST, Vol. 34, pp. 455, 456, Nos. 3735-3737.]

Cases referred to:

*(1) *Briggs* v. *Dryden (T.) & Sons, Talbot* v. *Vickers, Ltd.*, [1925] 2 K.B. 667; 34 Digest 458, *3752*; 95 L.J.K.B. 275; 133 L.T. 409; 18 B.W.C.C. 163. A

(2) *Dobson Ship Repairing Co., Ltd.* v. *Burton*, [1939] A.C. 590; [1939] 3 All E.R. 431; Digest Supp.; 108 L.J.K.B. 542; 161 L.T. 122; 32 B.W.C.C. 151: *affg. sub nom. Burton* v. *Dobson Ship Repairing Co., Ltd.*, [1938] 3 All E.R. 410; 31 B.W.C.C. 294.

(3) *Gibson (George) & Co.* v. *Wishart*, [1915] A.C. 18; 34 Digest 431, *3511*; 83 L.J.P.C. 321; 111 L.T. 466; 7 B.W.C.C. 348. B

(4) *Williams* v. *Bwllfa & Merthyr Dare Steam Collieries* (1891), *Ltd.*, [1914] 2 K.B. 30: 34 Digest 459, *3760*; 83 L.J.K.B. 442; 110 L.T. 561; 7 B.W.C.C. 124.

(5) *Leivers* v. *Barber, Walker & Co., Ltd.*, [1943] 1 K.B. 385; [1943] 1 All E.R. 386.

Appeal by the workman from a decision of the Court of Appeal, dated Mar. 12, 1943 ([1943] 1 All E.R., p. 444). The facts are fully set out in the opinion of Viscount Maugham.

F. W. Beney, K.C., and *Gilbert Dare* for the appellant workman. C

Gilbert Paull, K.C., and *J. B. Herbert* for the respondents.

Viscount Maugham: My Lords, this is an appeal from an order of the Court of Appeal dated Mar. 12, 1943, setting aside an award made by His Honour Judge Hildyard on July 17, 1942, in favour of the appellant and remitting the matter to the Mansfield County Court.

The appeal turns on the true construction of some rather obscure provisions of the Workmen's Compensation Act, 1925, relating to weekly payments to workmen in cases of partial incapacity. The material sections are as follows: D

> 9 (3). The rules for calculating the weekly payment in the case of partial incapacity shall be (i) If the maximum weekly payment would, had the incapacity been total incapacity, have amounted to 25*s.* a week or upwards, the weekly payment in case of partial incapacity shall be one-half the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident. E
>
> 11 (1) Any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased, subject to the maximum hereinbefore in section nine provided, and the amount of payment shall, in default of agreement, be settled by arbitration under this Act.
>
> (2) Where the workman was at the date of the accident under 21 years of age and the review takes place more than six months after the accident and the application for the review is made before or within six months after the workman attains the age of 21 years, the amount of the weekly payment may be increased to such an amount as would have been awarded if the workman had at the time of accident been earning the weekly sum which he would probably have been earning at the date of the review if he had remained uninjured. F
>
> (3) Where the review takes place more than six months after the accident, and it is claimed and proved that, had the workman remained uninjured and continued in the same class of employment as that in which he was employed at the date of the accident, his average weekly earnings during the twelve months immediately preceding the review would, as a result of fluctuations in rates of remuneration, have been greater or less by more than twenty per cent. than his average weekly earnings during the twelve months previous to the accident (or if the weekly payment has been previously varied on a review during the twelve months previous to that review or the last of such reviews), the weekly payment shall be varied so as to make it such as it would have been if the rates of remuneration obtaining during the twelve months previous to the review had obtained during the twelve months previous to the accident. G H

It will be remembered that the Act is a consolidation Act, and it would seem that the three subsections of sect. 11 are grouped together mainly for the purpose of convenient drafting. Subsect. (2) in particular, which originally was in the form of a proviso in Sched. I (16) of the Act of 1906 and has been twice amended, is very different from the other two subsections; it relates only to reviews in the case of injured infants and on their application. The application for the review must be made before the infant is twenty-one years and six months old.

and the increase in the amount of the weekly payment depends upon the amount which the applicant would probably have been earning at the date of the review, that is, generally by reason of his greater age, if he had remained uninjured. Under this subsection there is power upon proper evidence to award an increase of the weekly payment as from a date antecedent to the date of the application to review : *Talbot* v. *Vickers* (1), *Dobson Ship Repairing Co., Ltd.* v. *Burton* (2). Under subsects. (1) and (3) it is important to remember that the applications for review may be made either by the employer or by the workman, and that subsect. (3) relates only to reviews on fluctuations of wages.

It is apparent from a perusal of sects. 9 and 11 that, whatever may be the true meaning of the word " review " and of the date indicated by the phrase " during the 12 months immediately preceding the review," the effect of sect. 11 (3) is that, if certain facts in reference to fluctuations in rates of remuneration are alleged and proved, then (applying sect. 11 (3) to sect. 9) the weekly payment (in such a case as the present) will be (stating the matter shortly) half the difference between (*a*) the hypothetical average earnings of the workman before the accident calculated by reference to the rates of remuneration obtaining during the 12 months before the review and (*b*) the average of his actual or possible earnings (as mentioned in sect. 9).

For the sake of brevity I shall use the phrase " hypothetical average pre-review earnings " as meaning the average weekly earnings of the workman on the hypothesis mentioned in subsect. (3) during the 12 months immediately preceding the review, and the phrase " average pre-accident earnings " (obviously a fixed figure) as meaning the workman's average weekly earnings during the 12 months previous to the accident. By the " hypothesis " I mean to incorporate the words " had the workman remained uninjured and continued in the same class of employment as that in which he was employed at the date of the accident."

The facts in the present case were complicated, but have been simplified by agreement between the parties or counsel on their behalf. As found by the county court judge or agreed between counsel, they can be shortly stated thus : The workman was a man aged 58 years who, prior to his accident, which occurred on May 25, 1928, was a contractor in a hand-got stall at the respondents' colliery. On that date, whilst at his work, he suffered injury to his left eye and as a result of this injury he lost all vision in that eye and since then he has been admittedly partially incapacitated for work by reason of such loss of vision.

He was paid compensation for total incapacity from May 25, 1928, until March, 1929, at the rate of 30*s.* a week, based upon average pre-accident earnings of £4 9*s.* 2*d.* He then commenced light work for the respondents at the pit top and has carried out such or similar work since that time and has been paid compensation for partial incapacity.

The basic rates of remuneration payable to hand-got stall contractors had not varied since May 25, 1928. But certain percentage increases upon those basic rates had progressively increased since that date and hence there had been fluctuations in rates of remuneration in an upward direction within the meaning of sect. 11 (3) of the said Act.

The basic rate plus percentage in the pre-accident period was the minimum, namely, 138 per cent. This gave the average pre-accident wage of £4 9*s.* 2*d.* as stated. During the 12 months prior to Aug. 1, 1937, the average percentage over basic rates was 167.9 per cent. which would give a weekly wage of £5 8*s.* 6*d.* This figure exceeded £4 9*s.* 2*d.* by more than 20 per cent. During the 12 months prior to Sept. 1, 1940, the average percentage over basic rates, after making the same conditions, was 204.71 per cent. which would give a weekly wage of £6 12*s.* 3*d.* This figure exceeded £5 8*s.* 6*d.* by more than 20 per cent. During the 12 months prior to Feb. 1, 1942, the average percentage over basic rates after making the same additions was 247.10 per cent. which would give a weekly wage of £7 19*s.* 10*d.* This figure exceeded £6 12*s.* 3*d.* by more than 20 per cent.

The workman claimed on this footing to have three reviews of his weekly payments of compensation : (*a*) As from Aug. 1, 1937, by substituting for his pre-accident average weekly wage of £4 9*s.* 2*d.* the figure of £5 8*s.* 6*d.* (*b*) As from Sept. 1, 1940, by substituting for his pre-accident average weekly wage of £4 9*s.* 2*d.* the figure of £6 12*s.* 3*d.* (*c*) As from Feb. 1, 1942, by substituting for his pre-accident average weekly wage of £4 9*s.* 2*d.* the figure of £7 19*s.* 10*d.*

The three dates mentioned are claimed to be the dates of "the review" and the hypothetical average pre-review earnings are calculated by reference in each case to the preceding 12 months. I shall refer to these claims as claims (*a*), (*b*) and (*c*).

On Sept. 22, 1941, the appellant by letter to the respondents claimed a review of the weekly payments payable to him under the Workmen's Compensation Act, 1925. This informal request was marked "without prejudice"; but it has been agreed between the parties that it should be treated as if these words had not been written. On Jan. 30, 1942, the appellant issued a formal application in the Mansfield County Court requesting an arbitration with respect to the review of the weekly payment payable to him under the Workmen's Compensation Act, 1925, in respect of his said personal injury. By his said application, as amended by leave of the county court judge at the hearing of the arbitration, the appellant claimed an increase in his said weekly payments on the footing of claims (*a*), (*b*) and (*c*).

On July 17, 1942, the judge made an award in favour of the appellant for £89 15*s*. 4*d*. together with supplementary allowances payable under the Workmen's Compensation (Supplementary Allowances) Act, 1940, to which he might be entitled as from Aug. 19, 1940. The claims (*a*), (*b*) and (*c*) were thus in effect successful.

An appeal to the Court of Appeal was heard by Scott, Goddard and du Parcq, L.JJ., on Feb. 1, 2, 3, 1943, and the judgment of the court (Scott, L.J., dissenting) was given on Mar. 12, 1943, allowing the appeal, setting aside the said award and remitting the matter to the Mansfield County Court for the judge thereof to ascertain whether, had the appellant remained uninjured and continued in the same class of employment as that in which he was employed at the date of the accident, his average weekly earnings during the twelve months immediately preceding Jan. 30, 1942, would, as a result of fluctuations in rates of remuneration, have been greater by more than 20 per cent. than his average weekly earnings before the accident and, if so, to vary the weekly payment of compensation so as to make it such as it would have been if the average rate of remuneration obtaining during the 12 months immediately preceding Jan. 30, 1942, had obtained during the period immediately preceding the accident over which the average weekly earnings were ascertained.

The date mentioned, Jan. 30, 1942, was the date of the formal application in the county court. I shall deal later with the question which arose in your Lordships' House as to whether, if the order was in other respects correct, an earlier date (Sept. 22, 1941) when the informal request for a review was made ought not to be substituted for the later date.

Passing now to an examination of the claims (*a*), (*b*) and (*c*), it appears that the theory of sect. 11 (3) underlying the claim (*a*) is that, on Aug. 1, 1937, it was and is capable of proof that during the 12 months previous to that date the hypothetical average pre-review earnings would have been greater by more than (meaning just more than) 20 per cent. than the appellant's average pre-accident earnings, namely, £4 9*s*. 2*d*. That date, namely, Aug. 1, 1937, is said to be the date of "the review" indicated by subsect. (3). Therefore (if that be correct) it can be claimed and proved at any time thereafter that the workman was entitled as from Aug. 1, 1937, to the variation pointed out in the subsection, with the result that he is still entitled to have substituted for his average pre-accident earnings of £4 9*s*. 2*d*. the figure of £5 8*s*. 6*d*., and to have an increase of his weekly payment on that basis until the next review.

Before criticising this contention I will explain the claim (*b*). It is based on the view that the weekly payment was varied on the "review" which it is said took place, or must be treated as having taken place, on Aug. 1, 1937. On Sept. 1, 1940, it was and is capable of proof that the hypothetical average pre-review earnings during the 12 months previous to that date, would have been greater by more than (meaning just more than) 20 per cent. than the appellant's hypothetical average pre-accident earnings, fixed under claim (*a*), namely, £5 8*s*. 6*d*. Therefore, as from Sept. 1, 1940, we must substitute for the man's first hypothetical pre-accident average weekly wage (£5 8*s*. 6*d*.) a new hypothetical pre-accident average weekly wage of £6 12*s*. 3*d*., and the workman will be entitled to an increase of his weekly payment on that basis. The claim (*c*) is to be explained on the same basis, with the date of the last review being taken to be Feb. 1, 1942.

It will be noted that, on that theory the word " review " indicates a date having no connection with the date of the claim or of the hearing of the arbitration (if the claim be settled by arbitration) or of the award. It is the date on which a certain arithmetical result could have been reached. In other words, as counsel for the appellant explained in his very clear argument, and taking the case of (*a*), if the rise in average weekly wages was indicated on a graph by a rising curve, the place or spot where the curve crossed the line denoting 20 per cent. above the pre-accident average weekly wage would fix irrespective of any claim at that time by the workman (or the employer) " the review " or the date of the review contemplated by the subsection so far as the claim (*a*) is concerned.

My Lords, while admiring the ingenuity of this contention, I cannot bring myself to believe that it accords with the natural meaning of the noun " review " which occurs no less than eight times in the subsection. The first line of the subsection speaks of a review which " takes place " at a certain date. This is not, I think, an apt description of the result of a mathematical calculation which may never have been made till long afterwards. The second line continuing the sentence refers to a fact which is to be " claimed and proved." I think this points with reasonable clarity to the inference that something must be " claimed and proved " in the course of the review which is " taking place."

Then coming to the words in the brackets in the subsection we have the phrase " if the weekly payment has been previously varied on a review." I find it difficult to believe that these words could have been used by the draftsman to indicate a case in which the weekly payment might have been (but was not) previously varied as the result of an arithmetical calculation if it had been made.

The word " review " in the context in which it is found *prima facie* designates a proceeding or process in which something can be proved, and it is, I think, for the appellant to establish another meaning. There is, however, a strong probability that very different language would have been used by the legislature if " review " had been intended to bear what I cannot help calling the artificial meaning for which the appellant contends.

There is another consideration which, in my view, makes it very difficult to accept that contention. It will have been observed that I have emphasised the circumstance that the date of the review for which the appellant contends is the precise date when the hypothetical pre-review earnings prior to the review just exceed by 20 per cent. the average pre-accident earnings on the first occasion when a claim to review is made. Counsel for the appellant was bound so to contend, for admittedly the date of a review must be fixed and certain, or the 12 month period cannot be ascertained. If, then, the workman made a claim for a variation and showed that at a certain date his hypothetical average pre-review earnings (on the view under discussion) exceeded by, say, 25 per cent. his average weekly pre-accident earnings, that would not be the date of the " review " because it would postdate the real date on the hypothesis of counsel for the appellant. According to that hypothesis you must fix the date when the 20 per cent. is just exceeded. But why should you do so ? The words of the subsection merely require that the average weekly earnings during the 12 months preceding the review would " have been greater or less by more than 20 per cent. than " his average pre-accident earnings. If, then, it was shown on the first application that the first figure (pre-review earnings) exceeded the pre-accident earnings by 25 per cent. or 50 per cent. or by any other percentage in excess of 20 per cent., he would under the subsection be entitled to have his weekly payment varied " so as to make it such as it would have been if the rates of remuneration obtaining during the 12 months previous to the review had obtained during the 12 months previous to the accident." But this is in contradiction of the appellant's contention, and would give a different result. That, I think, is another reason for rejecting the appellant's contention.

The appellant relies on the first two subsections and argues that the word review should have the same meaning in all three subsections ; but, to my mind, this view, if it is correct, does not help him. I think the noun " review " in each case indicates the proceedings in question. The words in subsect. (1), " on such review may be ended, diminished or increased " point strongly not to a sum in arithmetic, but to the legal decision of a tribunal or to a definite agreement for a variation. The words in subsect. (2):

> . . . the review takes place more than six months after the accident and the application for the review is made before or within 6 months after the workman attains the age of 21 years . . .

point clearly in the same direction.

My Lords, a certain number of decided cases have been cited to us and ably commented on. I do not propose to deal with them beyond saying that, on the best consideration I have been able to give to the cases cited, I have been unable to find anything to prevent your Lordships from giving to the word "review" the meaning I have above stated. I can, however, easily understand that some observations in those cases may have added to the difficulties both of the county court judge and of the Court of Appeal.

I should add that, subsect. (3) being applicable on the claim of the employer and of the workman alike, it seems to me to be *prima facie* improbable that the legislature should have been contemplating the recovery by the employer of perhaps substantial sums at periods long after the weekly payments had been paid and spent by the workman. The section, however, is of an artificial character and may be considered inequitable or unjust in its effect in individual cases, whatever the meaning which ought to be attributed to sect. 11 of the Act. I think not much weight is to be attributed to such considerations. I have come to the conclusion for the reasons above stated that the appellant's contention cannot be correct, and I must accept the respondent's contention that the word "review" has its natural meaning in sect. 11 (3), that is, that it indicates a process or proceeding generally (though not always) of a legal character, in which specified facts will be alleged and proved.

This was, I think, the view of GODDARD and DU PARCQ, L.JJ.; but the question remains, what is the date of such a review for the purposes of subsect. (3)? Several dates might be suggested. It seems very difficult to accept the date as being that of the award, for it might well be that at that date the facts and figures alleged and proved in the course of the proceedings would have become out of date. The Court of Appeal as above stated accepted the correct date of the review as being that of the formal application in the county court proceedings. I think all your Lordships feel a difficulty about that, since the section is certainly applicable to cases where the review is the result of an agreement out of court, so that no formal application for a review may exist. The Act is a remedial measure and it has constantly been held that it is expressed in a popular sense rather than in strict technical language, and should be so construed. With this in mind, I think that the review should be taken generally as beginning when there is an unequivocal though informal claim to a variation even though it be followed later, as in this case, by an arbitration beginning with a formal application pursuant to the rules which have been laid down under the Act. The date of the review in the present case must, therefore, be Sept. 22, 1941, and not Jan. 30, 1942, as in the order of the Court of Appeal. To make that order perfectly clear it would be desirable to add the words "as from that date" after the words "and if so to vary the weekly payment of compensation."

My Lords, subject to those alterations, I am in favour of not disturbing the judgment of the Court of Appeal. On the whole and having regard to the fact that this has been in the nature of a test case in a very difficult matter and to the alterations in the date above referred to which, though not important here, may be a matter of some importance in other cases, I am disposed to advise your Lordships that it is not desirable to make any order as to the costs.

I beg to move your Lordships accordingly.

LORD THANKERTON: My Lords, I agree with the opinion of VISCOUNT MAUGHAM, but, in view of the differences of opinion in the court below and among your Lordships, I shall add some observations, though it is unnecessary for me to recite again the statutory provisions or the facts.

My Lords, it is settled beyond dispute that there must be some change of circumstances of the case to justify a review under sect. 11 (1) of the amount of the weekly payment fixed by agreement or an award, and it is equally clear that no review of the pre-accident wage figure would be justified by that subsection. This explains the special provision made in subsects. (2) and (3) for the substitution of a notional pre-accident wage figure in the calculation of the weekly payment. In the absence of these two subsections, an attempt to have the pre-accident wage figure altered would, in the case of an existing award, constitute an appeal against that decision, for which other provision is made, and would not be a readjustment on account of a change of circumstances. It was on that view of subsect. (1) that this House decided in *George Gibson & Co.* v. *Wishart* (3), that, on a review, the readjustment of the existing award or agreement could be made operative as from the time when the change of circumstances took place. The same reasoning does not necessarily apply to subsects. (2) and (3), and it may equally well have been the intention of Parliament that the benefit of these subsections should only have effect as from the time when the applicant claimed the advantage conferred by them, for such benefit involves a corresponding disadvantage to the other party.

The word "review" is used throughout the section, and, *prima facie*, one is entitled to assume that the word is used throughout in the same sense. In *Gibson's* case (3), which arose under subsect. (1), it is clear that this word was taken as meaning the process of review; the expression "on such review" appears to confirm this. There are two cases under subsect. (2) to which VISCOUNT MAUGHAM has referred. The first of these is the second stage of *Talbot* v. *Vickers, Ltd.* (1), in which it was held by the Court of Appeal that "the date of the review" might be a date prior to the application for review. In so far as the opinions appear to construe the word "review" as anything other than the process of review, or—to use the phrase which does occur in the opinions—the actual review, I would prefer to reserve consideration of their correctness, if and when the point comes before this House. The other case, *Dobson Ship Repairing Co.* v. *Burton* (2), only decided that the expression "application for review" included an application to the employer for a review. The present point was reserved, and, in fact, *Talbot* v. *Vickers, Ltd.* (1), was not cited or referred to. I shall say no more about sect. 11 (2).

I need add little to the comments of my noble and learned friend on sect. 11 (3), and the proposed construction of counsel for the appellant of the phrase "average weekly earnings during the 12 months immediately preceding the review." It seems to me that the latter would be correctly expressed as "average weekly earnings during twelve consecutive months," and, towards the end of the subsection, making the phrase "obtaining during the twelve months previous to the review" read "obtaining during the said twelve months." I cannot think that the *punctum temporis* by which the twelve months are to be identified is dependent on the circumstances of the twelve months, and does not depend on action taken by the employer or workman for a review. This view, in my opinion, is fortified by the opening words of the subsection, "Where the review takes place."

I need only add that, so construed, the subsection leaves no room for more than a single period of twelve months forming the ground of the particular proceeding for review.

I agree with the motion proposed by VISCOUNT MAUGHAM.

LORD RUSSELL OF KILLOWEN: My Lords, the question for our decision has narrowed itself down to this: whether in sect. 11 (3) of the Act of 1925 the words "during the twelve months immediately preceding the review" and "during the twelve months previous to the review," refer to a period of time which ends with the request for a review, or to a period of time which ends at the date as from which the variation which is made as a result of the request comes into operation.

Either view may lead to difficulties, and the divergent views that have been held in the earlier stages of this case are reflected here; but we are all, I think, agreed that, if the point of time which ends the period is the date of the request, it must be the date of the initial request by workman to employer (or *vice versa*), and not, as the majority in the Court of Appeal have decided, the date of the formal request for arbitration. The rights of the parties cannot be subject to variation according as the procedure of arbitration has or has not to be adopted for the purpose of enforcing those rights.

For myself, however, I have come to the conclusion that the point of time at which the twelve months end is the date as from which the variation of the weekly payment comes into operation.

Personally, I do not get much assistance from the authorities, because the point which we have to determine has not, I think, ever come up for consideration before; therefore, passages in the judgments of judges, and in speeches in your Lordships' House, which treat a "review" as a proceeding which leads up to a variation of the weekly payment, or as a consideration of the request, and not as the resultant variation, are far from being decisive on the point with which we have to deal. Thus, in *Gibson* v. *Wishart* (3), the only matter for consideration was the general question whether the alteration effected on a review could be made retrospectively. The decision was in the affirmative. The word "review" may well, as a matter of the word's meaning, refer to the actual variation which is made in the weekly payment as a result of a consideration whether a claim to be entitled to a variation is well founded.

Nor does a consideration of the history and pedigree of the different statutory provisions which were the ancestors of the three subsections of sect. 11 assist me in construing that section. The section was considered by the legislature and amended in the year 1926, and it should now be considered and construed in its amended form as one section containing three subsections.

It must also be borne in mind that the primary intention of the section is that claims for reviews should be dealt with by agreement between the parties. Arbitration only comes in in default of agreement. The words must be construed so as to fit in with either event.

With these preliminary observations I turn to the construction of the section and in particular of the third subsection.

The first subsection confers the general power to review on a change of circumstances an existing weekly payment. The review may take the form of ending, diminishing or increasing the weekly payment. It may be retrospective (see *Gibson* v. *Wishart* (3)). The second subsection deals only with workmen who were under age at the date of the accident. As amended in 1926 it enables an increase of the weekly payment to be made if the review takes place more than six months after the accident, and the application for review is made before or within six months after the workman attains the age of 21 years. The second subsection is of importance in construing the section for two reasons. (i) Because it draws a distinction between "the review" and "the application for review." It is as if it said in express terms that they are different things. (ii) In *Talbot* v. *Vickers* (1), it was decided by the Court of Appeal that the words "at the date of the review" refer to the date from which the existing weekly payment is altered. That case was decided on the proviso to para. 16 of Sched. I to the Act, 1906, the wording of which is similar to that of the second subsection before its amendment. It will be sufficient to cite passages from two of the judgments. WARRINGTON, L.J., said, at p. 696:

> I think that this expression in the proviso means neither the date when the workman applies for the review nor the date when the county court judge sits to hear that application, but the date at which . . . the weekly payment is either increased or diminished.

After pointing out why the date cannot be the date of the application to review, or the date of the hearing, he adds:

> It seems to me that when once it is realised that the review may be retrospective the only possible interpretation . . . is that the date of the review is the date at which the weekly payment is, as the result of the review, either increased or diminished.

At p. 700 ATKIN, L.J., stated his opinion thus:

> . . . I think that the true construction of "the date of the review" is the date from which the weekly payment of compensation is in fact ended, diminished or increased by the decision on the review.

If this decision and these judgments are right (and I see no reason to doubt their soundness), the words in subsect. (2) "at the date of the review" mean and refer to the date as at which the result of the review comes into operation, and the increase which has been agreed upon or awarded takes effect.

Passing to subsect. (3), the words "preceding the review" and "previous to the review" are words which refer to a particular point of time. They mean just the same thing as, and might just as well have been, "preceding the date of the review" and "previous to the date of the review," just as the words "previous to the accident" mean the same thing as, and might just as well have been "previous to the date of the accident." No matter which phrases were used, there would be no difference in the points of time at which the respective periods of twelve months ended. Is there any sufficient reason for saying that the point of time indicated by the phrases which occur in subsect. (3) should be any different from the point of time which is indicated by the similar phrase "the date of the review" in subsect. (2)? I can find no sufficient or satisfactory reason. Subsect. (2), by the express distinction which it draws, seems to forbid the only suggested alternative, viz., the commencement of the process or proceeding which ultimately results in a variation of the weekly payment. It appears to me only natural that the date at which the right which is conferred by subsect. (3) arises and the date as from which it is to be enjoyed should be identical.

Let me state what in effect subsect. (3) enacts. It confers rights on both workman and employer, but for brevity I confine myself to the workman's rights, and to cases where there has been no previous variation on a review. I will also refer to "the average weekly earnings during the 12 months immediately preceding the review" of the workman had he remained uninjured and continued in his old class of employment, as the hypothetical average. The subsection presupposes an existing weekly payment the amount of which has been calculated under sect. 9, one factor in which calculation was the amount of the average weekly earnings of the workman before the accident, and it provides that, if the hypothetical average would (as a result of fluctuations in rates of remuneration) have been greater by more than 20 per cent. than the abovementioned factor, the weekly payment shall (note the word is "shall" not "may") be varied by substituting for that factor in the calculation under sect. 9 the hypothetical average.

This subsection confers upon the workman a right to an increase in the existing weekly payment, and that right accrues as soon as the hypothetical average shows an increase of more than 20 per cent. over the amount (already ascertained when the existing weekly payment was fixed) of his average weekly earnings before the accident. The workman is then entitled to claim a review of his weekly payment, alleging that the requisite increase occurred on a given date. His claim may be admitted by the employer, or it may be disputed. In the latter event it will be for the arbitrator to decide whether the claim is established. But in either case once the increase and its date are established, nothing remains to be done except a sum in arithmetic under sect. 9. The workman's right to the increase in his weekly payment accrued on the given date, and I can see no reason in law why the increase should not date back to that date, nor can I see any justification in law for making his enjoyment of the right begin at any later date.

It is said that, unless the retrospective operation of the increase is limited to the date of the workman's request for a review, it will be possible for a workman to delay making his request (as in the present case he has done through ignorance of his rights) and to come forward, at a very late date, with a large retrospective claim. No doubt a workman might do so, but it is unlikely that he would do so except through ignorance of his rights. Even if he did so wilfully, his conduct could not take away or alter his right. It would be establishing a novel legal principle to hold that a man's legal right to a periodical payment varies according to the time at which he asserts it. Unless some law of limitation applies, he is entitled, on asserting and establishing his right, to recover the payment from the time at which his right to be paid first accrued.

It is only by adopting the point of time at which the revision operates as the point of time which is indicated by the words "twelve months immediately preceding the review," and "twelve months previous to the review," that the right conferred on the workman by subsect. (3) can be enjoyed by him to the full extent. The choice of any later point of time is, in my opinion, open to the fatal objection that it would result in postponing the commencement of the increased weekly payment to a date subsequent to the date on which his right to it accrued. The retrospective date on which the variation operates can truly be said to be the date on which the review of the weekly payment begins, and, therefore, in that sense, the date of the review.

In my opinion, the periods of twelve months preceding or previous to the review mentioned in subsect. (3) end on the date as from which the increase in the weekly payment takes effect, i.e., in this case on Aug. 1, 1937. As from that date the workman became entitled to a weekly payment calculated under sect. 9 on the footing that the amount of his average weekly earnings before the accident was £5 8*s.* 6*d.*

There remains the question whether the arbitrator had power on one application to review the weekly payment in three steps during three successive periods. That he could do so on three successive applications seems clear, and at first sight it seems a technical view to suggest that what can be done on three separate applications cannot be combined in one.

On consideration, however, I think the objection to the procedure adopted by the arbitrator is a sound one. The arbitrator's power under sect. 11 is to end, diminish, or increase an existing weekly payment which has been calculated under sect. 9. In the particular case of sect. 11 (3) the power is to diminish or increase, or, in other words, to recalculate under sect. 9 with an altered factor. But, in every case, the power given to him is only a power to ascertain what is the correct amount of "a weekly payment during the incapacity" of the workman. He is nowhere given power to ascertain an amount of a weekly payment payable during a period, the duration of which is fixed without any reference or relation to the incapacity of the workman. That is what he has done in the present case. In my opinion, he could only have awarded that the existing weekly payment be varied as from Aug. 1, 1937, to such sum as would make it such as it would have been if the rates of remuneration, obtaining during the 12 months before that date, had obtained during the 12 months previous to the accident. The result would be that the varied weekly payment would become the "weekly payment during the incapacity," and would continue not for a fixed period, but until a second variation took place as the result of some subsequent request either on the part of the workman or the employer.

I would allow this appeal, but since the majority of your Lordships take a different view of how subsect. (3) should be construed, I need not consider the exact form which an order allowing the appeal should assume.

Lord Macmillan: My Lords, in the case of total or partial incapacity for work resulting from injury the weekly payment to which the injured workman is entitled under the Workmen's Compensation Act is calculated with reference to his average weekly earnings during the twelve months preceding the accident. This is the normal basic figure in such calculations of compensation under the Act.. As the workman's incapacity for work may vary in degree as time goes on or may come to an end, provision is made for reviewing the amount of the compensatory weekly payment at the instance either of the employer or of the workman. Thus the workman may completely recover, in which case his weekly payment will on review be ended; or his partial incapacity may become less or more serious or may become total incapacity, whereupon his weekly payment will on review be correspondingly varied. It has been held that, when on review a workman is found to have completely recovered his capacity for work, his weekly payments are terminable as at the date of his recovery although that date may be some time before the employer's application or request for review: *George Gibson & Co.* v. *Wishart* (3).

But the Act also makes provision for review of the injured workman's weekly payments on grounds other than a variation in his capacity for work. It is obvious that, in consequence of his total or partial incapacity, an injured workman may not only be unable to earn his pre-accident wages but may also be deprived of the benefit of participating in rises of wages which, if uninjured and continuing at his previous work, he would normally have enjoyed. For this case provision is made by sect. 11 (3) of the Act. The subsection gives a corresponding right of review to the employer where wages have fallen, but for simplicity's sake I shall deal only with the workman's rights which alone are in question in the present appeal, though the result of your Lordships' decision will be applicable equally to the rights of employers.

The scheme of the subsection is to entitle the workman, if he proves certain prescribed facts, to have his average weekly earnings during the 12 months preceding the accident notionally enhanced. By the attribution to him of this new basic figure the workman becomes entitled to a corresponding increase in his compensatory weekly payments, which are calculated with reference to his pre-accident wages. When the workman by satisfying the conditions of the subsection establishes his case for such an increase the question arises as to the date from which he should receive it, and that is the question with which this appeal is concerned.

Now the statutory pre-requisite of a request by the workman for a review under subsect. (3) of his weekly payments is that he should claim and prove that, as a result of fluctuations in rates of remuneration for the class of employment A in which he was employed when he was injured, his " average weekly earnings during the 12 months immediately preceding the review " would, if he had remained uninjured and in the same class of employment, have exceeded by more than 20 per cent. his average weekly earnings during the 12 months previous to the accident—what I have called his basic figure. The relevant considerations in the case of a review under this subsection are manifestly quite different from those which arise where the review is sought because of a change in the B workman's capacity for work. The subsection gives a special remedy for a special case.

To me it seems clear that the new notional pre-accident average weekly earnings become operative only as from the end of the 12 months immediately preceding the review. But what is the date of the review ? A review is a process of revision. It begins with a request or application, it proceeds to investigation and it terminates with a decision. The decision may be reached C by agreement or may take the form of an award after arbitration proceedings. But in either case the review is one composite act. It can be set in motion only by a request or claim based on a calculation of the workman's supposititious earnings during the 12 months immediately preceding the review. The initiation of the review and the termination of the 12 months, the figures of which are invoked to justify the review, are clearly meant to be simultaneous. The D workman tables his claim and produces his calculation for the immediately preceding 12 months. If he establishes his claim he becomes entitled to have the supposititious earnings shown in that calculation substituted for his actual pre-accident earnings, with the result of a corresponding increase in his compensatory weekly payments. This increase, as I read the subsection, is given to him as from the initiation of his claim and the termination of the 12 months' calculation on which it is based, being one and the same point of time. I can E see no other date from which, within the scheme of the subsection, the increased weekly payments could date. In particular, I do not see how they could date from the point of time when the workman could first have claimed (but did not claim) a review under the subsection. The 12 months' figures on which such a claim would have been based would be different figures from the figures for the 12 months immediately preceding the review, and it is the latter figures which become the new basis of calculation. In short, despite the ingenious F tortures to which the words of the subsection have been subjected, I find myself convinced of the soundness of the construction placed upon it by GODDARD, L.J.

It has to be remembered that the subsection works both ways, and it seems to me inconceivable that in a period of falling wages an employer was intended to be entitled on a review to go back upon overpayments made possible many years previously. I would point out also that on getting his new basis the G workman will continue to enjoy his correspondingly increased weekly payments, notwithstanding a subsequent fluctuation of wages downwards, until the employer can show over a twelvemonth a drop in excess of 20 per cent., and then the consequent diminution will operate only as from the initiation of the employer's request or application for review.

The appellant's application for three reviews is in any case, in my opinion, misconceived. This is a first application for review under the subsection. H The only comparison admissible on such a review is between the workman's actual pre-accident average earnings and the average weekly earnings which, if uninjured, he would have received in the 12 months preceding the review. It is only in the case of a second or subsequent review that comparison is to be made between the latter and previous notional or substituted average weekly earnings. When the present application was presented no notional pre-accident average weekly earnings had been fixed which the workman could invoke as a basis of the calculations he puts forward.

The order of the Court of Appeal directs that the 12 months preceding Jan. 30, 1942, are to be taken as the relevant 12 months. I think that this date should be altered to Sept. 22, 1941, being the date on which a review was claimed by a letter which, although inscribed "without prejudice," counsel at your Lordships' bar agreed should be judicially noticed. The revised weekly payments to the appellant when ascertained will, therefore, begin as from Sept. 22, 1941.

I accordingly agree with the motion proposed by my noble and learned friend VISCOUNT MAUGHAM that the order of the Court of Appeal be affirmed with the variation indicated and that the appeal be dismissed without costs. A

LORD WRIGHT: My Lords, the result of this appeal depends on the true construction of the Workmen's Compensation Act, 1925, s. 11 (3).

The subsection provides for an increase or diminution of the weekly payments during incapacity if there have been fluctuations in the rates of remuneration, and requires a review to be made of the weekly payments when the man's average weekly earnings during the twelve months previous to the review B would have been greater or less, if he had been uninjured and continued in the same class of employment, by more than 20 per cent. than his average weekly earnings during the twelve months previous to the accident. In that event a review may be made of the weekly payments. There is provision for a further review or reviews if there are subsequent changes in the average weekly earnings.

The subsection is mandatory: the weekly payments "shall be varied." C That must be at and from some specific date, to be ascertained by applying to the facts of the case the words "immediately preceding the review." The county court judge and SCOTT, L.J., in the Court of Appeal, expressed an opinion which may be expressed by applying in reference to subsect. (3) the language which ATKIN, L.J., as he then was, applied to subsect. (2) in *Talbot* v. *Vickers* (1), at p. 700, "the date from which the weekly payment of compensation is in fact ended, diminished, or increased by the decision on the review." I agree with their D opinion. That is the only date which, to my mind, gives an intelligible point of time for the variation which the Act requires.

The majority of the Court of Appeal, GODDARD and DU PARCQ, L.JJ., were of opinion that the date of the review for purposes of this case meant the date of the formal application for review made to the arbitrator and accordingly sent the matter back to the county court judge to proceed on that basis. But once it is seen that the order is retrospective, there seems to be no real reason E to stop at the date of the application.

The word "review" is used in all three subsections of sect. 11 and has, I think, the same meaning throughout. The section is giving effect in its three subsections to the general principle of the Act that weekly payments of compensation, whether fixed by agreement or by arbitration, are liable to be varied from time to time in certain conditions, in particular where there are changes F in the man's capacity or incapacity under sect. 9, or in his earnings. Subsect. (1) of sect. 11, which is the general provision, enacts that "On such review any such weekly payments may be ended, diminished, or increased." On that subsection (or rather the corresponding section in the Act of 1906) this House in *Gibson* v. *Wishart* (3) settled a question which had been the subject of serious conflict when they finally decided that the right of review is retrospective and is not restricted to the date of the application. This decision is of great importance for the consideration of subsect. (3). G

The particular question there was whether on the review the court could go back to the date when in fact the workman's incapacity had ceased so that the right to compensation which had been awarded to him on that basis no longer continued. But I do not read the decision as limited to the special facts of the case. LORD ATKINSON, at p. 29, expressed the then inclination of his mind to be that the same principle would apply where it is merely claimed that the H weekly payment should be diminished or increased. LORD PARKER, at p. 35, indicated the same view. He regarded the arbitrator as a tribunal for determining and adjusting from time to time, as circumstances alter, the extent and duration of the employer's liability under the Act. LORD SUMNER more elaborately expressed his view that "the power of review" is expressed without limitation in order that the man's incapacity on which his right to compensation depends may be followed as closely as possible in its fluctuations by the award. The review was to be retrospective to the extent that the purpose of the Act required. The "request" on which the claim under subsect. (1) is based is obviously distinguished from the review in the same subsection. The opinions I have quoted show, as I think, that the review is the variation which is settled or decided upon. The date when that is to take effect is, in my opinion, the date of the review. Since the decision is retrospective, neither the date of the actual inquiry nor of the decision, either or both of which may depend on mere accident, is material. That the "review" means the actual change or variation is also seen if the matter is settled by agreement, as subsection (1) contemplates that it may be. If the parties, when they had arrived at agreement, were asked what was the date of the review, they would naturally, as it seems to me, in reply give the date at which the change was to be effective. That would seem a normal use of language.

Subsect. (2) deals with the case of an infant workman whose compensation may be increased when he becomes an adult so as to correspond with what he would then have been earning if he had not been injured. In the words of the subsection:

> . . . the weekly payment may be increased to such an amount as would have been awarded if the workman had at the time of accident been earning the weekly sum which he would probably have been earning at the date of the review if he had remained uninjured.

The subsection as originally enacted was construed by the Court of Appeal in *Talbot* v. *Vickers* (1), from which I have already quoted the clear and precise constructions adopted by ATKIN, L.J. In that case the county court judge had held that he could not go back beyond the date of the application and that the only material date was that of the application to review. He so held on the authority of *Williams* v. *Bwllfa Collieries* (4). The Court of Appeal reversed the county court judge. As to the *Bwllfa* case (4), it was held that it could not stand along with *Gibson* v. *Wishart* (3). But it was also held by all members of the court that "the date of review" meant in the words of WARRINGTON, L.J., at p. 696, "the date at which the weekly payment is as the result of the review either increased or diminished." WARRINGTON, L.J., pointed out what he regarded as the "absurdity" of taking either the date of the application or of the hearing. I have already quoted the opinion of ATKIN, L.J., to the same effect. That decision was given under the Act of 1925 before the amendment was made by the Act of 1926, which made "the application to review" the decisive date for the limitation of time for proceeding. That amendment clearly distinguishes "the application to review" from the review; that was emphasised by the Court of Appeal. In *Dobson Ship Repairing Co.* v. *Burton* (2), the question came before this House whether "application" in the 1926 Act included applications to the parties as well as formal applications to the courts. It was decided that it did. LORD PORTER, with whose opinion the other Lords present concurred, did not find it necessary to decide the particular question I am now considering, but he added, at p. 600:

> Even if the word "review" were used alone, I should not have thought a review had taken place until the award had been pronounced. But where, as in sect. 11 as amended, one finds the words "application to review" and "review" used side by side, those expressions are apparently intended to bear different meanings, and it seems impossible to say that each takes place at the same time. The application to review, whether it be formally or informally made, is one thing; the review itself is another. For the purpose of the present case it is unnecessary to decide whether the review takes place at the time at which the tribunal gives its award or the time from which that award takes effect. It must be one or the other, and either meaning would enable the respondent to succeed in the present case.

As between these two alternatives, I have already said that I choose the latter as being the true construction of the words "date of review" in subsect. (2), and agree with the reasoning of the Court of Appeal on this point in *Talbot* v. *Vickers* (1).

But it has still to be considered whether the word "review" as used in subsect. (3) has a different connotation from what it has in subsect. (2) and means in subsect. (3) the application to review. Subsect. (3) does not use the words "date of review," but it is clearly referring to the date of the review. "Review" is used several times in subsect. (3). "Where the review takes place," "his average weekly earnings during the twelve months preceding the review," "varied on a review," "previous to that review," and finally "the weekly payment shall be varied so as to make it such as it would have been if the rates of remuneration obtaining during the twelve months previous to the review had obtained during the twelve months previous to the accident." The comparison is between the rates of remuneration which obtained previous to the accident and the rates of remuneration obtaining during the twelve months previous to the review. The accident is a definite and significant point of time: the review must, it seems, be an equally definite and significant point of time. That can only be so if the "review" means the operative decision on the review. It cannot, I think, mean merely an interlocutory and inconclusive proceeding like an application, or a mere preliminary process of claim and proof. It must, in my opinion, mean the actual decision which effects the variation and that variation must have effect at a definite time. The applicant, whether employer or workman, is setting out to establish that on a given date the twelve months' period had elapsed. That is the issue in the proceedings. On any view the decision must be retrospective and it must fulfil the object or purpose of making the compensation fit in with the fluctuations of wages. I cannot see how this object or purpose can be achieved unless "review" here means the date on and from which the variation is to take effect. It is true that subsect. (3) contemplates a proceeding, whether by agreement or by arbitration, but that proceeding is directed to and culminating in a variation. The date of that variation is the terminus *ad quem* of the twelve months' period and of the proceeding. That is, in my opinion, what is meant by the "review" in subsect. (3) just as much as it is in subsect. (2). The reasoning of WARRINGTON and ATKIN, L.JJ., is, in my opinion, equally apposite in regard to subsect. (3). Indeed, I repeat I think the word "review" is used with the same signification throughout sect. 11.

As a mere matter of language "review" may mean either a process of reconsidering or the result of the reconsideration. What it means in any particular place is to be solved by the context. Here the context shows, to my mind, that "review" means the decision arrived at as the result of the reconsideration.

I agree, therefore, with the conclusion on this point of the county court judge and of SCOTT, L.J.

A further objection which was raised to the award appealed from was that it dealt with three separate and successive variations, operating from three successive dates, each of the two latter variations presupposing a decision upon the one preceding it. It is true that in that sense there are three separate arbitrations. Each might be the subject of a separate request or a separate arbitration and a separate award. But it is, I think, a question of procedure whether the arbitrator can conveniently deal with all three in one proceeding. It is a matter for his discretion. It is like the joinder of separate causes of action in one proceeding. If he thinks he can conveniently consider all three in one proceeding, his decision to take that course does not affect his jurisdiction. Nor is it a ground of objection unless it can be shown that his decision was vitiated in some way by the course he took. I cannot see any ground for so holding in the present case. The objection, if it had force, would simply result in the two later variations being set aside, and the workman would then have to start afresh on the second and third submissions, and these I suppose would have to be tried separately one after the other in order of time. But it seems to me that no question of jurisdiction is involved, and that the proposed separate hearings and awards would merely lead to delay, expense and inconvenience. I should, speaking for myself, overrule this objection.

There is no question here of the Statute of Limitations so that it is unnecessary to consider whether the statute applies o claims under the Workmen's Compensation Act, or whether the decision of the Court of Appeal in *Leivers* v. *Barber, Walker & Co., Ltd.* (5) is correct.

Appeal dismissed. No order as to costs. Order of the Court of Appeal affirmed except that the date of the review was to be the date of the informal claim for review by the workman.

Solicitors: *Taylor, Jelf & Co.*, agents for *Hopkin & Son*, Mansfield (for the appellant); *Peacock & Goddard*, agents for *Elliot Smith & Co.*, Mansfield (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

MELLOWS (H.M. INSPECTOR OF TAXES) *v.* BUXTON PALACE HOTEL, LTD.

[COURT OF APPEAL (Scott, Luxmoore and du Parcq, L.JJ.), **November 30, 1943.**]

Income Tax—Requisition of hotel—Compensation deemed to be rent—Assessment of excess over Sched. A valuation—Compensation (Defence) Act, 1939 (*c.* 75), *s.* 2—*Finance Act,* 1940 (*c.* 29), *s.* 15.

Emergency Legislation—Compensation deemed to be rent—Requisitioned property—Compensation (Defence) Act, 1939 (*c.* 75), *s.* 2.

The appellants owned and carried on a hotel until Sept., 1939, when it was requisitioned and compensation was paid at the rate of £7,600 per annum under the Compensation (Defence) Act, 1939. The hotel was assessed under Sched. A at £2,350 gross. The Crown contended that the annual value for the purposes of tax must be determined with reference to the compensation fixed at £7,600, which, by the terms of the Act of 1939, was deemed to be rent and that, under the provisions of the Finance Act, 1940, s. 15, the appellants should be assessed under Sched. D, case VI, on the excess of the payment of £7,600 over the Sched. A assessment. The appellants contended that the compensation was not " rent payable under a lease " within the meaning of the Finance Act, 1940, s. 15 :—

HELD : upon the proper construction of the Compensation (Defence) Act, 1939, s. 2, and of the Finance Act, 1940, s. 15, the compensation paid was rent payable under a lease within the meaning of the latter section and the appellants were liable to an assessment under Sched. D, case VI, in respect of the excess over the Sched. A assessment.

Decision of MACNAGHTEN, J. ([1943] 1 All E.R. 462) *affirmed.*

[**EDITORIAL NOTE.** This is purely a question of construction of the two sections which use slightly different language in describing rent. One speaks of rent payable by a tenant to a landlord and the other of rent payable under a lease with the addition of a special definition of the word " lease." It is held, however, that the two expressions are synonymous ; but it should be noticed that under the Compensation (Defence) Act, 1939, there is only a notional tenancy.

FOR THE COMPENSATION (DEFENCE) ACT, 1939, s. 2, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, p. 1013.]

APPEAL by the taxpayer from the decision of MACNAGHTEN, J., dated Jan. 26, 1943, and reported [1943] 1 All E.R. 462. The facts are fully set out in the judgment of SCOTT, L.J.

Sir Walter Monckton, K.C., and *J. H. Bowe* for the appellants.

The Attorney-General (*Rt. Hon. Sir Donald B. Somervell, K.C.*), and *Reginald P. Hills* for the respondent.

SCOTT, L.J. : This is an appeal by the taxpayer, the Buxton Palace Hotel, Ltd., in respect of an income tax question arising out of the compulsory occupation of the hotel in and after Sept., 1939, by His Majesty in connection with the war. The question that arises is whether payment made to the company by the Crown pursuant to the terms of the Compensation (Defence) Act, 1939, is for the purpose of the Income Tax Acts to be deemed to be rent payable under a tenancy.

The legislation for tax purposes which has caused the question to arise is the Finance Act of 1940, s. 15. Before I read it I will just state very shortly what the point is. Under that section, read in the light of an earlier section in that Act and of the Compensation (Defence) Act, 1939, ss. 1 and 2, it is contended by the Crown that it is entitled to treat the difference between the Sched. A rent (as I call it shortly) of the hotel and the periodic payment in respect of the occupation by the Crown as " an excess rent " which attracts tax under sect. 15, which provides that the tax shall be treated not as an addition to Sched. A, but as a special tax falling under Sched. D, case VI.

The company contends that the tax legislation does not apply because no tenancy is created by the language of the Act, and that the compensation payment, therefore, is not rent in the true sense, and, consequently, does not attract tax under the Acts.

In order to make the point clear, it is necessary to read the sections of the two Acts. The Compensation (Defence) Act, 1939, was passed on Sept. 1, 1939, almost at the outbreak of war, and by sect. 1 provides that :

> Where, in the exercise of emergency powers during the period beginning with Aug. 24, 1939, and ending with such day as His Majesty may by order in council declare to be the day on which the emergency came to an end, (*a*) possession of any land has been taken on behalf of His Majesty, . . . then, subject to the following provisions of this Act, compensation assessed in accordance with those provisions shall be paid, out of moneys provided by Parliament, in respect of the taking possession of the land . . .

Sect. 2 provides for the measure of compensation. Subsect. (1) says :

> The compensation payable under this Act in respect of the taking possession of any land shall be the aggregate of the following sums . . .

Then four different sums are set out, and we are only concerned in this case with the first one :

> (*a*) a sum equal to the rent which might reasonably be expected to be payable by a tenant in occupation of the land, during the period for which possession of the land is retained in the exercise of emergency powers, under a lease granted immediately before the beginning of that period, whereby the tenant undertook to pay all usual tenant's rates and taxes and to bear the cost of the repairs and insurance and the other expenses, if any, necessary to maintain the land in a state to command that rent . . .

Subsect. (2) of that section provides that :

> Any compensation under para. (*a*) of the preceding subsection shall be considered as accruing due from day to day during the period for which the possession of the land is taken in the exercise of emergency powers, and be apportionable in respect of time accordingly, and shall be paid to the person who for the time being would be entitled to occupy the land but for the fact that possession thereof is retained in the exercise of such powers ; but this subsection shall not operate so as to require the making of payments at intervals of less than three months.

Then I come to the most important provision :

> For the purposes of the enactments relating to income tax . . . and in particular for the purposes of such of those enactments as relate to the deduction of tax from rent, any compensation under the said para. (*a*) shall be deemed to be rent payable for the land, the Crown shall be deemed to pay it as tenant occupier, and the person receiving it shall be deemed to receive it as landlord.

Now the important thing about that provision is that it was passed expressly for the purpose of the application of the Income Tax Acts including, for instance, the right of a tenant who pays Sched. A tax conferred by No. VIII of that Schedule to deduct the amount of the payment from his next payment of rent to the landlord. That provision, we are given to understand, was introduced in order to enable the deduction procedure to be applied. But be it observed that that is only one particular application of the enactment, and the rest of the provision applies the Income Tax Acts generally, or rather makes this provision applicable to the Income Tax Acts generally.

I now come to the Finance Act of 1940, which became law in June, 1940, nine months later. The first observation I make is that, as the earlier Act was passed for the purpose of its application to income tax purposes, so the Income Tax Part of the Finance Act of 1940 was passed, *inter alia*, to deal with the position arising under the earlier Act. Sect. 15, (1), provides this :

> If, as respects any year of assessment, the immediate lessor of a unit of assessment is entitled in respect of the unit to any rent payable under a lease or leases to which this section applies, he shall be chargeable to tax under case VI of Sched. D in respect of the excess, if any, of the amount which would have been the amount of the assessment of the unit for the purposes of Sched. A, as reduced for the purpose of collection, if the annual value of the unit had been determined . . . by reference to that rent and the other terms of the lease or leases, over whichever is the greater of (*a*) the actual amount of the assessment of the unit for the purposes of Sched. A, as reduced for the purpose of collection.

It will be noted that the section speaks of " the immediate lessor " and " the unit of assessment." Those terms are defined in sect. 13 : " ' immediate lessor ' means in relation to any premises " for our purpose, " a lessor whose immediate tenant is occupying or entitled to occupy the entirety of the premises." The word " lease " is defined as including " an agreement for a lease if the term to be covered by the lease has begun, and any tenancy " ; that must include any tenancy whatsoever of any kind or sort, statutory or otherwise.

Then it defines leases : " ' long lease ' means a lease granted for a term exceeding 50 years," and " ' short lease ' means a lease which is not a long lease." Those two definitions must be read in the present case in relation to the expression "any tenancy" to which I have already referred. " ' Unit of assessment ' means any land which forms a unit of assessment for the purposes of Sched. A." It is common ground that this hotel was a unit of assessment.

Sect. 15, therefore, provides that, if, as respects any year of assessment, the Palace Hotel Company as lessor of a unit of assessment (the Palace Hotel) is entitled in respect of the hotel to any rent payable under a tenancy to which this section applies, "he shall be chargeable to tax under Sched. D, case VI, in respect of the excess." The figures here were something between £2,000 and £3,000, I think, as the Sched. A assessment, and the amount payable by the Crown, by quarterly payments, was at the annual rate of £7,600 ; and it is in respect of the difference between those two (the exact figures do not matter), that the claim by the Crown to treat the difference as excess rent within the meaning of sect. 15 arises.

Now, having said that, I go to sect. 15 (4), which is in very definite language. "A lease" (I translate that as "a tenancy") "shall be deemed to be a tenancy to which this section applies if, and only if, the following conditions are fulfilled with respect to it." That, in effect, says : If the following conditions are fulfilled, the section applies ; otherwise it does not. The conditions are : "(*a*) that it is a short lease." That is, a tenancy which is not a tenancy or lease for 50 years certain. "(*b*) that the land comprised in it is or forms part of a single unit of assessment" ; that condition is satisfied. "(*c*) that the rent" (if it be rent) "under it is payable to the immediate lessor of that unit" ; that is satisfied ; and the last one also is satisfied ; I need not trouble about that.

Under those circumstances the Crown says : "This payment by the Crown at the rate of £7,600 a year is deemed by the Act of 1939 to be rent payable for the land ; payable by the Crown as tenant occupier to the hotel company, which is deemed to receive it as landlord." The phrase there "shall be deemed to be a tenancy between the Crown and the immediate lessor" does not occur in the statute ; and counsel for the appellants submits that that is a vital omission and that the section is of limited application, and that, in so far as it is not said by the statute that that payment shall constitute rent for a tenancy, the Act of 1940 does not apply. His words to me were : "There is no statutory provision saying that the compensation is deemed to be payable under a tenancy." In my opinion, the failure to insert those particular words "payable under a tenancy" is irrelevant if the effect of the Act of 1939 is to create what I call a putative tenancy between the Crown and the immediate lessor. That it does so is, I think, made quite clear by the words in the latter part of sect. 2 (2) of that Act, "any compensation under the said paragraph" (that is, the paragraph of sect. 1), "shall be deemed to be rent payable for the land." That word "for," I think, quite clearly must be interpreted as meaning "in respect of the occupation of" the land of which the Crown is deemed to be the tenant occupier, and to pay the amount as tenant occupier, the landlord being the person in receipt of the compensation. As the Act of 1939 expressly refers to the income tax, and particularly refers to the Sched. A about deduction, in my view the Income Tax Part of the Finance Act of 1940 must be read as being one of the Income Tax Acts which are incorporated ; and that being so, I think it follows necessarily that, for all income tax purposes, this compensation payment made quarterly, at the annual rate, is to be treated as rent for income tax purposes.

For those reasons the appeal must be dismissed.

LUXMOORE, L.J. : In my judgment, the decision of MACNAGHTEN, J., is correct. What are the material facts ? In Sept., 1939, the Palace Hotel, Buxton, was requisitioned under the regulations made pursuant to the Emergency Powers (Defence) Act, 1939, s. 1, (2) (*b*). The compensation to be paid to the appellants, who own and occupied the hotel at the date of the requisition, and still own it, was fixed under sect. 2 (1) of the Compensation (Defence) Act, 1939. Subsect. (2) provides that :

> Any compensation under para. (*a*) of the preceding subsection shall be considered as accruing due from day to day during the period for which the possession of the land is taken in the exercise of emergency powers, and be apportionable in respect of time accordingly, and shall be paid to the person who for the time being would be entitled

> to occupy the land . . .
>
> For the purposes of the enactments relating to income tax and in particular for the purposes of such of those enactments as relate to the deduction of tax from rent, any compensation under the said para. (*a*) shall be deemed to be rent payable for the land, the Crown shall be deemed to pay it as tenant occupier, and the person receiving it shall be deemed to receive it as landlord.

The compensation was fixed at £7,600. When it was so fixed under the Compensation (Defence) Act, the section which I have read, I think, provides that this sum is to be deemed for the purposes of the Income Tax Acts to be rent payable by a tenant to a landlord. The expressions "rent," "tenant," and "landlord," when used in conjunction can, I think, only connote the existence of a tenancy, and none the less so when there is express reference to rent payable for the land. It seems to me that the words I have quoted from the subsection are synonymous with "rent payable under a lease" as used in sect. 15 of the Finance Act, 1940, having regard to the definitions which are contained in that Act.

Counsel for the appellants has argued that there is some technical difference between the phrase "rent payable under a lease," which appears in sect. 15 of the Finance Act, 1940, and "rent payable by a tenant to a landlord." Sect. 15 of the Finance Act, 1940, provides :

> If, as respects any year of assessment, the immediate lessor of a unit of assessment is entitled in respect of the unit to any rent payable under a lease or leases to which this section applies, he shall be chargeable to tax under case VI of Sched. D in respect of the excess . . .

in the manner stated in the section. The object of the section is to impose on the excess there defined a liability to tax in addition to the Sched. A taxation in respect of the premises. The section only applies to short leases and to rent which is payable under a lease as defined in the Act. The definitions in the Act, which are material, are in sect. 13. "Lease" is defined as including "an agreement for a lease . . . and any tenancy, but does not include a mortgage." "Long lease" is defined as "a lease granted for a term exceeding 50 years," other than certain classes of leases. "'Short lease' means a lease which is not a long lease."

It seems to me plain that the Finance Act, 1940, s. 15, applies to the present case, if there is a rent payable under a tenancy for a term which does not exceed 50 years. As I have already stated, the Compensation (Defence) Act, 1939, s. 2 (2), provides that the compensation thereunder is to be deemed to be rent payable for the land by the tenant to the landlord. The words are, as I have already stated, in my opinion synonymous with "rent payable under a lease" as defined in the Finance Act, 1940. The trial judge so held ; I think he was correct in so doing, and for these reasons I agree that the appeal fails.

du Parcq, L.J. : I have come to the same conclusion. I think, when one looks at the Finance Act, 1940, s. 15, that there is no real doubt that it was the intention of the draftsman to include such a case as this, and it would be necessary to take a very technical view in order to support the argument of the appellants. I have felt a little difficulty, for this reason, that Parliament has been at pains to specify the different categories of leases with which the sections deal and it is a little difficult for a court to say whether or not a lease is of a particular class when, in fact, there is no lease, and the only tenancy which there is (I use the word "tenancy" as interchangeable with the word "lease," as it is here) is a notional tenancy ; but in spite of that difficulty, I agree with what has been said by Scott and Luxmoore, L.JJ. I think, when one looks at the material section of the Compensation (Defence) Act, 1939, it is reasonably clear that there being, necessarily, a notional tenancy, because you cannot have a landlord and a tenant without a tenancy, one must regard its terms as to duration, and so forth, as being those which would necessarily be found in it if the relation between the Crown and the appellants were, in truth, that of landlord and tenant. I think this appeal should be dismissed, and I agree with the judgments which have been delivered.

Appeal dismissed with costs. Leave to appeal refused.

Solicitors : *Cripps, Harris, Hall & Co.* (for the appellants) ; *Solicitor to the Treasury* (for the respondent).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

Re HOOPER (*deceased*), PHILLIPS *v.* STEEL.

[CHANCERY DIVISION (Uthwatt, J.), **December 21, 1943.**]

Wills—Construction—Annuity—"Free of all deductions"—Whether the annuity is payable as net sum after income tax has been accounted for.

By his will the testator gave the defendant an annuity for her life to be paid free of all deductions whatsoever. The question was whether the defendant was entitled to the amount of the annuity without deduction in respect of income tax:—

HELD: income tax is not a deduction from an annuity and, in the absence of an intention in the will that income tax shall be treated as a deduction, the annuitant must bear the tax.

[**EDITORIAL NOTE.** In a long line of decisions on this subject, that of *Re Cowlishaw* (7) is distinctly out of line with those upon comparable wills. That case is not followed here, but, of course, it can only be definitely overruled by the Court of Appeal.

AS TO EFFECT OF DIRECTION TO PAY ANNUITY WITHOUT DEDUCTION, see HALSBURY, Hailsham Edn., Vol. 28, pp. 214, 215, para. 386; and FOR CASES, see DIGEST, Vol. 39, pp. 166-168, Nos. 572-593.]

Cases referred to:

(1) *Festing* v. *Taylor* (1862), 3 B. & S. 235; 28 Digest 77, *419*; 1 New Rep. 32; 32 L.J.Q.B. 41; 7 L.T. 429.

(2) *Lethbridge* v. *Thurlow* (1851), 15 Beav. 334; 39 Digest 166, *575*; 21 L.J.Ch. 538.

(3) *Abadam* v. *Abadam* (1864), 33 Beav. 475; 39 Digest 167, *580*; 33 L.J.Ch. 593; 10 L.T. 53.

(4) *Gleadow* v. *Leetham* (1882), 22 Ch.D. 269; 39 Digest 167, *581*; 52 L.J.Ch. 102; 48 L.T. 264.

(5) *Giles* v. *Melsom* (1873), L.R. 6 H.L. 24; 44 Digest 577, *3968*; 42 L.J.C.P. 122; 28 L.T. 789.

(6) *Perrin* v. *Morgan*, [1943] A.C. 399; [1943] 1 All E.R. 187.

*(7) *Re Cowlishaw, Cowlishaw* v. *Cowlishaw*, [1939] Ch. 654; Digest Supp.; 108 L.J.Ch. 196; 160 L.T. 455.

*(8) *Re Wells' Will Trusts, Public Trustee* v. *Wells*, [1940] Ch. 411; [1940] 2 All E.R. 68; Digest Supp.; 109 L.J.Ch. 261; 162 L.T. 422.

*(9) *Re Best, Belk* v. *Best*, [1942] Ch. 77; [1941] 3 All E.R. 315.

SUMMONS by the trustees of the will of the deceased to determine a question arising thereunder. The facts are fully set out in the judgment.

W. Gutch for the plaintiffs.
Wilfrid M. Hunt for the annuitant.
R. J. T. Gibson for a pecuniary legatee.
E. M. Winterbotham for the residuary legatee.

UTHWATT, J.: By his will dated Dec. 28, 1932, K. A. Hooper, the testator, after appointing executors and trustees (of whom one was a solicitor) gave divers pecuniary legacies and then by cl. 4 made a disposition in the following terms:

> I give free of all duty to my secretary Mrs. Ouida Steel of 293 Lower Addiscombe Road Croydon an annuity of £520 during her life without power of anticipation such annuity to begin from the date of my death and to be paid free of all deductions whatsoever by equal monthly payments the first of which shall be paid one month after my death.

By cl. 5 the testator authorised his trustees to provide for the payment of the annuity by appropriating in respect thereof part of his residuary estate sufficient by its income to pay the annuity and declared that when such appropriation had been made the annuity should be exclusively charged on the appropriated property; that resort might be had to the capital of the annuity fund for payment of the annuity and that such fund should on the death of the annuitant revert to his residuary estate. The will, after disposing of the residuary estate, contained a provision entitling any trustee being a solicitor, broker or banker or engaged in any other profession or business to charge and be paid for all business transacted or acts done by him in connection with the trusts of the will. The testator died on Apr. 4, 1940, having by various codicils, the last of which is dated July 11, 1940, confirmed his will.

The question for determination is whether the annuity to Mrs. Steel is given free of income tax by reason of the directions that it is to be paid "free of all deductions whatsoever."

Annuities given by a will are charged to income tax under the Income Tax Act, 1918, Sched. D, Case III. The tax so charged is thrown on the annuitant by his compulsory submission to deduction of tax on the occasion of the payment of any instalment of the annuity as provided by All Schedule Rules, rr. 19 and 21. The annuity is paid in full, in part by cash paid to the annuitant and in part by satisfaction in accordance with the provisions of the Act of the income tax exigible in respect of it. No deduction has in law or in fact been made from the annuity.

Testators frequently provide that an annuity of an amount specified by them is to be free of income tax or is to be paid without deduction of income tax. These words do not fit in at all comfortably with the provisions of the Income A Tax Acts, for it is beyond the competence of testators to free an annuity from income tax. The income tax withheld on payment of an instalment of an annuity is not a deduction from the annuity; and, where part of the annuity is not payable out of profits and gains brought into charge, the withholding of the income tax appropriate to that part is obligatory on the payer. But the Income Tax Acts are not read as controlling the expressed intention of testators: see *Festing* v. *Taylor* (1). The intention disclosed by the use of these phrases B (which are construed as identical in meaning), or phrases of similar import disclosing an intention to relieve the annuitant of the burden of income tax, is carried out by an appropriate increase in the money amount specified for the annuity, the increase being such as to enable the annuitant to receive the specified amount after the tax incident to the increased annuity in the hands of the annuitant has been satisfied in manner required by the Act. The annuity C as specified by the testator in money is increased; the increased annuity is not free of income tax and tax is deducted on payment made to the annuitant. But the testator's intention has been carried out.

The question which gives rise to difficulty is whether in any particular will there is, on its proper construction, shown an intention to make the annuity or the annual sum expressed to be payable a net sum after income tax has been accounted for. To achieve that object it is not necessary that income tax D should in terms be referred to. The purpose sought to be achieved, for instance, a direction to pay the rates incident to devised property, or the use of an artless phrase—I hazard the example of a "life annuity of £1 a week spending money payable every Saturday"—may well show an intention that the sums are to be net sums after tax has been accounted for. The only thing necessary is an adequate expression of the testator's intention. In this case the words used are "to be paid free of all deductions whatsoever," and they have to be con- E strued not in any general sense, but as part of the will in which they find a place.

One is not, however, without assistance from the reported cases as to the meaning of that phrase. The cases are many in number. That is due, perhaps, to the presence in some of the older books of precedents of the words "clear of all deductions whatsoever," as part of the common form in a gift of an annuity: see, for instance, MARTIN'S PRACTICE OF CONVEYANCING PRECEDENTS, Vol. V, p. 184. These words are not, so far as my researches have gone, common F form in the will forms contained in modern books of precedents. This perhaps may be due to Davidson's influence upon the work of his successors, for in his PRECEDENTS IN CONVEYANCING, 2nd Edn., published in 1864, he proclaimed that his will forms do not use the general words "without deduction," observing that where terms of that description are used the question of construction whether the annual sum is given free from deduction for income tax is one of G great nicety and that it is inexpedient to use ambiguous terms. Davidson's warning has been neglected, and the cases have multiplied since he wrote. The effect of the cases, which began with *Lethbridge* v. *Thurlow* (2), decided in 1851, and continue in a stream to the present day, is that income tax is not to be regarded as included in a direction to pay an annuity "free from deductions," unless there is shown in the will an intention that income tax is to be treated as a deduction. That construction has become the rule of the road. H It is not necessary to refer in detail to the cases. I refer only to two of them by way of example. In *Abadam* v. *Abadam* (3), the phrase used was "without any deductions whatsoever," and in the absence of any context sufficient to expand the meaning of "deductions," this phrase was held not to include income tax. In *Gleadow* v. *Leetham* (4), where the words were "clear annuity free of all deductions and abatements whatsoever," KAY, J., stated that in light of the presence of the word "abatements" he found it difficult to give any meaning to the word "deductions" unless it included "income tax." No other meaning was or, so far as I can see, could have been suggested for that word. The annuity was held not to be tax free.

I turn now to the will of this testator. There are three matters to be observed. First, the will throughout is expressed in technical terms. Colloquial language is absent. Second, the phrase "free of all deductions whatsoever" has no application to anything unless income tax is treated as a deduction. Freedom from death duty is expressly provided for. The professional charges authorised by the will could not in any event fall on the annuity. The possibility that in the future there might be appointed a trustee entitled to remuneration part of whose charges might otherwise fall on the annuity is not contemplated by the will and should not, in my opinion, be taken into account in construing it. Third, the rest of the will contains nothing to suggest that income tax is treated as a deduction.

The sole question, therefore, is whether, in the absence of any explanatory matter, it is proper to draw the inference that income tax was treated by the testator as a deduction for the purpose of this gift merely from the fact that, unless so treated, the phrase has no application at all. It is no doubt a sound rule of construction that, where words are susceptible of several interpretations, that interpretation should be adopted which will give some effect to every expression rather than one which will render any of the expressions inoperative. This must, however, not be pressed too far, for, as LORD SELBORNE, L. C., pointed out in *Giles* v. *Melsom* (5), at p. 33:

> Nothing can be more mischievous than to attempt to wrest words from their proper and legal meaning only because those words are superfluous . . .

And as LORD ROMER in the course of observations upon the function of settled rules of construction pointed out in *Perrin* v. *Morgan* (6) at p. 420 ([1943] 1 All E.R. at p. 197):

> It is, no doubt, of great importance to lawyers and others engaged in the preparation of wills that they should have the certainty of knowing that certain well-known words and phrases will receive from the court the meaning that the court has for generations past attributed to them.

In my view, it would not be right to construe the will as giving a tax free annuity. Income tax is not a deduction; and the will is expressed in technical terms. An expression of positive intention to treat income tax as a deduction is entirely absent. It is, I think, the sounder course to treat the phrase "without any deductions whatsoever" as meaningless rather than, in an instrument drawn in technical terms, to attribute to it a meaning which it does not bear in law and which has consistently been denied to it by authority for nearly a century.

In *Cowlishaw* v. *Cowlishaw* (7), BENNETT, J., in construing a will which I cannot distinguish from the will under consideration, came to the opposite conclusion to that at which I have arrived. He found himself unable to hold a similar direction meaningless. It is only with great diffidence that I differ from him, but it is to be observed that in *Re Cowlishaw* (7) there was no such citation of authority as showed the consistent meaning given to the phrase "without deduction" in many different wills over a long period, that *Re Cowlishaw* (7) was distinguished on this ground by SIMONDS, J., in *Re Wells' Will Trust* (8), and that BENNETT, J., himself observed on *Re Cowlishaw* (7). in *Re Best* (9).

I accordingly declare that the annuity is not given free from the income tax to which it is subject.

I would only add this. The larger part of income tax is at the present time collected by deduction at the source, and under promised legislation that method of collection is being extended. The association of income tax with "deduction" will no doubt, therefore, become more direct and more obvious to many people. But that will not alter the meaning to be attributed to the phrase "without deduction" in the gift of an annual sum. If a testator means a specified annuity to be received clear of income tax, he should say so in express terms and not use a general formula. In so doing a testator would not in the general case be abandoning an accustomed method of stating his ideas, for views on income tax are not usually conveyed under the cover of an amiable general phrase.

Order accordingly. Costs of all parties to be paid out of residue.

Solicitors: *Beachcroft & Co.* (for the trustees and the annuitant); *Pothecary & Barratt* (for the pecuniary legatee); *Syrett & Sons* (for the residuary legatee).

[*Reported by* R. L. ZIAR, ESQ., *Barrister-at-Law*].

STANLEY *v.* INLAND REVENUE COMMISSIONERS.

[Court of Appeal (Lord Greene, M.R., MacKinnon and Goddard, L.JJ.), **December 14, 15, 16, 1943, January 24, 1944.**]

Income Tax—Sur-tax—Infant tenant for life—Vested life interest—Accumulation of income during minority—Whether income of infant and subject to tax—Trustee Act, 1925 (*c.* 19), *s.* 31 (2).

Upon the death of his father on Aug. 22, 1931, the appellant, who was at that time an infant, became entitled to a vested life interest in certain estates. Between Aug. 22, 1931, and Aug. 23, 1936, when the appellant came of age, the trustees accumulated, in accordance with the Trustee Act, 1925, s. 31 (2), so much of the income as was not expended on the maintenance of the appellant. Additional assessments to sur-tax were made upon the appellant in respect of the income of the settled estates arising during his infancy. For the appellant it was contended that the effect of the Trustee Act, 1925, s. 31 (2), was that, during the minority of an infant with a vested interest, he was not to be regarded as entitled to the income of the property but merely as the person who was entitled to the income in the event of his attaining 21 years of age and, alternatively, that, in considering what is a person's income, there is no practical difference during minority between a contingent interest and a defeasible vested interest. The respondents contended that, as the appellant had a vested interest, the income of the settled estates was the income of the appellant as tenant for life and he was properly assessed to sur-tax in respect of the accumulations :—

Held : on the true construction of the Trustee Act, 1925, s. 31, the interest of the appellant in the surplus income during his minority was, in effect, a contingent interest only and he was not assessable to sur-tax in respect of it.

Decision of Macnaghten, J. ([1943] 2 All E.R. 422) *reversed.*

[**EDITORIAL NOTE.** The Court of Appeal in reversing the conclusion of Macnaghten, J., have started from the proposition that a person can only be charged to tax upon income to which he is entitled in the year of assessment. Where the taxpayer has a defeasible title to the income and no right to receive it in the year of assessment, it is not income to which he is so entitled and, therefore, not subject to tax.

As to Infant's Vested Interest Accumulated during Minority, see HALSBURY, Hailsham Edn., Vol. 17, pp. 272, 273, para. 544 ; and for Cases, see DIGEST, Supp., Income Tax, No. 619a.]

Cases referred to :

(1) *Gascoigne* v. *Inland Revenue Comrs.*, [1927] 1 K.B. 594 ; *on appeal sub nom. Inland Revenue Comrs.* v. *Longford* (3).

(2) *Inland Revenue Comrs.* v. *Blackwell*, [1926] 1 K.B. 389 ; 28 Digest 108, *668* ; 134 L.T. 372.

(3) *Inland Revenue Comrs.* v. *Longford* and *Inland Revenue Comrs.* v. *Pakenham*, [1928] A.C. 252 ; Digest Supp. ; 97 L.J.K.B. 438 ; 139 L.T. 121 ; 13 Tax Cas. 573.

(4) *Inland Revenue Comrs.* v. *Hamilton-Russell*, [1943] 1 All E.R. 474.

(5) *Dale* v. *Mitcalfe*, [1928] 1 K.B. 383 ; Digest Supp. ; 97 L.J.K.B. 161 ; 138 L.T. 167 ; 13 Tax Cas. 41.

(6) *Stern* v. *Inland Revenue Comrs.* (1929), 15 Tax Cas. 148 ; Digest Supp.

(7) *Re Turner's Will Trusts, District Bank, Ltd.* v. *Turner*, [1937] Ch. 15 ; [1936] 2 All E.R. 1435 ; Digest Supp. ; 106 L.J.K.B. 58 ; 155 L.T. 266.

(8) *Lincolnshire Sugar Co., Ltd.* v. *Smart*, [1937] A.C. 697 ; [1937] 1 All E.R. 413 ; Digest Supp. ; 106 L.J.K.B. 185 ; 156 L.T. 215 ; 20 Tax Cas. 643.

Appeal by the taxpayer from an order of Macnaghten, J., dated July 28, 1943, and reported [1943] 2 All E.R. 422. The facts are fully set out in the judgment.

R. F. Roxburgh, K.C., and *J. S. Scrimgeour* for the appellant.

The Solicitor-General (*Sir David Maxwell Fyfe, K.C.*), *J. H. Stamp*, and *Reginald P. Hills* for the respondents.

Roxburgh, K.C. : The income from the interest of the infant in this case, except so far as it was applied to his maintenance, was not the income of the infant. It is true that he had in law a vested interest, but under the Trustee Act, 1925, s. 31, his interest in the accumulations of income was, in effect, converted into a contingent interest. He had no right to receive the income in the year of assessment and it is not assessable to income tax. [Counsel referred to *Inland Revenue Comrs.* v. *Blackwell* (2), *Inland Revenue Comrs.* v. *Longford* (3) and *Inland Revenue Comrs.* v. *Hamilton-Russell* (4).]

Scrimgeour followed on the same side.

The Solicitor-General : In *Dale* v. *Mitcalfe* (5) there is a passage in the judgment of SARGANT, L.J., which shows the distinction between a vested interest and a contingent interest. The vested interest was regarded as property of the A infant and he had to pay tax upon it. The insertion of sect. 25 in the Income Tax Act, 1918, which gave additional rights to contingent interests, only emphasised the original distinction which has always been admitted. The Crown has never said that, in the case of a contingent interest, accumulated income should be assessed to sur-tax because one cannot ascertain who will become entitled and there is no person whose income it can be said to be. The term "vested interest" is used in the Trustee Act, 1925, s. 31, according to the then B existing interpretation. Unless there is a clear alteration, either by definition or by very clear words in another way, "vested interest" should keep the meaning which has been judicially attached to the expression. The appellant had a vested life interest which was defeasible. The section does not affect the title to the income. It still keeps the distinction between a vested interest and a contingent interest. A person who receives income should pay tax upon it. The fact that the income was defeasible would not raise a presumption C that that person would escape tax upon it unless it was asserted in clear words or intended by necessary implication. In the case of a contingent interest the accumulations are not the money of the recipient until the contingency arises. It is different, however, in the case of a vested interest. [Counsel referred to *Gascoigne* v. *Inland Revenue Comrs.* (1), *Stern* v. *Inland Revenue Comrs.* (6), *Re Turner's Will Trusts, District Bank, Ltd.* v. *Turner* (7), and *Lincolnshire* D *Sugar Co., Ltd.* v. *Smart* (8).]

Stamp followed on the same side.

Roxburgh, K.C., in reply.

LORD GREENE, M.R. [delivering the judgment of the court] : By his will dated June 2, 1926, the 5th Baron Stanley of Alderley appointed lands in Wales (subject to certain charges) upon trusts under which on his death his second son, E the appellant, became equitable tenant for life in possession. The death took place on Aug. 22, 1931. In the absence of any directions in that behalf in the will the statutory provisions as to maintenance and accumulation during infancy and as to the destination of accumulations of income contained in the Trustee Act, 1925, s. 31, applied. The appellant was an infant when the testator died, and he attained his majority on Oct. 23, 1936. Meanwhile the trustees accumulated so much of the income of the estate as was not expended upon his main- F tenance.

The appellant appealed to the Special Commissioners against four additional assessments to sur-tax for the years ended Apr. 5, 1934, 1935, 1936 and 1937. These assessments were made in respect of or comprised the surplus income of the estate remaining in the hands of the trustees after providing for the maintenance of the appellant and were supported on the ground that the surplus income for the relevant years was income of the appellant for income tax G purposes and chargeable with sur-tax accordingly. The Special Commissioners upheld the assessments, and their decision was affirmed by MACNAGHTEN, J.

The power to make additional assessments in respect of sur-tax is contained in the Finance Act, 1927, s. 42 (3). Subsect. (7) (*a*) of that section imports the provisions of the Income Tax Acts relating to assessments to income tax, and the relevant provision is that contained in the first paragraph of the Income H Tax Act, 1918, s. 125 (1). Under that paragraph an additional assessment may be made :

> If the surveyor discovers that any properties or profits chargeable to tax have been omitted from the first assessments . . .

and it was, apparently, under these provisions that the assessments in question were made. An additional assessment can only be made in respect of a particular year and it cannot be made unless an original assessment could lawfully have been made in respect of that year. There can be no such thing as a conditional assessment and the Crown can derive no support for its claim from the fact that it did not make the assessments until the title of the appellant to the accumulations became absolute when he attained his majority. If the Crown is right in its claim, it can only be for the reason that assessments could lawfully have been made year by year during the minority of the appellant in respect of the surplus income of the estate and the circumstance that in the event he in fact attained his majority is entirely irrelevant.

In order that a person may be charged with sur-tax, the income in respect of which he is assessed must be his income. Under the Finance Act, 1927, s. 38 (1), the charge for sur-tax is only imposed "in the case of an individual whose total income from all sources exceeds a stated amount." By subsect. (2) "total income" in relation to any person means "the total income of that person from all sources" estimated as there provided. Apart from any special provision in the instrument under which an infant derives his interest and apart from statutory provision, an infant who has a vested interest in possession is the person entitled to the income. It is his income although he cannot give a good receipt for it. On his death under twenty-one income which has accumulated during his minority goes to his legal personal representatives. In such a case there can be no doubt that the income accruing during minority is the income of the infant. He is, accordingly, chargeable with sur-tax in respect of it. A creditor who has lawfully obtained judgment against the infant, for example, in an action of tort, can levy the appropriate form of execution against it. If, on the other hand, the infant is only entitled contingently on his attaining twenty-one, he has no title to any income until that event takes place. If the event does take place, he becomes entitled to future income and (in appropriate circumstances) to accumulations of past income. But that past income was not his income in the years in which it accrued, and no one suggests that he could be assessed to sur-tax in respect of it.

The Conveyancing Act, 1881, s. 42, gave certain statutory powers and created certain statutory trusts in relation to the income of land in which an infant had a vested interest in possession. By subsect. (5) of that section the title of the infant to accumulations of his income was preserved in the sense that, if he died under twenty-one, they went (in the absence of special provision) to his legal personal representatives as part of his estate. Here, again, there could have been no doubt that the income of such an infant was his income assessable to sur-tax. His title to it was absolute throughout, although his power to enjoy it was suspended during his infancy. If he had become domiciled in a country where testamentary capacity is acquired at an earlier age than twenty-one, he could have dealt with the accumulations by will.

If the statutory trusts in the present case had been those contained in the Conveyancing Act, 1881, s. 42, the appellant would clearly have had no case. But this was not so. The Trustee Act, 1925, s. 31, has effected a radical change in the law. It declares statutory trusts which, in the case of an infant with a vested interest in income who dies during minority, destroy his title to the accumulations and direct them to be held, not as part of the infant's estate, but as an accretion to capital. The section applies to property of any description held in trust for any person for any interest whatsoever, whether vested or contingent. It provides that, during the infancy of any such person income may be applied for his maintenance, education or benefit and any income not so applied is to be accumulated with power to apply accumulations as income. Subsect. (2), so far as relevant, proceeds as follows: The trustees shall hold those accumulations as follows:

> (i) If any such person (*a*) attains the age of twenty-one years, or marries under that age, and his interest in such income during his infancy or until his marriage is a vested interest . . . the trustees shall hold the accumulations in trust for such person absolutely . . . (ii) In any other case the trustees shall, notwithstanding that such person had a vested interest in such income, hold the accumulations as an accretion to the capital of the property from which such accumulations arose . . .

Some highly technical arguments were addressed to us upon the question what precise interest in surplus income an infant having a vested interest enjoys during his infancy in view of these provisions. This no doubt is a relevant question to be considered; but the fundamental question remains, namely, is that interest such as to make the surplus income income of the infant for the purposes of sur-tax? It was said on behalf of the Crown that the infant has a vested interest in the surplus income as it accrues and that there is nothing in the section that deprives him of that interest during infancy. All that the section does is to divest him of his title to the accumulations of surplus income if he dies before attaining his majority. In other words, it was said, he has a vested interest in the accumulations which is defeasible in the event of his dying under twenty-one. Therefore, it was said, the surplus income is, during minority, income of the infant and as such is assessable year by year.

It is necessary at this point to call attention to a distinction which apparently was not appreciated by the Special Commissioners. The expression " defeasible interest in income " may be used in two senses. In the case of an adult he receives and enjoys the income until the defeasance takes place. Until that event occurs, the income is his income and he is assessable accordingly. But the same expression (if it be the correct one to use in reference to surplus income in such a case as the present) means, in the case of an infant in the situation of the appellant, something quite different. The infant does not during infancy enjoy the surplus income. It is not his in any real sense. The title to it is held in suspense to await the event and, if he dies under twenty-one, his interest in it (whether or not it be truly described as a vested interest) is destroyed. He is in fact for all practical purposes in precisely the same position as if his interest in surplus income were contingent. If he attains twenty-one, he takes the accumulations, if he dies under twenty-one, he does not. But, as a matter of fact, the section itself does use words of contingency, since the trust of the accumulations is expressed to be for the infant " if he attains the age of twenty-one years or marries under that age." We are disposed to think that the effect of the section is better described, not as leaving the interest of the infant as a vested interest subject to defeasance, but as engrafting upon the vested interest originally conferred on the infant by the settlement or other disposition a qualifying trust of a special nature which confers on the infant a title to the accumulations if, and only if, he attains twenty-one or marries. The words in subsect. (2) (i) (*a*), "If his interest during his infancy or until his marriage is a vested interest," and the corresponding words in subsect. (2) (ii), " notwithstanding that such person had a vested interest in such income," appear to us to refer to the nature of the interest conferred upon the infant by the settlement or other disposition and not to affirm that the interest of the infant in the surplus income remains a vested interest notwithstanding the alteration in his rights effected by the section. If this view is right, the interest of the appellant in the surplus income during his minority was a contingent interest only and he was not assessable.

Even if this view is wrong and the interest of the infant in surplus income during his minority was technically in law a vested interest, the Crown's conclusion that this surplus income was, therefore, income of the infant for sur-tax purposes within the meaning of the Income Tax Acts is not, in our opinion, justified. As we have already said, the fundamental question is that of the construction of the words " income of a person " in those Acts in relation to the particular situation brought about by the Trustee Act, 1925, s. 31. In our opinion, the effect of that section is to make the income of the settled property different for sur-tax purposes from what it would have been if the section had never been enacted and to remove it for those purposes from the category " income of the infant." The rights of the infant in respect of this surplus income during infancy are, whatever their technical description, precisely what they would have been if they had been expressly made contingent. We need not repeat what we have already said in this connection. But, if the Crown's contention be brought to the practical test, it means (and, indeed, it was conceded on behalf of the Crown) that, in respect of every year during his infancy, the infant is assessable to sur-tax in respect of income which may never in truth be his. As it is not possible to make a contingent assessment or to improve the position of the Crown by waiting until the infant attains twenty-one before making an assessment , and as, if the infant were to be assessed during infancy and were to die before attaining twenty-one, his legal personal representatives would have no right to recover the tax levied upon him, it necessarily follows (and it was conceded on behalf of the Crown) that on the Crown's argument the infant could be assessed to sur-tax in respect of income which, if he died under twenty-one, he would never receive. The Crown's claim in the present case would have been equally good if the appellant had died in infancy and the assessments had been made on his legal personal representatives.

Moreover, the Crown was unable to give any acceptable answer to the question how the tax could be paid. It was, indeed, suggested that the Crown could have recourse to the accumulations in the hands of the trustees. But this answer begs the question. We do not see on what principle a claim by the Crown against the infant could defeat the rights conferred on the remainderman by sect. 31 to have the accumulations added to capital for his benefit. An A endeavour was made to support the argument by asserting that a judgment creditor of the infant could levy equitable execution against the accumulations while the infant was still an infant. This argument is, in our opinion, quite wrong. No claim against the infant can defeat the rights conferred upon the remainderman by the section. The result, therefore, would be that the only way in which the Crown could enforce its rights during the infancy would be against the separate property of the infant—if he had any—and his estate B would thus be depleted to meet a claim for tax in respect of income which, if he died an infant, would never become his.

The real fallacy, if we may so describe it, which underlies the argument for the Crown is that it gives to the words " income of a person " in the relevant passage of the Income Tax Acts an entirely artificial meaning. Those words are to be construed in a common sense business way and we do not see how C they can be stretched so as to include income which in no real sense can be described as income of the infant unless and until he attains his majority. The action of the Crown in refraining from making the assessments until it was ascertained that the title of the appellant had become absolute gives, at first sight, a colour of reasonableness to its claim and suggests that, if the infant had died under twenty-one, the claim would never have been put forward. But, once it is appreciated that the claim, if it be a good one, would have been D equally good if the assessments had been made during the infancy and the appellant had died an infant, the fallacy, in our opinion, is convincingly exposed.

The only authority to which we need refer is *Gascoigne* v. *Inland Revenue Comrs.* (1), at p. 605. It was on this case that the Special Commissioners relied, and it was much pressed upon us by counsel for the Crown. But the decision appears to us to be of no assistance in determining the present question. Miss Gascoigne had two interests under the will of her grandfather. The first was an absolute E vested interest in certain property in Ireland subject to a direction to accumulate the rents during her infancy. The income of the property was hers from beginning to end and the direction to accumulate was mere administrative machinery which did not affect her title in any way. The other interest was an absolute interest in the residuary estate of the testator subject to a gift over if she died under twenty-one without having been married. ROWLATT, J., in his judgment does not appear to refer to the position with regard to this F interest, no doubt because it was quite unarguable that the income pending the defeasance was not income of Miss Gascoigne. It was, however, on this decision as it applied to the gift of residue that the Special Commissioners based their conclusion, and it was here that they fell into the error to which we have already referred. Miss Gascoigne's interest in the residue was a defeasible interest in the first of the two senses mentioned earlier in this judgment. The G income year by year was hers until the defeasance should take place. She could, of course, give no receipt for the income during her infancy, but, if she had died an infant, any income, which had previously accrued and had not been spent on maintenance, would have passed to her legal personal representatives as part of her estate.

The appeal is allowed with costs here and below.

Appeal allowed with costs. Leave to appeal to the House of Lords. H

Solicitors: *Maples, Teesdale & Co.* (for the appellant); *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

HOLMES *v.* HADFIELDS, LTD.

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and du Parcq, L.JJ.), **January 18, 19, 1944.**]

Factories and Shops—Dangerous machinery—Travelling crane—Absolute duty to prevent crane approaching within 20ft. of place of work where workmen liable to be struck by crane—Breach of duty—Workman standing where not liable to be struck by crane injured by tool dislodged by crane—Factories Act, 1937 (*c.* 67), *s.* 24 (7).

The appellant workman was employed by the respondents in their factory in working on a ratchet drill which stood on a platform some 16ft. above the floor. An overhead crane passed the platform at a distance of less than 20ft. and was liable to strike anybody working on the platform. At the material time the workman was aware of the approach of the crane and stepped off the platform on to a girder which was situated between the platform and the floor. He signalled to the crane driver but owing to a misunderstanding the crane passed the platform instead of stopping short of it. The projecting cab of the crane struck the ratchet drill which fell upon the workman and injured him. The workman brought an action alleging breach of an absolute duty imposed by the Factories Act, 1937, s. 24 (7), upon the respondents requiring them to take effective measures to ensure that an overhead crane did not approach within 20ft. of any place where a person was liable to be struck by the crane. The respondents contended (i) that at the moment when the accident occurred the appellant was standing on the girder and was not in a place where he was liable to be struck by the crane and that he was injured by the drill and not by the crane; (ii) that there was contributory negligence on the part of the workman in giving the signal to the crane driver to come on:—

HELD: (i) the respondents had committed a breach of the absolute duty in allowing the crane to come within 20ft. of the workman's place of work and upon the true construction of the section it was immaterial that at the moment of the accident the workman was in a place where he was not liable to be struck by the crane or that the actual object which struck him was not part of the crane.

(ii) on the facts of the case there was no contributory negligence on the part of the workman.

[**EDITORIAL NOTE.** The importance of this case lies in the construction of the section. The latter says that a crane is not to approach within 20ft. of the place where a workman is working if the place is such that he is liable to be struck by the crane. In this case the crane struck not the workman, but the machine at which he had been working and from which he had moved away to a position which he thought was safe. The court have decided that the section applies although the workman is not in fact struck by the crane.

AS TO DANGEROUS MACHINERY, see HALSBURY, Hailsham Edn., Vol. 14, pp. 594-603, paras. 1130-1146; and FOR CASES, see DIGEST, Vol. 24, pp. 908-913, Nos. 62-85.]

Cases referred to:

*(1) *Lotinga* v. *North Eastern Marine Engineering Co.* (1938), *Ltd.*, [1941] 2 K.B. 399; [1941] 3 All E.R. 1.

(2) *Gorris* v. *Scott* (1874), L.R. 9 Ex. 125; 42 Digest 759, *1853*; 43 L.J.Ex. 92; 30 L.T. 431.

APPEAL by the workman from an order of His Honour JUDGE ESSENHIGH, Rotherham County Court, dated Oct. 19, 1943, and reported [1943] L.J.N.C.C.R. 199. The facts are fully set out in the judgment of LORD GREENE, M.R.

Gerald Gardiner for the appellant.

G. H. B. Streatfield, K.C., and *Hon. H. Fletcher Moulton* for the respondents.

LORD GREENE, M.R.: The Factories Act, 1937, s. 24 (7), provides as follows:

> If any person is employed or working on or near the wheel-track of an overhead travelling crane in any place where he would be liable to be struck by the crane, effective measures shall be taken by warning the driver of the crane or otherwise to ensure that the crane does not approach within 20ft. of that place.

That subsection, like so many of the directions in the factories legislation, imposes an absolute duty and that has been laid down by the Divisional Court in *Lotinga* v. *The North Eastern Marine Engineering Co.* (1938), *Ltd.* (1). The absolute duty under these Acts is so familiar that I need not say any more now about it.

In the present case the appellant was engaged in work on a platform some 16ft. above the floor of the shop and he, with his mates, was working on a ratchet drill which stood on the platform. In that part of the shop overhead cranes were working—there appear to have been three of them—two of them were of one type and the third was of a different type. The first two, or at any rate one of them, had made several journeys past the place where the appellant was working. The crane which caused the accident was a crane of a rather different type in that the cab extended more to one side than the cabs of the other cranes.

The county court judge came to the conclusion that the respondents had been guilty of a breach of the statutory obligations imposed upon them by this subsection. There is no question but that the platform on which the man was working was a place where he would be liable to be struck by the crane. There is no question that the crane did approach within 20ft. of that place, because the crane passed the platform, and as it passed by, the cab hit the ratchet drill and it fell upon the appellant. The appellant, on the approach of the crane, had got down from the platform and stood on a girder which was part way between the platform and the ground. The ratchet drill, having been hit by the cab of the crane, fell upon him and injured him.

It was argued on behalf of the respondents that the judge in finding a breach of duty must have misdirected himself in law for this reason. At the precise moment when the crane moved and had started its last movement it was some 7 or 8 ft. away from the platform. At that moment, it is said, the appellant was not working in a place where he would be liable to be struck by the crane. It was said he was liable to be struck by the tools he was using if the crane hit them as it did hit them. It hit the drill in this case, but it is said that is not what the section means—he must be employed in a place where he would be liable to be struck by the crane. In my opinion, that argument on the facts of this case involves placing much too narrow a construction upon this subsection. The place where the appellant was employed was a place which comprised both the platform and the girder on which he stood. The fact that at the time of the accident the actual position where he was was one in which the crane would not in fact strike him seems to me to be immaterial. The crane came within 20ft. of the place where he was employed, and the respondents cannot excuse themselves by saying that at the precise moment when the crane moved he was in a part of the place of his employment where as a matter of fact he was not liable to be struck. If that argument were to prevail, it seems to me that the protection of the section would be liable to be whittled away very materially in practice. If a man's place of employment is partly within the 20ft. and partly outside the 20ft., he may be at any given moment at one part or the other. The object of the subsection is to lay down an absolute rule of safety and not make the obligation of the employer dependent upon the precise point where the workman may be at any given moment.

It seems to me that there was ample evidence on which the county court judge could come to the conclusion he did on this point, and I cannot find that he in any way misdirected himself as to the true meaning of the section. The county court judge, however, found against the appellant on the ground that he was guilty of contributory negligence. His finding is as follows:

> I hold that the injury was occasioned by the contributory negligence of the plaintiff. He was responsible for the operations going on on the platform. He and his mates were given ample time to clear the platform and take cover and he knew that the drill had been left in position and he gave warning to the crane driver that all was clear and that it was safe for her to go on.

In my opinion, the facts here are not sufficient in law to support a finding of contributory negligence. It appeared that the respondents, on the breach of their statutory obligation by allowing these cranes to come within 20ft. of the place of work, had either set up themselves or had allowed to be set up a sort of private or substituted safety scheme under which warnings were given or signals were given to come on or stop, and in the present case the practice which other cranes had adopted under this system was to stop when they got within one or two feet of the platform in order to ensure that they had got a clearance. The appellant, when he gave the signal in this case, gave it under the belief that the crane driver's responsibility would be to bring the crane up to that one or two feet and then stop. As that had happened with the other crane, that is what he thought would happen in this case. The reason why he thought that would happen apparently was that he had failed to observe that an earlier stopping of the crane had taken place, with the result that the crane driver would think that his signal was the signal to proceed to the end of her journey, whereas he intended it merely to be a signal to approach within a foot or two and then stop in order that they might be quite sure that there was sufficient clearance.

It seems to me that, where an employer fails to conform to the statutory obligation of safety and allows it to be replaced by some private safety system of his own or one which the men are allowed to work out for themselves and that system depends on the accurate giving and understanding of signals which are liable to be misunderstood, and a signal is given by the workman under a misapprehension as to how it will be understood by the person to whom it is given, it is impossible to say that the workman is guilty of contributory negligence. The only thing of which the appellant could be accused in this case was that he gave the signal without having full knowledge of the situation. That is not blameworthy in any relevant way. Indeed, sooner or later, a safety system of this kind, which depends upon signals, is pretty sure to lead to misunderstandings. In my opinion, there was no evidence on which the finding of contributory negligence could be supported.

The other point that was taken by counsel for the workman, on which he had failed in the court below, was that, quite apart from statutory duty, the respondents had failed in their common law obligation to provide a safe system of working, but so far as that is concerned, I do not think it is necessary to go into it, because, in my opinion, the appellant succeeds on the point of statutory duty.

It must not be taken from that that I am satisfied that the decision of the county court judge was right on that point. We have not heard counsel for the workman in reply upon it, and I must not be taken as expressing any opinion upon it because it is unnecessary to do so.

The result, therefore, is that the appeal succeeds on the question of liability.

MacKinnon, L.J.: I agree and I do not think that I need add anything.

du Parcq, L.J.: I agree. The only matters that it becomes necessary to decide are these: Was the county court judge right in coming to the conclusion that there had been a breach of statutory duty and that the plaintiff suffered damage by reason of a breach of statutory duty; and, secondly, was there evidence to support his finding of contributory negligence on the part of the plaintiff?

As to the latter question, I have nothing to add to what has been said by Lord Greene, M.R. It is, I think, common ground that this accident happened to the plaintiff through a misunderstanding, and I cannot see that any blame is to be attached to the plaintiff for that misunderstanding.

The other question deals with a matter which might, in other cases, no doubt raise difficult problems, but I think that the difficulty will usually be occasioned rather by the facts than by any question of construction. I suggested to counsel for the workman in the course of his argument that it would often be a question of degree whether a man could be said to be employed or working in any place where he would be liable to be struck by the crane. It may be said, I suppose, of all men working in a factory, or at any rate of most of them, that their work is within some area. As counsel for the workman said, the place where a man is working is not the piece of ground occupied by his two feet or the space taken up by his whole body. It is the area within which his work requires him to move about, and the work which for the time being he is doing is the work at which one must look to see what that area is. If one were to say that the moment a man absented himself from that area he was to be regarded as ceasing to be employed or working there, the result might be terrible indeed, because the time when the man has temporarily gone away for some legitimate purpose of his own may be the very moment when the crane driver elects to drive on, perhaps just in time to catch the man when he is returning quite without suspicion of the danger that awaits him. The question is: What is the area within which his work requires that he should for the time being be, not as a stationary object, but as a sentient human being who from moment to moment may change his position within it, or may temporarily go outside it with the intention of shortly returning?

On that view of the matter, it is enough to say that the county court judge was fully justified in saying that there was a breach of statutory duty. That only leaves the question whether the damage suffered was occasioned by the A breach of statutory duty. Counsel for the respondents suggested that it was not, because the man was never struck by the crane, and in the position in which he was at the moment could not have been struck by the crane; he was struck by the drill which the crane dislodged.

I do not forget that, when you are dealing with a breach of statutory duty, you cannot hold the defendant liable because, by reason of his failure to perform that duty, some injury was suffered by the plaintiff, unless it is also shown B that the injury suffered by the plaintiff was an injury of the kind which was contemplated by the statute. I do no more than allude to *Gorris* v. *Scott* (2), which, I think, lays down that principle. But when one looks to see what was in the contemplation of the legislature, I think it is plain that it is impossible to say that the injury which was suffered by the workman here was not the kind of injury which was in the contemplation of Parliament. This section is in Pt. II of the Factories Act, 1937, which deals with the safety of workmen. C Parliament has been at pains to provide for the safety of workmen by allowing what certainly is a reasonable margin and has said that the crane is not to approach within 20ft. of the place where the man is working, and if the question is asked whether Parliament was only thinking of the danger of the crane itself striking the workman, or had also in contemplation the possibility that the crane might go so close to the workman and so close to his immediate surroundings D that it would strike some object near him whereby he suffered injury, the answer, I think, can only be that Parliament must be assumed to have contemplated the latter possibility, which any reasonable person would contemplate.

I agree that this appeal should be allowed.

Appeal allowed with costs. Leave to appeal to the House of Lords granted on terms.

Solicitors: *W. H. Thompson* (for the workman); *Corbin, Greener & Cook,* E agents for *Arthur Neal, Scorah & Co.*, Sheffield (for the respondent company).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

MINISTER OF HEALTH *v.* BELLOTTI.
MINISTER OF HEALTH *v.* HOLLIDAY.

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[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and Goddard, L.JJ.), **January 24, 25, 1944.**]

Constitutional Law—Power of Minister to recover possession—Evacuees from abroad allowed to occupy premises—Revocation of licence—Ministry of Health Act, 1919 (*c.* 21), *s.* 7.

Landlord and Tenant—Licence—Revocation—Evacuees—Reasonable time for G *removal—Evacuees from abroad granted licence to occupy premises—Terms of notice of revocation—No necessity to state date of removal—Notice good though time stated for removal too short.*

The respondents were evacuees from Gibraltar and occupied premises at an evacuees' centre under licences from the Ministry of Health. The respondents were licensees for valuable consideration in respect of the premises which they occupied and the licences extended to allow them to H live in their flats, to have furniture of their own, which in fact they did, and to have their wives and families there, in addition to certain other amenities. Differences arose between the respondents and officials of the Ministry and the respondents were each given a week's notice to quit the premises they occupied. The respondents failed to leave on the expiration of the notices and, after an attempt to eject them, proceedings were taken in the county court to obtain orders for possession. It was contended that the action ought to have been brought on behalf of the Crown and that the Minister of Health had no title to maintain it. It was further contended that the notices were invalid on the ground that the time given to vacate the premises was unreasonably short and, therefore, the licences were not effectively revoked :—

HELD : (i) the Minister of Health, being in possession of the premises on behalf of the Crown, is entitled, by reason of the provisions of the Ministry of Health Act, 1919, s. 7 (1), to enforce the rights of the Crown as the party in possession.

(ii) the length of time to be given to licensees on the determination of the licence must depend upon the circumstances of any particular case and, in the present case, the time limited was insufficient.

(iii) a notice determining a licence revokes the licence immediately on service and the notice becomes operative on the expiration of a reasonable time from the date of service, and this is so even though the notice states a period of time for the vacation of the premises which is held to be too short. No particular period of time need be stated in the notice.

[**EDITORIAL NOTE.** It is clear that, where a licence is revocable, it may be revoked at any time and that the licensee must be given a reasonable time for removal. This, however, leaves open the question whether, in the notice determining the licence, a period of time for removal must be stated. It was argued that this must be so, for then the licensee could know whether the notice was good or bad, since, if the period stated was insufficient in law, the notice was bad and the licence had not been determined. It is held, however, that the law does not require any period of time for removal to be stated in the notice. The licence is revoked immediately on service of the notice, even though the notice requires removal within a period which is held in the circumstances to be unreasonable. The licensor must allow the licensee a reasonable time thereafter for removal. If he ejects before the expiration of that reasonable time, he is liable in damages. If, on the other hand, he brings an action to recover possession, the question is whether a reasonable time has elapsed at the time when the action is heard.

AS TO REVOCATION OF LICENCE, see HALSBURY, Hailsham Edn., Vol. 20, pp. 10-12, para. 6 ; and FOR CASES, see DIGEST, Vol. 30, pp. 512-514, Nos. 1669-1700.]

Cases referred to :

*(1) *Minister of Supply* v. *British Thomson-Houston Co., Ltd.*, [1943] 1 K.B. 478 ; [1943] 1 All E.R. 615.

*(2) *Canadian Pacific Ry. Co.* v. *R.*, [1931] A.C. 414 ; Digest Supp. ; 100 L.J.P.C. 129 ; 145 L.T. 129.

*(3) *Cornish* v. *Stubbs* (1870), L.R. 5 C.P. 334 ; 30 Digest 513, *1685* ; 39 L.J.C.P. 202 ; 22 L.T. 21.

(4) *Wood* v. *Leadbitter* (1845), 13 M. & W. 838 ; 30 Digest 515, *1708* ; 14 L.J.Ex. 161 ; 4 L.T.O.S. 433.

(5) *Mellor* v. *Watkins* (1874), L.R. 9 Q.B. 400 ; 30 Digest 513, *1686*.

(6) *Hurst* v. *Picture Theatres, Ltd.*, [1915] 1 K.B. 1 ; 30 Digest 513, *1682* ; 83 L.J.K.B. 1837 ; 111 L.T. 972.

(7) *Kerrison* v. *Smith*, [1897] 2 Q.B. 445 ; 30 Digest 512, *1675* ; 66 L.J.Q.B. 762 ; 77 L.T. 344.

(8) *Carltona, Ltd.* v. *Commissioners of Works*, [1943] 2 All E.R. 560.

APPEALS by the Minister of Health from orders of His Honour JUDGE HARGREAVES, made in the West London County Court on Nov. 9, 1943. The facts are sufficiently stated in the judgments.

The Attorney-General (*Rt. Hon. Sir Donald B. Somervell, K.C.*), *Valentine Holmes* and *Hon. H. L. Parker* for the appellant.

Gilbert Beyfus, K.C., and *C. T. Salkeld-Green* for the respondents.

The Attorney-General : It is common ground that the licences in the present case were revocable. They were revoked and the licensees were given 7 days in which to remove themselves. The judge was wrong in law in considering matters which did not fall to be considered as between licensor and licensee. In particular, he has considered the length of time necessary for the licensees to obtain alternative accommodation. That is an irrelevant consideration. With regard to the notice of revocation of a licence, it is said that the notice must be one which allows a specific time to the licensee to remove any property which he has on the premises. The proper view in law is that a licence can be revoked at any time but that the licensee must be given a reasonable time in which to remove his property. It would be a formidable limitation upon the rights of licensors to confer upon licensees rights similar to those which are given

to statutory tenants. There is no authority which justifies one in saying that a licensor can only terminate a licence by allowing a period sufficiently long to enable alternative accommodation to be found. At common law a licensee of furnished premises is in the same position as a tenant of furnished premises. It was said in *Cornish* v. *Stubbs* (3) that a licensee, who has been making arrangements to remove, has a right to a reasonable time after the revocation of the licence to make whatever arrangements are necessary. That principle adequately protects the licensee. A licensor would be in an intolerable position A
if he had made a wrong estimate of the time and thus had to start all over again. The law implies a right to give a lodger 7 days' notice. A licensee should not be in a better position. [Counsel referred to *Mellor* v. *Watkins* (5), *Canadian Pacific Ry. Co.* v. *R.* (2), *Hurst* v. *Picture Theatres, Ltd.* (6), and *Kerrison* v. *Smith* (7).]

Beyfus, K.C.: The present case depends really upon whether or not the propositions laid down in the *Canadian Pacific Railway* case (2) are right. There B
is no authority as to which of the following two propositions is right, namely, that a notice specifying a reasonable time must be given at the licensor's peril, or, that no period of time need be stated in the notice provided that a reasonable time is given before taking any steps. The *Canadian Pacific* case (2) makes it quite clear that a notice which is unreasonable in point of time is in fact no notice at all. In considering what restriction should exist upon the power of a licensor to determine a licence, the court should take the view that a licensee C
is entitled to notice as to the sufficiency of which he can take advice and if the notice is insufficient in point of time, the licensee can treat it as of no value. The original notice must be a reasonable notice and, if the notice be unreasonable, it is of no effect. The Crown ought to be the plaintiff in the present case. No servant can have such possession as will entitle him to sue for trespass. In the present case, the Minister can sue only if the statute constituting the Ministry gives him the power. The only purpose, and the only effect, of the Ministry D
of Health Act, 1919, s. 7, is to create an artificial personality as distinct from the Minister for the time being. All that is said in sect. 7 is that the Minister of Health may sue and be sued in that name. The present action is for trespass and an action for trespass can only be brought by the person who has the right to possession. The present case is quite different from the *British Thomson-Houston* case (1). When a section appears deliberately to exclude certain matters E
from its purview, the court should not treat them as included. The possession of land is not included and it would be straining the section to apply it to matters which are deliberately excluded. [Counsel referred to *Mellor* v. *Watkins* (5), and *Carltona, Ltd.* v. *Works Comrs.* (8).]

The Attorney-General in reply: In *British Thomson-Houston's* case (1), the court was dealing with a contract. There is nothing in the Ministry of Health Act, 1919, s. 7, which confines the right to cases of contract. F

LORD GREENE, M.R.: It is agreed on both sides that the present respondents were in the position of licensees and, further, that they were not gratuitous licensees but that, by the payment or contribution which they made under a scheme that was set up by the ministry, they are entitled to be regarded as licensees paying a consideration in money for the licence which they enjoyed.

I must deal, in the first instance, with what is really a preliminary point. G
The action is brought by the Minister of Health by that description. It is said that the action ought to have been brought on behalf of the Crown and that the Minister of Health has no title to maintain it. In order to explain the point it is necessary quite shortly to analyse the situation. The block of flats in question was requisitioned by the Office of Works, as it is generally called, a department which it is well known carries out for the civil departments of government all the machinery of requisitioning under the defence legislation. H
The actual possession and control of the block of flats was handed over to the Ministry of Health, which was the ministry taking charge of the welfare of these persons who had been evacuated from Gibraltar. Under the provisions of the Emergency Powers (Defence) Act, 1939, s. 1 (2) (*b*), regulations may authorise:

> . . . the taking of possession or control, on behalf of His Majesty, of any property or undertaking.

The regulation itself is the Defence (General) Regulations, reg. 51, which provides that a competent authority in the circumstances mentioned "may take possession of any land." That, of course, means may take possession of any land on behalf of His Majesty. There could be no controversy that possession taken of these premises was possession taken on behalf of His Majesty.

It is argued by counsel for the respondents that, in those circumstances, the possession of the Ministry of Health being possession on behalf of His Majesty, nobody but His Majesty is competent to institute proceedings such as have been instituted here, which are in form a claim for damages for trespass and an injunction to restrain the respondents from occupying their rooms. In my opinion, that argument cannot prevail by reason of the provisions of the Ministry of Health Act, 1919, s. 7 (1). Apart from those provisions, I do not suppose it would be disputed that the argument would be right, but under that subsection it is provided that:

> The Minister may sue and be sued by the name of the Minister of Health, and may for all purposes be described by that name.

Counsel for the respondents would have us construe the general language of that subsection as limited in effect to two classes of cases; the first is the case where the Minister could have been sued personally in respect of contracts or torts, under which he incurred a personal liability; the second class of proceedings are proceedings admittedly by the Minister in his capacity as a servant of the Crown but limited, according to counsel for the respondents, to proceedings under contracts or proceedings in respect of land acquired and held in trust for His Majesty under subsect. (3).

In my opinion, it is not possible to place such a limited construction on the words of subsect. (1). That subsection, in my opinion, enables the Minister, who in his capacity as a servant of the Crown has the necessary relationship to the subject-matter of the action, to do what otherwise he would not be able to do, namely, to enforce the rights of the Crown as though they were his own and as though he were not merely a servant of the Crown. Of course, the Minister, in order to be able to do that, must have the necessary relationship to the subject-matter of the action. If he has made a contract as Minister on behalf of the Crown, he can sue on that contract and the Crown is not the proper party or, at any rate, is not the necessary party. He may have a different relationship. He may, as Minister of the Crown, be in possession of chattels or land on behalf of the Crown, and, if a cause of action arises which strictly would be a cause of action in the Crown, he, the Minister, by virtue of his possession on behalf of the Crown, is entitled as Minister and by that name to sue in the action. It seems to me that any other construction would cut down in an unjustifiable way language which is quite general and which must be directed to the actions and the rights of the Minister as a servant of the Crown. Once it is realised that the subsection must apply to those actions and rights, I see no ground for limiting the scope of the subsection to any particular class of action or right.

In the present case, under the very language of the Emergency Powers (Defence) Act, 1939, the possession is to be taken by the Minister on behalf of the Crown and this therefore is a case where the Minister of Health, being in possession on behalf of the Crown, is entitled as Minister and by that name to enforce the rights of the Crown as the party in possession. That conclusion, in my opinion, is one which is supported by the reasoning of this court in *Minister of Supply* v. *British Thomson-Houston Co.* (1). I do not take up time in explaining the nature of that case, but I would refer in this connection particularly to the language of MacKinnon, L.J., at pp. 481, 482, and the language of Goddard, L.J., at pp. 488, 489. So much for the preliminary point.

With regard to the substantial point in the case, the question raised is one of some interest. As I have already said, the respondents were licensees for valuable consideration in respect of the premises which they occupied, and the licence extended to allow them to live in their flats, to have furniture of their own, which in fact they did, and to have their wives and families there, in addition to certain other amenities. It is, I think, important to remember the circumstances in which that licence came to be granted. This is not a case of a licence granted on commercial lines, nor is it a licence granted out of mere friendship or kindness. It was a licence granted by a department of state under a very high duty to persons who, through the exigencies of the war and no fault of their own, had by governmental action been removed from their homes and transported to this country. No decent-minded person could possibly suggest and, indeed, it is unthinkable that, in those circumstances, the Government should act otherwise than under a very strong sense of responsibility for the care and welfare of these individuals. The grant of this licence, or something like it, was one which was incumbent upon the Minister as the person entrusted with the duties of government in that behalf. I refer to that for this reason, because it appears to me that, where a licence is granted and a question arises as to the A lawful method of terminating it, the circumstances in which the licence came to be granted are matters most relevant to consider, particularly when one is faced with the question: How, and in what circumstances and in what conditions can the licence be terminated?

Where a licence is granted under a contract, it may very well be that the contract will make express provision for those matters. Where it does, those express provisions with regard to termination of the licence and so forth must be B observed. But what is to happen in a case where the contract is silent on those matters? I cannot take the view that there is some cast-iron principle of law which lays down for every type of contract, whatever the circumstances and whatever the purposes for which it was entered into, some rule which is always to operate. In my opinion, the true rule is that the implications of the contract on those matters are to be determined in view of all the relevant circumstances of the case. C I may cite here a very short passage from the judgment of the Privy Council in *Canadian Pacific Ry. Co.* v. *R.* (2). In that judgment, the following paragraph appears, at p. 432:

> Whether any and what restrictions exist on the power of a licensor to determine a revocable licence must, their Lordships think, depend upon the circumstances of each case.

That is the only proposition of general application which I find it possible to D extract from that authority, to which I shall return later; and although the case, of course, is not binding upon this court, in my opinion, if I may say so with great respect, the law is there laid down with complete accuracy.

That being the position, what is the licensee, in the particular circumstances of this case, entitled to expect? What treatment is he entitled to receive in the matter of the termination of his licence? It is, in my opinion, impossible to answer that question by referring to other cases and different circumstances. E I find no assistance in considering the position of a lodger or the position of the guest at an hotel or the spectator in a cinema. It seems to me that the answer to that question must be given in relation to the whole of the circumstances in which this licence came into existence.

It was argued by the Attorney-General that there was a rule applicable, as I think he at first put it, to all licences, that the only notice or the only time F which the licensee can demand is time sufficient to enable him to remove himself and his property from the premises comprised in the licence; and so, he said, the only time which the respondents could insist upon was sufficient time to enable them to remove themselves and their furniture from the premises. He said that a consideration, which the county court judge had said was a relevant consideration, namely, the time required to find alternative accommodation, was not a matter which ought to be taken into account in fixing the time the G licensee is entitled to have.

In my opinion, in the circumstances of this case, to say that the implied term of the licence was that the Minister of Health could at any moment turn any one of these individuals out of the flat provided, giving him only sufficient time to move his furniture and himself into the street, would be quite illegitimate. These people are not inhabitants of this country; their home was in Gibraltar. All their relationships in the matter of their way of life, their friendships and H their facilities to earn their livelihood were there. They find themselves removed to this country and provision made for them by the Government under a licence of this kind. They having been put—no doubt with the right, if they chose, to go away, but that really is academic, at any rate as to a good many of them—into these flats, it must surely be the case that the implied intention of the parties was that, if they were turned out by the ministry, they should be given such an opportunity as strangers in the land might require to enable them to find other accommodation. It seems to me that that consideration is a matter which ought to be taken into account in deciding what time is to be allowed to such licensees as those concerned in this case to comply with the notice determining the licence.

That being so, that deals with one of the points upon which the county court judge relied and, in my opinion, in that respect, he took the right view. But the matter does not end there. The Minister's letter intended to determine the licence is dated June 8, and I take the one addressed to Bellotti, which is in the following terms:

> I am directed by the Ministry of Health to give you notice that you are required to leave the Gibraltar evacuees centre at Marlborough Court and the scheme together with your dependants, taking all your possessions with you, by noon one week after delivery of this letter; otherwise you will be expelled.

It is, of course, beyond question that the ministry as a matter of law had the right to determine these licences, and in all the circumstances of the case no one would criticise them if, in order to enforce a reasonable system of administration and discipline, they found it necessary to do so.

That notice, in my opinion, operates as a clear determination of the licence at the expiration of one week. It conveys to the mind of the recipient as clearly as anything can convey it, notice that the licence is determined. It goes on, however, to indicate that the recipient of the letter, together with his possessions, is to be removed from the premises within one week. Now, so far as the letter gives that instruction it was, in my opinion, quite inoperative. The true view, in my judgment, quite apart from the question of notice of intention to revoke the licence (as to which I shall say a word later), is that, where a licence is revoked the licensee has, in spite of the revocation, whatever in the circumstances is a reasonable time to enable him to remove himself and his possessions from the scene of the licence.

I have already said that, in the circumstances of this case, such a reasonable time must extend to whatever is a reasonable time to find alternative accommodation; and, if the day after this notice expired proceedings had been taken by the Minister to eject these respondents, in my opinion, on the facts as found by the judge, those proceedings would have failed, because the respondents were entitled to a reasonable time and a week was not a reasonable time to enable them to find alternative accommodation. But the circumstance that the threat to remove them before the expiration of what would have been a reasonable time was inserted in the letter does not, in my opinion, prevent the letter from being a perfectly good notice to determine the licence. That being the position, the judge has in point of fact decided that the interval which elapsed between the expiration of the week mentioned in that document and the commencement of these proceedings was a sufficient time to enable alternative accommodation to be found. The judge, after referring to the judgment in *Canadian Pacific Ry. Co.* v. *R.* (2), to which I shall return in a moment, said:

> I agree that the length of time between the expiry of Mr. Bein's notice on June 15 and the issue of the summons on Sept. 11 was a reasonable interval to allow the defendants to remove their goods and to make alternative arrangements.

In view of that finding of fact, if bound by the proposition of law which appears to me to be indeed the right one, the respondents could not complain at the time these proceedings were instituted that they had not been allowed sufficient time in the circumstances to remove themselves and their possessions and find alternative accommodation.

I may at this point refer to the well-known case of *Cornish* v. *Stubbs* (3). I quote a passage from the judgment of WILLES, J., at pp. 339, 340. That was a case where there was a licence to stack timber upon a wharf, and WILLES, J., says this:

> No question arises in this case whether or not the landlord could have determined such a licence before the termination of the tenancy, for he certainly did not do so; and the only question is, whether the tenant has a right to a reasonable time after the revocation of the licence to take away his goods; and I am clear that he has. The rule of law is, that a simple licence, in order to be binding on the licensor, must be under seal; but if it is not, the licensee is not a trespasser until the licensor revokes the licence. Under a parol licence the licensee has a right to a reasonable time to go off the land after it has been withdrawn before he can be forcibly thrust off it; and he could bring an action if he were thrust off before such a reasonable time had elapsed. . . . Applying that view to the present case, I think that the Barons would clearly

have thought [he is referring to *Wood* v. *Leadbitter* (4)] that the licence to put the goods upon the defendant's land involved a right to take away his goods, and to have a reasonable time for doing so.

I do not read those observations as in any way contrary to what I said at the beginning of this judgment as my own opinion, that the right of the licensee in respect of the manner and method of the revocation of his licence and the time to be allowed him to comply with it is, in the absence of express provision, to be ascertained by a consideration of all the circumstances of the case. What Willes, J., is there referring to is, of course, the perfectly ordinary common A and simple case of a mere licence to deposit goods on somebody else's premises, and in such a case there is no need to consider other matters except those to which he refers.

If the matter had stood there, the result would be, in my opinion, that the Minister was entitled to judgment in the action; but it is said on behalf of the respondents that the law is correctly laid down, as a matter of general application, B in the judgment in *Canadian Pacific Ry. Co.* v. *R.* (2), to which I have referred. I have already quoted the passage which, in my opinion, is the only passage of general application to be found in the judgment; but, on the particular facts of that case the Privy Council held that, in order effectually to determine the licence, the Crown, which was the licensor, must determine it by notice specifying a date in the future which would give to the appellants there, the railway company, sufficient time to remove their property from the Crown's C land. The Crown, it was said, would have to fix that time rightly, correctly and with sufficient accuracy at its own risk, and, if the time it limited was too short, then the notice would be a bad notice. From that case is extracted the proposition that a licence can only be revoked by a notice which specifies a time which will be sufficient time to enable the licensee to do all those things which, on the termination of the licence, he is entitled to do, in the matter of removing himself, his property and any other matters which are relevant. D

I do not read this case as purporting to lay down any such general rule. It was a very peculiar case. The Crown was asserting that the railway company was a trespasser in respect of the telegraph poles which it put on the land of the Crown, and the action was based on that view. The licence was set up by the railway company and it was found that, in the circumstances, the licence should be implied. The question then arose as to the circumstances in which the E licence would be revocable. There was a question whether on the facts of that case the licence which was found to exist had been revoked by the institution of the proceedings. That question was not decided by the Board, but the Board treated the matter as though the institution of the proceedings had not revoked the licence, and set itself to consider what form of notice would be necessary to revoke the licence in the future; and the form of notice which it was thought would be appropriate to that case was that which I have mentioned, F and it is introduced by these words:

> It appears to their Lordships that this is a case in which the licence can only be effectively ended . . .

Then it goes on to describe the method of ending it which I have mentioned. It is quite clear to my mind that the judgment was directed, and directed only, to the special facts of that case, and is not of general application in laying down G a rule that in every case of licence the notice to revoke must specify a time at the licensor's risk.

It seems to me that, in the present case, there is nothing which really makes that part of the judgment applicable at all. In my judgment, the notice in the present case was a perfectly good notice, so far as determination of the licence was concerned. The time specified in it for the licensee to move out was quite inadequate, but that is immaterial in view of the circumstance that the licensee H was in fact given sufficient time to move out, as the judge has found. The reason why the judge decided against the Minister in this case was that he found in *Canadian Pacific Ry. Co.* v. *R.* (2), authority for the proposition that the notice was a bad notice because it did not specify a time within which they were to get out, which was in fact a reasonable time in all the circumstances; in other words, taking the dates as he found them, if a notice had been served terminating the licence not on June 15, but on the day when these proceedings were instituted, that would have been a good notice because on the face of it it would have specified what the judge found was in fact a reasonable time. In my opinion, there was no necessity to specify a reasonable time in the notice, and the notice was a good one for the reasons I have given.

In my opinion, therefore, the appeal must be allowed, but I cannot leave this case without saying one word about the circumstances which led up to the litigation, because they may have a bearing upon other matters which we shall have to discuss when the judgments have been delivered. The courts of this country are open, and where persons are to be ejected from premises which they have lawfully occupied, the general expectation and hope would be that recourse would be had to the courts rather than to the high-handed method of ejectment by force. These considerations are perhaps particularly applicable to a government department which one would expect to act with some feelings of dignity. However, in this particular case, the ministry concerned, having got into controversy with these respondents, as to the rights or wrongs of which it is not necessary to go into—like most controversies, I imagine there was a good deal to be said on both sides—and having found itself unable to secure obedience to its regulations, instead of proceeding to eject these persons by obtaining an order of the court, proceeded with the assistance of four porters to endeavour to drag them from their flats. That particular offensive having failed, largely through the intervention of the ladies who apparently, if they did not mob the persons who were engaged in this operation, at any rate assumed a threatening attitude, the next step appears to have been to withdraw the meal tickets and in effect to endeavour to secure evacuation of the premises by starving these people out. I do not think that that particular incident is one to which those responsible for it will look back with any sense of self-congratulation. As I have said, the courts are open, and it is to be hoped that that type of action will not be regarded as a precedent. I say no more. I have only referred to those matters, not because they have any bearing on the substantial matter which we have to decide—I am not fond of departing from the strict purpose for which we sit in order to administer rebukes—but I mention it for the reason that it is a matter which is extremely relevant, or may be extremely relevant, on the question of costs and in order that it may be in mind if any controversy arises at the conclusion of these judgments on the question of costs.

MACKINNON, L.J.: I agree. I think the rule of law is that the licensor can revoke his licence at any time, but the licensee has thereafter a reasonable time, having regard to all the circumstances, to comply with the revocation. I do not think it is part of the rule that the licensor must in his notice of revocation specify the amount of time to which the licensee is to be entitled.

GODDARD, L.J.: I agree. On the point with regard to whether the action can be brought by the Minister I have nothing to add to what has been said by LORD GREENE, M.R.; and I think the case is really concluded by the decision of this court in *Minister of Supply* v. *British Thomson-Houston Co.* (1).

On the other point, it seems to me the position is this: If a licensor determines the licence, he is bound to give a reasonable time within which the determination is to take effect, so that the licensee can collect himself, his property or whatever it may be, from the premises in respect of which the licence has been withdrawn. He is bound to give a reasonable time and, if he does not and takes proceedings before the reasonable time has elapsed, he loses his action. But although he may not give a reasonable time, it seems to me that that does not put an end to the withdrawal of the licence. The licence has been withdrawn and the withdrawal becomes effective when a reasonable time has expired. The fact that he may have limited a time which, as in this case, was unreasonable, and in this case wholly unreasonable, does not justify the licensee in sitting down and doing nothing. He should have begun to make arrangements, or attempted to make arrangements to remove himself, and by the time the proceedings had started on Sept. 22, he had had ample time.

With regard to the contention of the Attorney-General that we ought to lay down that in a case such as this, that is to say, where the licence relates to a furnished room or rooms, that as a matter of law a week must be a reasonable time, I think it would be quite wrong or quite impossible to lay down any such rule.

I need not go over this part of the case at any length because it has been explored by Lord Greene, M.R., and I think it is clear that the judge was justified in holding that the week given was not a reasonable time.

Appeals allowed. Injunction granted to restrain the defendants from trespassing on the premises. Injunction to be stayed for 2 months. Costs agreed.

Solicitors: *The Solicitor, Ministry of Health* (for the appellant); *H. Newcome Wright* (for the respondents).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

Dictum of Lord Greene, M.R., at p. 246, *applied.* Old Gate Estates, Ltd. *v.* Alexander. [1949] 2 All E.R. 822.

Applied. Middleton *v.* Baldock. [1950] 1 All E.R. 708.

BROWN *v.* DRAPER.

[Court of Appeal (Lord Greene, M.R., MacKinnon and du Parcq, L.JJ.), **January 13, 28, 1944.**]

Landlord and Tenant—Rent restriction—Letting to husband—Separation of husband and wife—Wife remaining in house—Furniture belonging to husband remaining on the premises—Right of landlord to recover possession—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (*c.* 32)—*Rent and Mortgage Interest Restrictions Act,* 1939 (*c.* 71).

The appellant was the wife of J.D. who, in Oct., 1941, became the tenant of an unfurnished dwellinghouse belonging to the respondent, the rent being 12*s.* a week inclusive of rates. The house was subject to the Rent Restriction Acts, 1939. Until Apr., 1942, J.D. and the appellant lived in the house as their matrimonial home. The furniture belonged to J.D. In that month J.D. left the house because of matrimonial differences. The appellant continued to live in the house with the consent of J.D. who had left his furniture in the house and who continued to pay the rent. In Mar., 1943, the respondent served upon J.D. a notice to quit which expired on Apr. 5, 1943, and from that date J.D. paid no rent. He did not revoke his permission to the appellant to continue living in the house and he did not remove any of his furniture. The respondent took proceedings against the appellant to obtain possession. At the hearing J.D. gave evidence and admitted receiving the notice to quit and said that he made no further claim upon the house:—

Held: (i) J.D. was in possession of the house because no order for possession had been made against him and he could not contract out of the rights which the Acts gave him.

(ii) unless and until the tenant yields up possession or has an order for possession made against him, the protection of the Acts extends to protect a licensee of the tenant, not because the licensee can claim the protection of the Acts personally, but because the possession of the licensee must be taken to be the possession of the tenant.

(iii) in the case of a tenancy protected by the Rent Restriction Acts, the court has no jurisdiction to make an order for possession against a licensee unless the tenant is a party and an order is made against him as well.

[**EDITORIAL NOTE.** In the present case the tenant, no doubt unwittingly, had retained possession of the premises by allowing his licensee to occupy them. He was, therefore, a statutory tenant, although he had not been in occupation from some time before the notice to quit was served. It is held that, in these circumstances, no order for possession can be made unless the tenant is a party to the proceedings.

As to Statutory Tenants, see HALSBURY, Hailsham Edn., Vol. 20, p. 334, para. 400; and for Cases, see DIGEST, Vol. 31, pp. 575-578, Nos. 7226-7269.]

Cases referred to:

(1) *Savage* v. *Dent* (1736), 2 Stra. 1064; 31 Digest 546, *6918*.

*(2) *Barton* v. *Fincham*, [1921] 2 K.B. 291; 31 Digest 579, *7280*; 90 L.J.K.B. 451; 124 L.T. 495.

Appeal by the defendant from an order of His Honour Judge Willes, Burton-on-Trent County Court, dated Sept. 15, 1943. The facts are fully set out in the judgment of the court.

C. E. Loseby and *T. Simpson Pedler* for the appellant.

Robert Fortune for the respondent.

Lord Greene, M.R. [delivering the judgment of the court]: This appeal raises a novel and interesting point under the Rent Restriction Acts. The appellant is the wife of Joseph Draper, who, in the month of Oct., 1941, became tenant of a dwellinghouse belonging to the respondent. The tenancy was a weekly one, and the rent was 12*s.* a week inclusive of rates. Joseph Draper had been the owner of the house. He sold it to the respondent in 1941, but remained in occupation as tenant under the tenancy. The house accordingly became subject to the Acts by virtue of the Act of 1939.

Down to the month of Apr., 1942, Joseph Draper and the appellant lived in the house as their matrimonial home. The furniture in the house was his. In that month Joseph Draper left the house and took up his residence elsewhere owing to matrimonial differences which had arisen between the spouses; and cross petitions for divorce are pending. When Joseph Draper left the house, the appellant and the child of the marriage continued to live there with his consent. He left his furniture in the house and allowed the appellant to have the use of it. He continued to pay the rent.

In Mar., 1943, the respondent served upon Joseph Draper a notice to quit, which expired on Apr. 5, 1943. As from the expiration of the notice, Joseph Draper has paid no rent. He has not, however, taken any steps to revoke the permission which he gave to his wife to continue living there. Nor has he removed any of his furniture. He said in evidence that "if she [the appellant] takes care of it, she can continue to have the furniture." He also said: "Apr. 5 I got notice to quit. I finished with the house . . . I have no further claim to the house."

It is convenient to pause here and consider the position of Joseph Draper himself under the Acts, in the light of the facts as above stated. If he had given up possession of the house to the respondent on the expiration of the notice, or subsequently, he would have placed himself outside the protection of the Acts, since that protection is based upon the statutory restriction on the power of the court to make an order for recovery of possession. If the tenant voluntarily gives up possession, no occasion for the operation of the statutory restriction arises. The landlord takes possession without the necessity of obtaining an order of the court; and there is nothing in the Acts which prevents him from doing so. But Joseph Draper did not give up possession. He not only left the appellant in occupation without taking any steps to revoke the licence which he had given her to continue living there, but he left his furniture in the house in her charge. It is obvious that, if she were to vacate the house leaving the furniture behind, he would claim the right to enter the house for the purpose of taking it away. The permission given to the appellant to have the furniture was only to last so long as she took care of it. In these circumstances, Joseph Draper is, in our opinion, still in possession of the house (see *Savage* v. *Dent* (1), cited in COLE ON EJECTMENT, at pp. 110-111). Apart from his statement in the witness-box that he had no further claim upon it, he would be entitled to the protection of the Acts. In order to obtain possession from him, the respondent would have to bring an action for recovery of possession against him; and an order could only be made if the statutory requirements were satisfied.

However, it is said, and the county court judge appears so to have held, that, in view of the statements above referred to made by Joseph Draper in the witness-box, his right to claim the protection of the Acts has gone. We do not take this view. There are, we think, only two ways by which a tenant whose contractual tenancy has come to an end can lose the protection of the Acts. One is, as we have stated, by giving up possession. The other is by an order against the tenant for recovery of possession. We do not see upon what ground it can be said that a tenant who remains in possession can, by a mere statement of his intentions and wishes in the witness-box in an action to which he is not a party, confer upon the court a jurisdiction of which the statute deprives it. Unless and until Joseph Draper gives up possession, the respondent can only obtain possession as against him by obtaining an order; and the power of the court to make such an order is limited by statute. A tenant remaining in possession cannot lawfully contract not to avail himself of the protection which the Acts give him if and when the landlord takes proceedings against him to recover possession. If he wishes to place himself outside the protection of the Acts without putting the landlord to the necessity of taking proceedings, his proper course is to deliver up possession. Unless and until he does so, he is under the shelter of the Acts, whether or not he so desires. No contract, and, *a fortiori*, no mere statement of his wishes or intentions, can deprive him of the statutory protection. Were the landlord now to take proceedings against Joseph Draper to recover possession, Joseph Draper could, in our opinion, say that he had changed his mind and that he now wished to avail himself of the protection of the Acts. If he offered to pay all arrears of rent, the court might or might not come to the conclusion that it was not reasonable to make an order—what the result of the proceedings might be is immaterial. The possibility of a tenant changing his mind where he himself has brought the contractual A tenancy to an end by notice and being entitled, nevertheless, to claim protection, is envisaged by Sched. I, para. (*c*), to the Act of 1933.

We may summarise the position of Joseph Draper as we see it as follows: (i) he was at the date of the trial, and presumably still is, in possession of the house; (ii) the only ways in which he can be deprived of the protection of the Acts are (*a*) by giving up possession, in which case no order for recovery of possession against him is required; or (*b*) by having an order for recovery of B possession made against him; (iii) he cannot contract to give up his right to claim protection: *a fortiori*, his mere statement in the witness-box that he had no further claim to the house could not operate to deprive him of that right.

These propositions appear to us to be established by the language of the Acts itself. If authority is needed for them, it is, we think, to be found in the decision of this court in *Barton* v. *Fincham* (2); and we would refer particularly C to the judgment of Scrutton, L.J., in that case. The only passages which we find it necessary to quote are these, at p. 297:

> He can leave of his own free will, surrendering his tenancy . . . But if he is in possession and unwilling to give it up, possession can only be obtained by order of a court . . .

At p. 298:

> If the tenant is willing to out, I do not see why any order is wanted; let him go; D but as at present advised I do not see any reason why the judge on being satisfied that a tenant is *then* ready to go out (*not that he was once willing but has changed his mind*) should not make an order for possession.

The words which we have italicised are pertinent to the opinion which we have expressed as to the right of Joseph Draper to change his mind.

The present proceedings are brought not against Joseph Draper but against his wife who, it is said (and the county court judge so held) is a mere trespasser. E An order against her, assuming that it ought to be made, could not be effective against him. It would not entitle the respondent to remove Joseph Draper's furniture. It would not deprive Joseph Draper of the right to claim the protection of the Acts. At common law the appellant would, it is true, have no defence to the action. Moreover, she cannot in her own right claim the protection of the Acts since she is not the tenant but a mere licensee. It is not F suggested that she is a sub-tenant under her husband. It is said, however, that in view of the Rent Restriction Acts, the respondent cannot obtain an order for recovery of possession against the appellant without joining Joseph Draper as a defendant and obtaining an order against him also. This argument raises an important question, the answer to which will affect many cases of common occurrence. We will take one example. The tenant of a house held for a fixed term goes abroad on military service, leaving his wife in the house. G While he is abroad, the lease comes to an end. At common law the wife thereupon becomes a trespasser and the landlord can take proceedings to recover possession from her. Do the Rent Restriction Acts prevent the landlord from taking this course? In our opinion, they do. If the contrary were true, the consequences would be lamentable. In such a case the possession of the wife must, we think, be regarded as the possession of the husband and cannot be treated as unlawful so long as the husband has the right to claim the protection H of the Acts. As we have already pointed out, the only ways in which the husband can lose the protection of the Acts are by giving up possession, which in the case assumed he can only do by removing his wife (or, perhaps, by revoking his permission to her to live there) and removing any furniture, etc., which belongs to him; or by having an order for possession made against him. The right conferred upon the husband to claim the benefit of the Acts entitles him, if at the expiration of the tenancy he remains in possession (and possession by his licensee or by leaving, for example, his furniture in the house is sufficient for that purpose), to remain in possession of the house unless and until an order is made against him; and the landlord is no more entitled to treat his licensee as a trespasser than he is entitled to treat the tenant himself as a trespasser. The protection of the Acts, in our opinion, extends to protect a licensee of the tenant, not because the licensee can claim the protection of the Acts in his or her own right, but because the tenant is a necessary party to the proceedings, and no order can be made against his licensee in his absence.

If the view which we have expressed is wrong, a curious situation would arise. In order to test it, let us assume that all the contents of the house belong to the wife. The landlord brings an action against her alone and obtains an order pursuant to which he evicts the wife and removes her furniture. He thus obtains possession and proceeds to live in the house himself. The husband then returns and claims the house. How could he obtain any benefit from the Acts? The landlord does not need to obtain an order for recovery of possession, for he is already in possession; and it is only by the fetter put upon the power of the court to make such an order that the tenant is given any right to protection. If, on the other hand, the tenant in such a case is entitled to say that his rights under the Acts have not been affected by the order against his wife, it can only be, as it seems to us, on the ground that the order was made without jurisdiction and that he must, accordingly, be treated, for the purposes of the Acts, as still being in possession and thus entitled to claim protection. In our opinion, the latter view is correct; and, if we are right, it follows that the court has no jurisdiction to make an order against the wife unless the husband is a party and an order is made against him as well.

If the views above expressed are correct, they cover the present case; and the proceedings are defective for want of parties. The action, therefore, ought to have been dismissed.

It may well be that, in the circumstances of this case, the appellant will not secure any lasting benefit from this decision; since, if the landlord brings a fresh action, making Joseph Draper a party, it may be that Joseph Draper will submit to an order. On the other hand, he may change his intention, since he is prepared, as he said in the witness-box, to pay the rent of a house for his wife; and he may very well take the view that he would prefer that she should continue to live in this house rather than be put to the trouble and expense of finding another, the rent of which might be higher than that at present payable. These considerations are not, however, relevant to the present appeal, which must be allowed with costs here and below.

Appeal allowed with costs.

Solicitors: *Gibson & Weldon*, agents for *C. Leslie Hale*, Coalville (for the appellant); *A. H. & H. W. Timms*, Swadlincote (for the respondent).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

IN THE MATTER OF THE LOCAL GOVERNMENT ACT, 1933, AND IN THE MATTER OF THE DECISION OF C. R. H. HURLE-HOBBS, DISTRICT AUDITOR. APPEAL OF F. W. SURRIDGE UNDER THE LOCAL GOVERNMENT ACT, 1933, s. 229, AND IN THE MATTER OF AN APPLICATION BY SIR ERNEST A. MILLS AND OTHERS FOR A DECLARATION AND RELIEF IN RESPECT OF THE SAID SURCHARGES.

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J., Atkinson and Tucker, JJ.), **January 11, 1944.**]

Local Government—Audit—Surcharge on councillors—Contract to dispose of refuse—Decision to increase remuneration of contractor—Local Government Act, 1933 (*c.* 51), *s.* 228 (1).

In 1940, F.W.S. was, by reason of a contract which had two years to run, under an obligation to the Lambeth Borough Council to collect and dispose of refuse in the borough for a fixed sum per annum. In Feb., 1940, he applied to the council for additional remuneration on the ground of increased costs due to the war. On the recommendation of a committee specifically appointed to investigate the matter, the council agreed to make an additional payment to the contractor for the two remaining years of the contract. The district auditor disallowed these items as being contrary to law within the meaning of the Local Government Act, 1933, s. 228 (1) (*a*) and surcharged them on the councillors responsible for the decision. The auditor contended that the council had failed to investigate the contractor's claim with proper care in that (*a*) they did not sufficiently investigate the financial circumstances of the contractor and that he had not established a case of hardship; (*b*) that they failed to enlist the services of the borough treasurer in arriving at their decision; (*c*) that they failed to consult other borough councils with whom the contractor had contracts; and (*d*) that they failed to note that the quantity of refuse to be disposed of was declining and that this was likely to continue owing to war circumstances:—

Held: (i) the surcharge should not have been made, since the council were justified in their decision that, unless additional remuneration was given, the contractor might be unable to fulfil the contract or that the service might deteriorate.

(ii) the council should have consulted other borough councils but, since they were acting *bona fide*, their failure to do so did not make the payments unlawful within the meaning of s. 228 (1) (*a*).

(iii) there was no necessity to consult the borough treasurer who was aware of the proceedings.

(iv) the council had no grounds for believing that the decline in volume of the refuse was anything more than a seasonal diminution.

[**EDITORIAL NOTE.** The increase of prices and wages due to the war has created many difficulties and few greater than that here considered. The auditor has to be assured that any sum paid beyond the contract price is properly incurred, and the discussion of the position in the judgments herein is of importance both to auditors and local authorities generally. It will be noticed that the local authority, although they had a binding contract, were not bound to hold the contractor to that contract, since they were justified in thinking that, if they did so, the contractor would be forced to break it with the result that the ratepayers would be put to greater expense than the suggested increases of payments.

As to Powers and Duties of Auditor, see HALSBURY, Hailsham Edn., Vol. 21, pp. 223, 224, para. 415; and for Cases, see DIGEST, Vol. 33, pp. 19-21, Nos. 76-86.]

Cases referred to:

*(1) *Roberts* v. *Hopwood*, [1925] A.C. 578; 33 Digest 20, *83*; 94 L.J.K.B. 542; 133 L.T. 289; rev'g. S.C. *sub nom. R.* v. *Roberts, Ex p. Scurr*, [1924] 2 K.B. 695.

(2) *Kruse* v. *Johnson*, [1898] 2 Q.B. 91; 13 Digest 326, *631*; 67 L.J.Q.B. 782; 78 L.T. 647.

Appeal, under the Local Government Act, 1933, s. 229, by members of the Lambeth Borough Council, from a decision of the district auditor disallowing under sect. 228 of the Act certain items in the accounts of the council. The facts are fully set out in the judgment of Viscount Caldecote, L.C.J.

W. Craig Henderson, K.C., and *J. A. S. Collins* for the appellant, the contractor.

M. P. Fitzgerald, K.C., and *Erskine Simes* for the members of the council.

Sydney G. Turner, K.C., and *H. G. Robertson* for the district auditor.

Viscount Caldecote, L.C.J.: The Local Government Act, 1933, s. 219, provides that the accounts of every metropolitan borough council shall be subject to audit by a district auditor. Sect. 223 requires that all accounts which are thus subject to audit shall be made up yearly to Mar. 31, and shall be audited as soon as may be thereafter. Sect. 228 imposes on the district auditor the duty at every audit held by him to disallow every item of account which is contrary to law and to surcharge the amount of any expenditure disallowed upon the person responsible for incurring or authorising the expenditure. The respondent held two audits, one being the ordinary audit for the year ending Mar. 31, 1941, and the other, an extraordinary audit as directed by the Minister of Health for part of the period up to Mar. 31, 1942. In each of the accounts thus subjected to audit there was an item of payment of £7,000 made to Frederick Walter Surridge, who had contracted with the Lambeth Borough Council for the collection and disposal of house and street refuse. An agreement between

Surridge, whom I will call the contractor, and the borough council was made on May 19, 1932, to commence on Apr. 1, 1932, and to terminate on Mar. 31, 1937, subject to the council's option to extend the term for periods of three or five years respectively from Mar. 31, 1937. The council exercised this option and on July 7, 1936, renewed the agreement for a further period of five years ending Mar. 31, 1942. The agreement was made under the powers given to the council by the Public Health (London) Act, 1936. That Act imposed upon the council the duty of collecting and removing street and house refuse, and by sect. 90 it became the duty of the council to employ a sufficient number of scavengers, or to contract with scavengers for the performance of these duties. The agreement prescribed the duties of the contractor in great detail. It was not disputed that a very high standard of efficiency had been maintained by the contractor in complying with the conditions of his contract. The practice was after collecting the refuse from house to house and street to street to put it upon barges at a Thames wharf. The barges were taken to a disposal site in Essex where the refuse was dumped and packed in accordance with the most up-to-date methods. In addition to his agreement with the Lambeth Borough Council the contractor had a number of similar agreements with other borough councils and local authorities, totalling together with the Lambeth agreement, £248,303 a year. In the agreement with the Lambeth Borough Council the contractor agreed to pay his carmen and dustmen a wage equal to that prescribed by the London District Council of the Joint Industrial Council for Local Authorities' Non-Trading Services (Manual Workers).

Soon after the outbreak of the European war, in Sept., 1939, prices and wages began to rise and the contractor approached the council with a request for a payment to be made to him to meet the heavy increase in wages and the cost of replacement of plant, equipment, etc. This application was made by letter of Dec. 13, 1939, addressed to the borough engineer, who had by letter, dated Dec. 1, called upon the contractor to pay the rates of wages to his carmen and dustmen as fixed by the London District Council. In reply to this request the contractor asked to be reimbursed the extra cost involved in view of the fact that the increases had been authorised by the appropriate Joint Industrial Council and were entirely due to the war. The borough engineer replied on Jan. 5, declining, on the strength of an opinion by the town clerk that the increase of wages of employees had no relationship whatever to war conditions, to reimburse the contractor the extra cost of wages and as to other matters informing the contractor that it would be necessary for him to produce evidence of the increase in the cost of barging and disposal of the refuse, petrol, oil, fodder, etc., and to make a specific suggestion as to the appropriate increase in the contract price. On Feb. 12, 1940, the contractor said that, although the increase of wages might have been under consideration prior to the war, the amount of the present increase could only be attributable to war conditions. He then gave instances of percentage increases under the heads mentioned by the borough engineer in his letter of Jan. 5. The contractor mentioned other heavy increases in the cost of a number of articles and concluded his letter in the following terms:

> I am always willing and most anxious to give the best possible service to your council but I am now faced with the above increases and in the circumstances it would appear to me that the most satsifactory method of dealing with this matter would be for your council to agree to an increased percentage upon the present contract price. Should this principle, which I submit is equitable, appeal to the council, I will be prepared to agree a percentage or failing an agreement, would consent to the matter going to arbitration.

As a result of this letter Councillors Deady and Lofthouse, chairman and vice-chairman respectively of the Public Services Committee, together with the borough engineer and the town clerk were appointed by the council on Mar. 5, 1940, to meet the contractor and confer with him on the general question. A meeting took place on Mar. 19, 1940, when the mayor was also present. There is some question as to what was said at this meeting. The contractor states in an affidavit that he explained his position very fully and as well as he could and that to the best of his belief and recollection he made it quite clear to the council's representatives that unless something was done to assist him he would undoubtedly find himself unable to continue giving them the service which he had always provided up to that time. The respondent, however, described the statements made by the contractor in his affidavit as "vague and ambiguous" and said that according to the evidence and information placed before him at the audits :

> . . . the contractor did not disclose to those present at the interview on Mar. 19, 1940, or at any time his actual financial position, neither did the council or any of its committee or representatives know that the rises that had taken place must be affecting him very considerably.

It is certain, in my opinion, that the contractor at the meeting with the council's representatives did not and was not asked to disclose in detail his financial position, but in view of the terms, cautious though they were, of his letter of Feb. 12, I have no doubt the contractor made some reference to the possibility of his being unable to continue to give as good service to the council in the future as in the past unless they were prepared to make him some payment in addition to the contract price. The contractor asked at the meeting for an increase of 12½ per cent. on the total contract price. The town clerk, however, advised the council that the contractor had expressly bound himself to pay wages according to the Joint Industrial scale, and that any increase in respect of wages not due to the war should, therefore, be eliminated, and that the increase referred to by the contractor had arisen out of a pre-war submission. In the light of this advice the council's representatives directed the borough engineer to go into the basis and amount of the contractor's application and to report to them. The borough engineer in due course made a report and as the result of further discussion with the contractor a round sum of £7,000 "representing 12½ per cent. on the estimated proportion of the contract price attributable to barging and disposal and the balance as the increase on that part of the contract price attributable to maintenance and haulage" was fixed. This description of the £7,000 agreed to be paid is taken from the affidavit of Councillor Deady. He adds that he and his colleagues had well in mind and discussed the fact that any proposed increase would ultimately have to satisfy the district auditor as being reasonable. The contractor agreed that he would make no further claim during the continuance of the contract and gave an assurance that he would be able to and would maintain the existing service unimpaired. Accordingly the council's representatives reported to the Public Services Committee of the council who in turn made a report which was considered at a meeting of the council held on Apr. 25, 1940. The Public Services Committee recommended :

> . . . that Mr. F. W. Surridge be granted an increase of £7,000 per annum on his present contract price for the collection and disposal of house and street refuse as from Apr. 1, 1940, and that the common seal of the council be affixed to the necessary memorandum to the existing agreement with the contractor.

The proposal had been considered by the Finance and General Purposes Committee on Apr. 16, when the borough treasurer was present. The recommendation of the Public Services Committee was approved by the council on Apr. 25, and on May 22 a memorandum was indorsed upon the agreement to the effect that the charges paid by the council to the contractor should be increased by the sum of £7,000 per annum. These payments were made and they are the items of account which have been disallowed by the respondent.

The respondent has stated his reasons for his decision in a document dated Feb. 22, 1943, as well as in two affidavits sworn by him in these proceedings on June 10, 1943. In the statement of his reasons, after setting out the history of the negotiations, the respondent expressed his opinion that there was no consideration for the increases in question and no service to the ratepayers which they were not entitled to receive and enforce under the principal agreement. There was no question of impossibility of performance or physical prevention. The war had only been in progress a few months and the contractor had not given any proof of hardship. At most the council might have made nominal grants subject to adjustment in the light of facts as they turned out, whereas the council without any evidence accepted the contractor's statements and committed the ratepayers of Lambeth to an expenditure of nearly 2*d.* in the pound. What was more grave still, according to the respondent, was that records of the council were not consulted which would have shown a decrease in tonnage for the first seven months of the war, and a corresponding reduction in the cost to the contractor of carrying out his contract. As to the steps taken by the council to ascertain the relevant facts no inquiries were made of other metropolitan borough councils with whom the contractor had contracts; neither was it thought proper to call for the services of the borough treasurer. In fact the council never inquired into the contractor's financial position and did not consider it necessary. Having reached these conclusions the respondent then examined the question as to whether the action of the council seemingly improvident at the time it was taken was in fact justified by the subsequent trend of events.

In considering these reasons for disallowance, it is all important to remember the test which has to be applied to the expenditure in question. Unless it is "contrary to law," it is not to be disallowed. It is not difficult to imagine cases where a particular item of expenditure would be contrary to law. For example, subsidies in cash or in kind or even in services paid or given to members of the council would plainly come under this description apart from express authorisation by law. What are called social services, such as free meals or subsidised lodgings for ratepayers, in so far as there is no express legal sanction, would come under the same head. Such cases present no difficulty. A different class of expenditure which was held to be contrary to law was considered by the House of Lords in *Roberts* v. *Hopwood* (1). The district auditor in that case had to deal with expenditure on the wages of the workpeople of a metropolitan borough in excess of a reasonable figure. The council of the borough in that case were empowered to allow to their servants such salaries and wages as the council might think fit. LORD BUCKMASTER dealt with the matter on the footing that the council had a discretion, with the exercise of which the court would be reluctant to interfere, to pay reasonable and not arbitrary wages. He thought that the council had not really exercised the discretion imposed on them. The auditor's disallowance of everything above a particular standard was upheld on this ground. This meant, to use LORD BUCKMASTER's phrase, that the object was lawful but the amount so excessive as to be unlawful to the extent of the excess. LORD SUMNER said, at p. 604:

> He [that is the auditor] has to restrain expenditure within proper limits. His mission is to inquire if there is any excess over what is reasonable. I do not find any words limiting his functions merely to the case of bad faith, or obliging him to leave the ratepayers unprotected from the effects on their pockets of honest stupidity or unpractical idealism.

Everything in *Roberts* v. *Hopwood* (1) turned upon the amount, the limit of expenditure being, as the House of Lords thought, that which upon a proper exercise of discretion was reasonable. Here there is no question of amount. It is all or nothing. The payments as a whole are said to be contrary to law. It was conceded both by the respondent in his reasons and by his counsel in argument that no objection could be taken to an addition to a contract price merely because the contractor was already bound by his contract and must deliver his pound of flesh. Indeed the respondent claimed that in numerous instances in which payments had been made by the London local authorities to contractors which were additional to those to which they were entitled under their respective contracts he had not found it incumbent upon him to take exception to what had been done in any single instance, save in the present case. Yet the respondent in his reasons asked himself this question: Did the council by committing the ratepayers to an additional payment of £7,000 for each of two years secure any services to the ratepayers which they were not entitled to receive and enforce under the principal agreement? I think this is too narrow a ground upon which to put the case for disallowance, and that the admission by counsel for the respondent that what he called a hardship payment might be proper in circumstances of war was rightly made. I have stated at some length the reasons which the respondent gave for his disallowance but they come down to one broad point, apart from the question with which I have already dealt as to whether the ratepayers received any services to which they were not entitled under the principal agreement. The respondent is of opinion that the council never really investigated the contractor's financial position with proper care, and the contractor never provided any real evidence of hardship or of his unstable financial position. It seems to me plain that more could have been done to investigate the contractor's position. I attach very little importance to the fact that the borough treasurer was not brought into the matter. He was aware of what was going on and I see no reason to think that the borough engineer, within whose province the contract arose, was not capable of considering the council's duty and the ratepayers' interest, especially as the town clerk was there to advise the council. It was submitted by counsel for the respondent that the council's performance of their duties was perfunctory and even wanton in the lack of care or zeal which they showed. I do not accept this view. The council seem to me to have considered the matter as one of real importance meriting careful inquiry, and though it did not seem necessary to them to examine the contractor's affairs in detail either in the light of or apart from his contracts with other public bodies, I am far from accepting the view presented by the respondent of the way they carried out their inquiry. The fact that they refused to reimburse the cost of the wage increase for which the contractor in the first place asked shows that they were not at all inclined to treat the contractor leniently. Their action was, I think, careful in this respect and proper. When it is said that there was no ground for thinking there would be a serious deterioration in the contractor's services, and indeed that, if proper inquiry had been made, the council would have been satisfied that there was no risk of this sort, I think the appellant's comment that it was a matter upon which the council was not in a position to run risks of the service breaking down is an answer. Litigation would have been an unsatisfactory sequel, even though in the end the council was likely to succeed. The whole matter for the council was really whether they should exercise the discretion, which I think they had, to make a payment. They had to make up their minds in the light of the facts as they presented themselves to the council and their officers at that time. I do not at all say that, if the council had, without any inquiry or real consideration at all, decided to make a payment in response to the contractor's request, they would have been acting legally. In such a case I do not think it could be said that they had used their powers properly, and this might well be enough to make the payment contrary to law. That, however, is not this case.

It was strenuously argued and with a good deal of persuasiveness that the contractor never gave, even in the course of such inquiry as took place, any real evidence of hardship or of his unstable financial position. I doubt whether there was material upon which the council could ever have reached a clear conclusion one way or the other as to the contractor's financial position, that is to say, whether it was or was not so unsound as to require buttressing with an extra payment. We had an elaborate examination of some figures said to show the contractor's deteriorating position with his bankers but the account was not very convincing to my mind because it omitted altogether any reference to the contractor's capital assets, whether pledged with the bank or not. The contractor kept no separate accounts of his expenditure and receipts in connection with the Lambeth contract and I think the council might well have thought a searching inquiry into his affairs in connection with half-a-dozen or more other local authorities was not called for. The fact is that the contractor really based his request for a payment on the rising cost of the services he provided. In other words, he relied on hardship though so far as I know this word was not used in any of the discussions that took place. It was an appeal for consideration in war conditions which had already brought about a rise in prices and wages which were likely to reach still higher ranges. As to the distinction between costs and prices which was so much insisted on for the respondent, no doubt the higher prices and rates of wages were to some extent offset by a reduced volume of tonnage with which the contractor had to deal owing to evacuation of the population of the borough. In April, 1940, this had not taken effect and I am satisfied that in the light of facts as then known to the council, or as they might have been known if existing records had been examined, the council were not at all likely to have foreseen the developments of the future.

On the whole I have not been able to find anything contrary to law in the items disallowed by the respondent. The payments may seem to have been improvident and unnecessary, especially in view of the events which happened after the early spring of 1940, but I think the council appreciated their responsibilities and exercised their discretion to make a payment upon proper principles. I, therefore, think this appeal should be allowed and the disallowance and the surcharge should be quashed.

ATKINSON, J.: In Feb. and Mar., 1940, the Lambeth Council was in possession of a contract with F. W. Surridge, by which he was bound till Mar. 31, 1942, to provide the necessary labour, plant and equipment for the collection of refuse for the borough and the disposal thereof by tipping at Mucking Creek, in Essex, for the sum of £62,379 18*s.* 10*d.* per annum. After negotiations extending from Feb. to Apr., 1940, the council determined to grant an increase of £7,000 a year for the years Apr. 1940-1941, and 1941-1942, and by a memorandum, dated May 22, the council entered into a formal agreement with Surridge so to do. The years ran from Apr. 1. The said sums were in fact paid, but the auditor has determined that the payments were contrary to law, and surcharged the members of the council personally with them. This is an appeal by the council against the surcharge, coupled with a prayer that, if the appeal fails, the persons surcharged may obtain relief under the Local Government Act, 1933, s. 230.

Before considering the facts, it is important to be clear as to the precise question involved. By sect. 228, the duty is imposed upon the auditor of disallowing any item which is contrary to law. To be lawful a payment must be made under a power conferred upon or in performance of a duty imposed upon the council by law, and it must be one which is made in the course of a wise and prudent administration; it must not be in excess of what is in fact reasonable. If the object be lawful but the expenditure in respect of it be so excessive as to be unlawful, then to the extent by which the amount exceeds legality it is the duty of the auditor to disallow it. Under sect. 228, it is not a question as to whether the council acted in good faith or bad faith, reasonably or unreasonably, or whether or not they acted on proper advice, or after consideration of all relevant circumstances. It is the expenditure which must be right. In *Roberts* v. *Hopwood* (1), LORD SUMNER said this, at p. 604:

> The purpose, however, of the whole audit is to ensure wise and prudent administration and to recover for the council's funds money that should not have been taken out of them. If, having examined the expenditure and found clear proof of bad faith, which admittedly would open the account, the auditor further found that the councillors' evil minds had missed their mark, and the expenditure itself was right, then the expenditure itself would not be "contrary to law" and could not be disallowed.

Still more must this be true if want of care and proper enquiry be substituted for bad faith. A council may accept and act upon assurances or advice too readily and without sufficient enquiry and probing into their truth or soundness; they may run serious risks in so doing, but if the assurances are in fact true and the advice wise and prudent their actions will not be unlawful. There is no question as to the objects of these payments being lawful. The disposal of refuse is a duty resting upon the council. The question for the court is whether it is established that the agreement to make the two payments of £7,000 was in fact one which was unwise or imprudent *in toto*. If some part of the payment would have been wise and prudent, to that extent it ought to have been allowed.

I will add one further citation from LORD SUMNER'S speech in *Roberts* v. *Hopwood* (1). At the bottom of p. 606, he says:

> There are many matters, which the courts are indisposed to question. Though they are the ultimate judges of what is lawful and what is unlawful to borough councils, they often accept the decisions of the local authority simply because they are themselves ill-equipped to weigh the merits of one solution of a practical question as against another.

The agreement came about in this way. On Dec. 1, 1939, Surridge was notified of an award made by the London District Council of the Joint Industrial Council for Local Authorities' Non-Trading Services (Manual Workers) which had the effect of increasing carmen's and dustmen's wages by 12½ per cent. On Dec. 13 Surridge wrote to the borough engineer telling him that it was his intention to pay the revised wages and asking that the council should reimburse him the extra cost involved as, in his view, the increase was entirely due to the war. He added these important words:

> I shall also in the near future have no alternative but to request the council to authorise a temporary increase on the contract price to enable me to meet the heavy increase in wages, in barging and disposal of refuse, petrol, oil, fodder, etc., which are additional to the heavy cost of replacement of plant, equipment, etc., I am now called upon to meet.

The point was taken by the borough engineer that Surridge had by his contract undertaken to pay his men whatever wages should be awarded from time to time by the Joint Industrial Council. Surridge replied that the increase could only be attributed to war conditions, and went on to specify certain increases in the cost of barging and other matters, barging 12½ per cent., petrol, oil, oats, mixture, straw, with increases varying from 33⅓ per cent. to 125 per cent. He said that while always willing and anxious to give the best possible service, he was faced with these increases, and suggested an increased percentage upon A
the contract price. The Port of London Authority had authorised an increase on barging charges of 12½ per cent., as from Dec. 4, 1939, and this was followed by a general increase of 12½ per cent. on disposal wages. The fact of an all-round increase of 12½ per cent. on the wages paid by the contractor is not in dispute.

The council appointed a sub-committee to inquire into the matter and Councillors Deady and Lofthouse, the town clerk and the borough engineer constituted the committee. The committee met Surridge twice, and the borough B
engineer made further enquiries and had further discussions with him. This resulted in a report by the engineer to the committee advising the two payments of £7,000. The committee incorporated this advice in their report to the council and the council acted upon it.

Although he complains several times that the council obtained nothing in return for their payment, it is not suggested by the auditor, indeed in para. C
5 of his affidavit he disclaims any such suggestion, nor has it been argued here, that the mere fact that the contractor was legally bound to perform the refuse service for a particular sum of money necessarily made it unlawful for the council to pay anything more. If owing to unexpected increases in the cost of performing the contract the contractor found that he was unable financially to stand up to his obligations, and that some further payment was indeed necessary to secure continuity of the contractor's services, it might well be a wise and D
prudent step to make a further payment. But the auditor's complaint is that the further payment was agreed without sufficient information as to the contractor's circumstances or financial position and without proof of hardship, and he complains of the absence of inquiry of other borough councils and that the borough treasurer was not called upon to advise.

It seems to me that these complaints are more relevant to questions arising under sect. 230 than to the question whether in fact the payments were unlawful E
payments. I will accept as the most relevant test of unlawfulness that suggested in para. 26 of the auditor's affidavit, where he says that to determine the question regard must be had to the contractor's undertakings with other local authorities, seeing that his business was carried on as one complete and co-ordinated whole, with a common system of book-keeping and accountancy, common management and common maintenance. I propose to apply that test to the figures F
and material contained in the auditor's affidavit and exhibits, in so far as they could have been known or ascertained at the time of the agreement. The wisdom or prudence of the payment must depend not merely on the facts and circumstances which were known to the council, but also upon the facts and circumstances which could have been known to them or their representatives.

The facts which were ascertained or which could have been ascertained were as follows. The contractor, Surridge, carried out similar services to those G
rendered under his agreement with the Lambeth Council for various other bodies, including the Wandsworth, Hammersmith and Finsbury Metropolitan Boroughs, and to a smaller extent for five other metropolitan boroughs or district councils. He also had other trading interests. His books of account did not allocate his expenditure so as to show the cost of the service to each particular undertaking, and it was in fact impossible to ascertain the precise expenditure on the performance of any one of his contracts. But the auditor as a result H
of his examination of Surridge's books at a later date has ascertained these facts: The total sum received by him in the financial year Apr. 1, 1938, to Mar. 31, 1939, was £292,614. The total payments for the year amounted to £272,226. For the year ending Mar. 31, 1940, the receipts amounted to £276,306, the expenditure to £264,296. The auditor has calculated that Surridge's activities other than the collection and disposal of refuse accounted for about one-eleventh of his total trading receipts.

In the year ending Mar., 1939, the receipts exceeded the payments by £20,000, in the following year by £12,000, but this sum included a loan from the bank of £10,000. It must, however, be pointed out that in March, 1940, there was £7,4000 owing to Surridge from borough councils over and above the sum owing at the end of March, 1939, so that for the purpose of comparison with the previous year the excess of receipts should be taken as about £9,000. For the year ending March, 1939, the wages amounted to £120,667. Of this sum £112,920 related to his business other than his farms. For the year ending March, 1940, the total wages were £120,403 or, excluding the farms, £109,572.

The actual barging of refuse was done by sub-contractors. The amount paid to them for barging in the year ending March, 1939, was £54,422, in the year ending March, 1940, £50,613. The extra 12½ per cent had not then been paid. Therefore, in the earlier of the two years, the sum of £175,089 was paid for wages and barging; in the latter year £171,016. There is one increase in Surridge's costs that can be ascertained with exactitude. It is not in dispute that his wages and the barging went up 12½ per cent. In other words, on the 1939 figures his costs on these two matters were increased by £21,885, on the 1940 figures by £21,370. Dealing with the earlier year that left some £97,000 expenditure of which no details have been supplied by the auditor, though doubtless they could have been supplied. Some part of this would, of course, be attributable to overheads, salaries and rents on which there may have been no increase. But a great deal of it must have been incurred on those matters in respect of which Surridge, Collins and Cattlin have proved very substantial percentage rises. Surridge's view was that it would be fair to take 12½ per cent on the whole of his expenditure. 12½ per cent on the £97,000 would add another £12,000 to the contractor's expenses, bringing the total increase to nearly £34,000. At any rate, it is certain that a sum substantially in excess of £21,850 would be added to the 1939 and 1940 figures for expenses, and I do not think that, bearing in mind Collins' evidence, I should be far wrong in taking the total increase as at least in the neighbourhood of £30,000. It seems to me that, bearing in mind that in the year ending 1939 his excess of receipts was only £20,000, and in the following year (after deducting the loan from the bank and allowing for the increased indebtedness from borough councils of £7,000) was under £10,000, it is clear that a case of serious hardship existed, and that Surridge's statement in his first letter that there was no alternative but to ask for an increase was well-founded.

Further relevant facts which could have been ascertained were these, that he had borrowed from his bank in June, 1938, £36,000, and on Aug. 9, 1939, a further £10,000, and that in March, 1939, his bank balance was in credit to the extent of £1,800, and at the end of March, 1940, it was in debt to the extent of over £10,000.

For many years Surridge had rendered excellent service to the Lambeth Council. It must be assumed, indeed Collins put it beyond doubt, that the sum they were paying him under their contract was, before the war, a fair sum giving him a reasonable profit, and no more than a reasonable profit. It has never been called in question by the auditor. Obviously it would have been a serious matter for the Lambeth Council if Surridge came to grief financially and was unable to carry out his contract or was forced to carry it out in a less efficient manner. If the council had been driven to seek another contractor, even if they had been able to find one, it is plain that they would have had to pay a price far in excess of the contract price.

In my judgment, the only inference that can be drawn from the facts was that there was a very serious risk, if not a certainty, that Surridge would be unable to perform, or properly to perform his contracts, unless he received some further remuneration. I do not see that there was any warrant for supposing he could face a reduction of receipts to the extent of £30,000. It is true that these particular figures were not before the council, but Surridge has sworn that he made it clear that, unless something was done, he would be unable to continue giving them similar service as before, and Deady has sworn that they formed the opinion that there was likely to be a serious deterioration in the service. That opinion was in truth well-founded on the facts as they then existed. I think it is quite impossible to say that it was not a wise and prudent thing to make some substantial contribution to these increased expenses.

I think it is quite wrong to suggest that the borough engineer did not appreciate the position. He arrived at his conclusions in a different way, but the accuracy of his judgment seems to me to be confirmed by the auditor's figures. In estimating that the contractor was hit in carrying out the contract to the extent of at least £7,000, his conclusion tallied very closely with a total loss of some £30,000 on all the contractor's commitments.

The auditor's view has clearly been coloured by the subsequent course of events. There is no doubt that for one reason or another the tonnage of refuse to be dealt with fell appreciably during the two years in question. He argues that this should have been foreseen, that it was obvious that the weight of refuse to be dealt with was declining and would decline, and that this would reduce the expenses to which the contractor would be put. It is, of course, easy to be wise after the event. The graph which is in evidence shows how variable was the quantity barged throughout the preceding years, but the outstanding facts are, I think, these. Always August shows the lowest figure and, until the war, is followed by a sharp rise till the following February. For example, in 1938 about 3,800 tons were dealt with in the month ending Aug. 18, 4,300 tons in the month ending Oct. 13, and just over 5,600 in the month ending Feb. 2. In the month ending Aug. 7, 1939, 4,300 tons were dealt with, followed, contrary to custom, by a fall until the month ending Oct. 12, when 3,600 tons were barged. A fall at that time of the year had never happened before, but from that date there was a very rapid rise, and on Feb. 29, 1940, the quantity barged for the previous month was only 200 tons less than that barged during the month ending Mar. 2, 1939. The rise between October and February had been 1,600 tons, the greatest rise between these dates shown in the graph. On Mar. 3, the figure of 4,900 for the month was the same as that in 1937 and 1938.

I am unable on these figures to see anything which could or ought to have caused the council to foresee the drop in the tonnage of refuse to be dealt with which was subsequently brought about by the Battle of Britain and the night bombing that followed. The problem before the council was one of difficulty, but on the facts as known to them and which could have been known to them, it is, in my judgment, quite impossible to say that they dealt with it in a way which was unwise or imprudent. The measure of wisdom or prudence that the law requires is not that of a prophet or seer, but a measure that is reasonable.

I cannot accept as well-founded the statement of the auditor in para. 33 (1) of his affidavit that no occasion had arisen for apprehending any impairment of the service to be performed under the agreement. That statement, basic and, indeed, crucial to the justice of his view is, in my judgment, contrary to the plain facts of the case.

I ought to add a word on the point that the council did not consult other local authorities to make sure that they were also prepared to do their share. It might have been wiser, but the fact that they, Lambeth, had agreed to do their share would, I think, encourage others to do the same, but, if they did not, and Surridge came to grief, the extra payment would cease. It would, of course, only be payable so long as efficient service was rendered. If the money kept or helped to keep him afloat, it was money well spent, if it did not keep him afloat, it would cease to be spent.

In my judgment, this appeal should be allowed, and the surcharge quashed.

TUCKER, J.: In the spring of 1940, the Lambeth Borough Council had a contract with two years still to run with Surridge for the collection and disposal of house, street and trade refuse in the Borough of Lambeth for the sum of £62,378 per annum. The contract had originally been entered into in 1932, and had been renewed for a further five years from 1937.

Surridge is a contractor in a large way of business with extensive premises and equipment in Essex for the disposal of refuse. He held contracts with several other London borough councils and other local authorities for the rendering of various services in connection with the collection and disposal of refuse. In Feb., 1940, he applied to the Lambeth Borough Council for additional remuneration on the ground of increased prices due to the war. His application was referred to a sub-committee who, after considering a report from the borough engineer, recommended the payment of £7,000 in each of the two remaining years of the contract. This recommendation was adopted by the council on Apr. 25, 1940, and the sums in question were subsequently paid to the contractor. At an audit held by the district auditor in the autumn of 1942 these items were disallowed as being contrary to law, and 48 councillors who took part in the decision to make the payments were surcharged in respect thereof. From this decision of the district auditor the 48 councillors appeal to this court under the Local Government Act, 1933, s. 229.

Before referring further to the circumstances of this case it is, I think, essential to endeavour to ascertain the guiding principles to be applied in order to decide whether or not the payments impugned were unlawful. In this connection A most assistance is, I think, afforded by a study of *Roberts* v. *Hopwood* (1). It must, however, be remembered that that was a decision under the Metropolis Management Act, 1855, s. 62, dealing with wages. The material words of that section are:

> Shall employ such servants as may be necessary, and may allow to such servants such wages as [the council] may think fit.

B The speeches of their Lordships were largely devoted to an analysis of the precise words of this section. It must also be kept in mind that the payments in question had been made in pursuance of a decision to pay a minimum wage of £4 per week for all adult labour, young and old, male and female, skilled and unskilled, it not having been shown, to use the words of LORD SUMNER, that the women's work was the same or comparable with the men's, or that the women *inter se*, or the men *inter se*, were engaged in equivalent tasks. It was a decision held C to have been made on social and political grounds rather than economic considerations. This being the position, much consideration was given to the question whether the word "reasonable," which did not appear in the section, was to be introduced for the purposes of construction. The observations of their Lordships on this matter include the following passages: LORD BUCKMASTER, at p. 588, said:

> D . . . the general rule applicable is that the council shall pay such wages as they may think fit, the discretion as to the reasonable nature of the wages being with them.

At p. 599 LORD ATKINSON used these words:

> But as wages are remuneration for services, the words "think fit" must, I think, be construed to mean "as the employer shall think fitting and proper" for the services rendered . . . The only rational way by which harmony of administration can be introduced into the various departments of local government covered by sect. 62 of E the Act of 1855, and by the several more recent statutes aforesaid, is by holding that in each and every case the payment of all salaries and wages must be "reasonable." I see no difficulty in so construing the words of sect. 62.

At p. 604, LORD SUMNER states:

> Bad faith admittedly vitiates the council's purported exercise of its discretion, but the auditor is not confined to asking, if the discretion, such as it may be, has been honestly exercised. He has to restrain expenditure within proper limits. His mission F is to enquire if there is any excess over what is reasonable.

At p. 613, after discussing whether, and if so where, the word "reasonable" should be inserted, LORD WRENBURY says:

> I rest my opinion upon higher grounds. A person in whom is vested a discretion must exercise his discretion upon reasonable grounds. A discretion does not empower a man to do what he likes merely because he is minded to do so—he must in the exercise G of his discretion do not what he likes but what he ought. In other words, he must, by use of his reason, ascertain and follow the course which reason directs. He must act reasonably.

A little lower down, dealing with the word "fit," he says:

> The measure is not the volition of the person vested with the discretion, it is the suitability or adequacy or fitness of the amount in the reasonable judgment of the person vested with the discretion.

H Having in this language dealt with the extent to which the word "reasonable" is to be introduced, the House made it clear that it is not for the district auditor, or the court, to substitute their discretion for that of the council if there are any grounds upon which the council could reasonably have exercised their discretion as they did. LORD BUCKMASTER, at p. 588, says:

> The discretion thus imposed is a very wide one, and I agree with the principle enunciated by LORD RUSSELL in *Kruse* v. *Johnson* (2), that when such a discretion is conferred upon a local authority the court ought to show great reluctance before they attempt to determine how, in their opinion, the discretion ought to be exercised.

In the result, their Lordships were of opinion on the facts of that case that the council had given what amounted to gratuities to their servants without any compensatory benefit to the ratepayers and accordingly had not reasonably exercised their discretion but acted arbitrarily. Before passing from that case, it is to be observed that from first to last there was no suggestion that there was at any time any difficulty existing or anticipated in getting the necessary labour to perform the required services at the usual rates of pay which were considerably less than the minimum of £4 a week.

In the present case, the court is concerned with the Local Government Act, 1933, s. 228 (1) (*a*), with reference to the powers and duties exercised by the council under the Public Health (London) Act, 1936, s. 90 (1). The former section provides that :

> It shall be the duty of the district auditor at every audit held by him (*a*) to disallow every item of account which is contrary to law; (*b*) to surcharge the amount of any expenditure disallowed upon the person responsible for incurring or authorising the expenditure.

The latter section is in these words :

> Every sanitary authority shall employ a sufficient number of scavengers, or contract with scavengers, for the performance of the duties of the sanitary authority under this part of this Act with respect to the sweeping and cleansing of streets within their district, the collection and removal of street refuse and house refuse, and the cleansing and emptying of ashpits, earth-closets, privies and cesspools.

When a borough council employs direct labour for this purpose it is empowered by the Local Government Act, 1933, s. 106 (2), to pay "such reasonable remuneration as they may determine." When, however, they contract for the performance of their statutory duties there are no express words with regard to the reasonableness of the remuneration to be paid to the contractor, but any such contract would no doubt be subject to the requirements of the standing orders with regard to obtaining tenders, and so forth.

In the present case we have to consider two payments made to a contractor who was already bound by contract to perform the necessary services for the council for the collection and disposal of refuse until Mar., 1942. It is not suggested that there was any consideration in law for these payments, and they were, therefore, in a sense gratuities and voluntary payments. None the less, counsel for the district auditor does not contend that such lack of legal consideration will of itself render the payments "contrary to law." He says the payments were unlawful because the council considered extraneous matters, ignored much relevant matter, acted without real evidence of hardship on the part of the contractor or probability that the services would suffer, and failed to investigate his claim with proper care. In considering such contentions as these it is desirable to endeavour to formulate with precision the test to be applied, and it is for this reason that I have set out in some detail the observations of their Lordships in *Roberts* v. *Hopwood* (1).

It appears to me that that case, although dealing with wages and a different section of the governing Act, indicates the broad principles which should be applied in the present case. It appears to me that the proper test to be applied in the circumstances of this case is contained in the following questions : (i) Did the councillors who have been surcharged apply their minds to the relevant considerations in deciding to make these payments ? (ii) Was there material upon which they could reasonably come to the conclusion that there was a danger that without the payments the services might be impaired ? (iii) Was there material upon which they could reasonably fix the amount at £7,000 ? Their *bona fides* is not in question, so I omit what would otherwise be a material matter for consideration. These questions may perhaps be put more shortly thus : Was their decision arrived at solely in the interests of the ratepayers upon reasonable materials, or was it a mere arbitrary decision to pay away the moneys of the ratepayers as a gratuity to the contractor so that he should suffer no diminution in his profits ?

Judged by this test I find that the propriety of the original contract and its price has never been questioned ; that prices had admittedly risen to the extent of the percentages shown in the borough engineer's report upon which the council acted ; that it was in time of war when it is more than usually difficult to foresee the probable course of events ; that the council had received a letter from the contractor dated Feb. 12, 1940, in which, after setting out the increase in prices, he said: "I am always willing and most anxious to give the best possible service to your council but I am now faced with the above increases" (which, I think, contains an implication that failing any increase he may no longer be able to maintain his services at their previous high level); that the contractor occupied a unique position, and that failing him the only alternative would have been for the council hastily to improvise some system of their own A at a time of labour shortage and rising prices; that the council had received a favourable recommendation from their experienced borough engineer; that they had received an undertaking from the contractor that he would ask for no further increase (including increases due to rises in wages) for the remainder of the contract period; and that the town clerk had advised them that such payments were lawful.

Taking all these matters into consideration and having regard to the sworn B evidence of Surridge in paras. 25 to 27 of his affidavit of Apr. 20, 1943, of Deady in para. 19 of his affidavit of Apr. 17, 1943, and of Cattlin, the borough engineer, in para. 4 of his affidavit of the same date, as well as Lofthouse's last answer to the district auditor at the meeting of Dec. 17, 1942, all of which go to show that these gentlemen were applying their minds to the proper question, namely, the interests of the ratepayers and the likelihood of the services being impaired, C I think there was material upon which the councillors could reasonably come to the conclusion that the services might suffer, and that they did in fact apply their minds solely to this consideration.

As to amount, they had the assurance of the borough engineer as to its reasonableness and the increases in prices are admitted. It is quite true that a good deal of criticism can properly be directed to the calculations and figures in the borough engineer's report, and the absence of information as to costs, as distinct D from prices, but it was known that Surridge kept no separate books showing the costings for the Lambeth contract, and even now that voluminous documents and calculations have been put before us, as a result of the district auditor's very thorough and proper investigations, it is not possible to arrive at any definite conclusions as to cost. At the most the figures show that in certain respects the council might have been put upon enquiry to make further investigations if they had insisted upon the employment of an accountant to go into E the books. I think, therefore, that the council had before them material as to *quantum* upon which they could reasonably act. I, therefore, answer each of the questions which I have suggested as containing the true test in the affirmative.

Having stated my conclusions, I pass to consider the district auditor's reasons as set out in his report, to all of which I have given careful consideration F before arriving at my decision already indicated. His reasons may be summarised as follows: (i) There was no consideration in law for the payments. (ii) The contract had not been frustrated. (iii) The contractor had not made out a *prima facie* case for increase. (iv) No evidence was provided as to the contractor's costs. (v) The council neglected to refer to their own records which would have shown that by Mar., 1940, the services were diminishing in volume. (vi) Failure to consult other borough councils with whom the contractor had G contracts. (vii) Failure to ask for expert advice from the borough treasurer. (viii) The council never in fact apprehended any danger of the service breaking down, and were never in real doubt as to the contractor's financial stability.

As to those, (i) and (ii) were not relied upon by counsel for the district auditor as sufficient *per se* to justify the disallowance. This is important, because it appears as if the district auditor took the view that these matters would of themselves have justified his decision apart from the other circumstances upon H which he relied. (iii) to (vii) inclusive, deal with matters which are all relevant to the issue, but I do not think it necessary to deal with them *seriatim* in detail, because after giving them due weight as against the considerations previously set out, I have come to the conclusion that they do not turn the scale in favour of the disallowance. As to (iii), I ought perhaps to say that I am not in agreement with the district auditor's conclusion. (v) I reject. The figures show that by Mar., 1940, there had been a slight drop in refuse collected, but the curve shown in the graph put in evidence was quite in accordance with seasonal fluctuations in previous years. By Mar., 1940, the bombing of London had not begun and France had not fallen. There had been some early evacuation from London in the previous autumn followed by a considerable return. I can see no reason at all why the council should have anticipated any appreciable variation in the volume of the services to be rendered in the future, and I think this argument was born of wisdom acquired from after events.

The lack of evidence as to costs, and the failure to consult other borough councils, are in my view much the most serious objections. The absence of information as to costs, persisting until the present time, I have already referred to. The failure to consult the other boroughs was, I think, an unfortunate mistake, but if *bona fide* cannot, in my view, be considered as fatal to the contentions of the applicants. The borough treasurer, although not actually consulted, was throughout conversant with what was taking place, and never raised any objection.

With regard to (viii), I do not think it necessary that the councillors should actually anticipate a complete breakdown in the services or the bankruptcy of the contractor before sanctioning any increase. If the district auditor took this view, I think he was applying too severe a test. If he did not take such a narrow view, but is intending merely to say that the councillors had no material before them upon which they could reasonably anticipate any likelihood of some impairment in the services, then I take a different view on the evidence before us.

In the result, I am of opinion that this appeal succeeds, and that the disallowances and surcharges should be quashed.

Appeal allowed. Costs of the auditor and the councillors to be paid out of the general rate fund. The contractor to pay his own costs and the costs increased by his appearance. Leave to appeal granted.

Solicitors: *Tudor & Rowe* (for the appellant contractor); *O. L. Roberts*, Town Clerk, Lambeth Borough Council (for the members of the council); *Sharpe, Pritchard & Co.* (for the auditor).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

Re OSMUND (*deceased*), MIDLAND BANK EXECUTOR AND TRUSTEE CO., LTD. *v.* THE ATTORNEY-GENERAL AND MASON

[Court of Appeal (Lord Greene, M.R., MacKinnon and Luxmoore, L.JJ.), **February 3, 1944.**]

Charities—Gift for furtherance of psychological healing—Gift for medical education—Validity.

By her will the testatrix devised and bequeathed all her real and personal estate to her trustees upon trust in their absolute discretion to apply the same to the medical profession for the furtherance of psychological healing in accordance with the teaching of Jesus Christ. The question to be determined was whether the gift was a valid and effective charitable trust or, in the alternative, failed for uncertainty or any other cause:—

Held: on the true construction of the will the bequest was for the furtherance of medical education which is a valid charitable object.

Decision of Bennett, J. ([1944] 1 All E.R. 12), *reversed.*

[**EDITORIAL NOTE.** In the court below it was thought that the terms of this bequest allowed the application of money for the cure of an individual patient. The Court of Appeal have decided that that is a wrong view to take and have held that the gift is confined to medical education and is, therefore, valid as a charitable gift and one for which a scheme should be drawn up.

As to Educational Purposes; see HALSBURY, Hailsham Edn., Vol. 4, pp. 116-118, paras. 153, 154; and for Cases, see DIGEST, Vol. 8, pp. 245-248, Nos. 51-73.]

Appeal by the defendant, the Attorney-General, from an order of Bennett, J., dated Dec. 1, 1943, and reported [1944] 1 All E.R. 12. The facts are fully set out in the judgment of Lord Greene, M.R.

The Solicitor-General (*Sir David Maxwell Fyfe, K.C.*), and *H. O. Danckwerts* for the appellant.

E. M. Winterbotham for the respondents, the next of kin.
A. Guest Mathews for the respondents, the trustees.

LORD GREENE, M.R.: This appeal raises a very short question upon the construction of the will of a testatrix who left the whole of her estate to the Midland Bank Executor and Trustee Co., Ltd.:

> . . . upon trust in their absolute discretion to apply the same to the medical profession for the furtherance of psychological healing in accordance with the teaching of Jesus Christ.

The question that we have to decide is whether or not that is a valid charitable gift. BENNETT, J., held that it was not. It is not open to dispute that, where the language of a gift upon its true construction makes it possible for the subject-matter of the gift to be applied for non-charitable purposes, that gift is not a good charitable gift even although the greater part of the purposes may be truly charitable. It is sufficient to destroy the charitable nature of the gift if on its true construction it is possible for those administering the property to go outside the scope of charity.

The sole question in this case is whether the language used by the testatrix makes the gift obnoxious to that rule. It is not, and, indeed, it could not be, disputed, that medical education is a good subject-matter of charity, nor can it be disputed that medical research and the general improvement of the medical art is a good charitable purpose. We are concerned here with a particular recognised branch of the medical art, namely, psychological healing. The testatrix has put a qualification upon that, because it must be "in accordance with the teaching of Jesus Christ." That I read as meaning no more than that the psychological healing in which she is interested is to be limited to healing of that character which is in conformity with the teaching of Jesus Christ. It puts a limit upon the psychological healing which it is permissible to consider but does not destroy the charitable quality of it if it be charitable, nor does it render the gift bad for uncertainty. That, indeed, was not suggested in argument.

In the court below BENNETT, J., held that the gift did offend against the rule which I have mentioned on the ground that it would be permissible for the trustees—to take an extreme case which he took—to pay a doctor to go and cure, by means of psychological healing, some extremely wealthy man who was suffering from chronic dyspepsia. That example really does not fall under the language of this phrase. It is to be noticed that the phrase is "for the furtherance of psychological healing" and not "for the provision of psychologica treatment." The example which BENNETT, J., took would be an example o the provision of psychological treatment, it is true, but it seems to me that it would be a great stretch of language to say that it fell within the words "furtherance of psychological healing." If, of course, those words comprise the mere provision of treatment, then the argument would be a valid one, but I cannot construe them as having such a wide meaning. The true meaning of those words, as it appears to me, is for the furtherance of the art of psychological healing and, accordingly, any application of the funds which stepped outside the bounds of that phrase would be contrary to the trust created by this testatrix.

It is perfectly true that the art of psychological healing may be furthered by the particular care and treatment of some individual case. If one takes medical healing in general, it may be that there is some very unusual case which it is desirable to study in the interests of the medical art. The mere fact that an individual suffering from that disease benefits from the treatment that he receives does not mean that the study of that disease in the course of treating that patient is something which is outside a charitable purpose. One, at any rate, of the principal ways in which diseases can be studied and the art of healing furthered is by the treatment, study and recording of individual cases, and it is quite irrelevant that the individual patients may benefit.

Any application of this money which was not directed to the furtherance of the art of psychological healing would, in my opinion, be a breach of trust. If the trustees, for instance, provided a sum of money for the mere object of curing one individual without any reference to the furtherance of the art of healing in general, that would be a breach of trust.

I find some confirmation for this view, if it be needed, in the fact that the trustees are "to apply the same to the medical profession." That surely means something different from applying the same to medical practitioners as in the example that Bennett, J., took. I read that reference to the medical profession as confirming the idea that the profession as a whole or some body in the profession is regarded by the testatrix as the body which will undertake the application of the money for the furtherance of the art of psychological healing. That seems to be a very much more sensible meaning to give to those words, because to construe them as including the hiring of individual practitioners to treat individual cases would be imposing upon the Midland Bank Executor and Trustee Co., Ltd., a type of activity which it is not likely that the testatrix would have entrusted to them.

On the other hand, if she contemplated them as making the money available to the profession as a body or through bodies and associations in the profession, a sensible meaning is given to it. The main reason for the view that I take lies in what appears to me to be the true meaning in the English language of the words "the furtherance of psychological healing."

In the result, therefore, the appeal must be allowed and an appropriate declaration made.

MacKinnon, L.J.: I agree.

Luxmoore, L.J.: I also agree.

Appeal allowed. Costs of all parties to be paid out of the estate.

Solicitors: *Treasury Solicitor* (for the appellant); *Herbert Smith & Co.* (for the next of kin); *Ridsdale & Son*, agents for *W. H. Heelis & Son*, Hawkshead (for the trustees).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

SIMMONDS AEROCESSORIES (WESTERN), LTD. *v.* ASSESSMENT COMMITTEE.

[King's Bench Division (Viscount Caldecote, L.C.J., Macnaghten and Atkinson, JJ.), **December 21, 1943.**]

Rates and Rating—Derating—Industrial hereditament—Canteen situated apart from factory but exclusively for use of employees—Rating and Valuation (Apportionment) Act, 1928 (*c.* 44), *s.* 3.

The appellants occupied a factory which was admitted to be an industrial hereditament. The appellants also occupied a plot of land, at a distance of 260ft. from the factory, on which was situated a canteen which provided meals at cost price exclusively for the appellants' employees who worked at the factory. The question was whether the canteen was an industrial hereditament within the meaning of the Rating and Valuation (Apportionment) Act, 1928, s. 3, and, therefore, entitled to the derating provisions of the Act. The respondents contended that the canteen was occupied and used primarily (i) for the purpose of a retail shop or of premises of a similar character; or (ii) for purposes other than a factory or workshop, and, therefore, came within the proviso to sect. 3:—

Held: (i) the canteen was not open to the public for the purpose of buying and taking away goods there offered for sale and, therefore, was not a retail shop.

(ii) the canteen was primarily occupied and used for the purposes of a factory or workshop, and was an industrial hereditament within the Act.

[**EDITORIAL NOTE.** This case is important since it decides quite generally that a works canteen is an industrial hereditament for derating purposes. This conclusion is reached quite apart from the fact that the canteen might be part of the factory itself as very frequently is the case. Therefore, in cases where there may be a doubt whether the canteen is part of the factory, it is clear that the canteen is derated.

As to Rating Relief for Factories and Workshops, see HALSBURY, Hailsham Edn., Vol. 27, pp. 439-445, paras. 876-886; and for Cases, see DIGEST, Supp., Rates and Rating, Nos. 226a-226ff.]

Cases referred to :

*(1) *Turpin* v. *Middlesbrough Assessment Committee & Bailey*, [1931] A.C. 451 ; Digest Supp. ; 100 L.J.K.B. 271 ; 145 L.T. 73.

*(2) *Gordon Hotels, Ltd.* v. *London County Council, London County Council* v. *Gordon Hotels, Ltd.*, [1916] 2 K.B. 27 ; 24 Digest 928, *193* ; 85 L.J.K.B. 1042 ; 114 L.T. 1126.

*(3) *Toogood & Sons, Ltd.* v. *Green*, [1932] A.C. 663 ; Digest Supp. ; 101 L.J.K.B. 453 ; 147 L.T. 201.

(4) *Glasgow Assessor* v. *Henderson & Co.*, [1932] S.C. 337 ; Digest Supp. ; [1932] S.L.T. 145.

*(5) *London Co-operative Society, Ltd.* v. *South Essex Assessment Committee*, [1942] 1 K.B. 53 ; [1941] 3 All E.R. 252.

(6) *Fullers, Ltd.* v. *Squire*, [1901] 2 K.B. 209 ; 24 Digest 903, *38* ; 70 L.J.K.B. 689 ; 85 L.T. 249.

APPEAL by the ratepayer, by way of case stated, from a decision of the Standing Rating Appeal Committee of Quarter Sessions that a canteen occupied and used by the appellants was not an industrial hereditament within the Rating and Valuation (Apportionment) Act, 1928. The facts are fully set out in the judgment of the court, delivered by ATKINSON, J.

A. S. Comyns Carr, K.C., *Gilbert Dare*, and *Harold Williams* for the appellant company.

R. M. Montgomery, K.C., and *Carey Evans* for the respondents.

ATKINSON, J. [delivering the judgment of the court] : This case stated raises the question whether a canteen occupied and used by the appellants is an industrial hereditament within the Rating and Valuation (Apportionment) Act, 1928, and, therefore, entitled to be inserted in Pt. 2 of the valuation list, getting thereby the benefit of the derating provisions.

The appellants occupy a factory where they manufacture accessories for aircraft. The factory is admittedly an industrial hereditament. By a lease dated Aug. 14, 1940, the appellants became lessees and occupiers of a plot of land on the same estate. At its nearest point the plot is 260ft. from the factory. The plot, in accordance with a covenant contained in the lease, is used and occupied for the purposes of a canteen restricted exclusively to the use of the appellants' employees. The canteen is in fact used solely by the appellants' employees engaged in work in the appellants' factory. Each employee has a pass to enable him to use the canteen. Over 92 per cent. of the employees are engaged directly in the manufacture of aircraft accessories. The remainder consist of clerical and administrative staff. The appellants' main clerical and administrative departments are centred at their head office at their London works. The canteen comprises a kitchen and two large dining-rooms, with tables and chairs, in which the appellants' employees have meals, cloakroom, and other accommodation. Hot and cold meals are served. The appellants charge their employees such prices as are estimated will cover the cost of the meals without making any profit. The appellants' employees number nearly 2,000 ; and the number using the canteen averages 1,850 per meal. The majority of the employees are females. Few, if any, of the employees live near enough to the factory to be able to go home to meals during working hours. The canteen is regularly inspected by the inspector of factories. Electrical machinery is used in the kitchen, including potato slicers, potato boilers, choppers, and washing-up machines, all of which are subject to regulations for securing safety in factories contained in the Factories Act, 1937.

It is provided by the Factories (Canteens) Order, 1940, which came into force on Nov. 11, 1940, that the occupier of any factory in which more than 250 persons are employed, and in which is carried on the manufacture or repair of any munitions of war shall, if so directed by the Chief Inspector of Factories, or by any other inspector of factories expressly authorised by the Minister of Labour to give directions under the Order, make arrangements to the satisfaction of the inspector for the establishment and maintenance in or in the immediate vicinity of the factory of a suitable canteen attached to the factory or group of factories where hot meals can be purchased by persons employed at the factory or factories. The inspector of factories is satisfied that this canteen, which was in existence before the making of the Order, satisfies the requirements of the Order, and renders it unnecessary for him to give any directions under that Order.

Subject to certain exceptions specified in sect. 3 (1) of the Act of 1928, an "industrial hereditament" means a hereditament used and occupied as a factory or workshop, these expressions having the same meaning as in the Factory and Workshop Acts, 1901-1920.

The first question, therefore, is whether this canteen is a factory or workshop. Both expressions include, *inter alia*, any premises wherein manual labour is exercised by way of trade, or for purposes of sale for gain, in or incidental to any of certain purposes, including the making of any article or the adapting for sale of any article.

It is plain that much manual labour is exercised in the canteen for the purpose of making articles of food and for the purpose of adapting articles of food for sale; and that such labour is exercised by way of trade. The canteen is, therefore, a factory or workshop.

However, it is said that, notwithstanding the fact that the canteen is a factory or workshop, it is not an industrial hereditament, because it falls within the proviso in sect. 3 (1) of the Act of 1928. That section, after providing that the expression "industrial hereditament" means "a hereditament occupied and used as a factory or workshop," contains this proviso:

> Provided that the expression industrial hereditament does not include a hereditament occupied and used as a factory or workshop if it is primarily occupied and used for the following purposes or for any combination of such purposes, that is to say . . . (*b*) the purposes of a retail shop . . . (*f*) any other purposes, whether or not similar to any of the foregoing, which are not those of a factory or workshop.

It is said that the canteen is primarily occupied and used for the purpose of a retail shop or of premises of a similar character, where retail trade or business is carried on. Alternatively, it is said that, if not a retail shop, the canteen comes within sub-heading (*f*) in that the primary purpose of the occupation and use is not that of a factory or workshop. A "retail shop" is defined as including "premises of a similar character where retail trade is carried on." There is no further definition of the expression "retail shop." It must, therefore, receive its ordinary and every-day meaning: *per* Viscount Dunedin, at p. 473, in *Turpin* v. *Middlesbrough Assessment Committee* (1).

Apart from authority, we think the main characteristic of a shop is that it is a place to which members of the public may resort for the purpose of buying and taking away the goods which are there offered for sale. We doubt whether anyone would regard a public-house with an on licence, or a restaurant, as a shop. In *Gordon Hotels, Ltd.* v. *London County Council* (2), the question for determination depended upon whether the grill-room and the dining-room at the First Avenue Hotel were shops within the definition of the word in the Shops Act, 1912. It was held that the grill-room was a shop, but the dining-room was not, inasmuch as the persons mainly using the grill-room were members of the public: but that the main users of the dining-room were guests living in the hotel. But for the definition in the Shops Act, 1912, even the grill-room would have been held not to be a shop.

Further guidance can be found in *Turpin's* case (1), at pp. 473-474. Viscount Dunedin was dealing with the question whether a hereditament used for the repair of cars was a place with similar characteristics to those of a shop. He said, on p. 473:

> For myself I am unable to state what are the physical features the existence of which is essential to or distinctive of a retail shop. I am familiar with many physical features which are frequently and even commonly found in retail shops, such as counters and shop windows; but I am equally familiar with retail shops where no such features exist. In my opinion it is not possible to say that the words "of a similar character," even if they include, are limited to physical features of the premises. They must, as I read them, include also similarity of character in other respects. The character of the premises must be similar to the character of a retail shop. Now if we compare the hereditament here in question with a retail shop, do we find any common characteristics? My Lords, I think we do; for they are both buildings to which the public can resort for the purpose of having particular wants supplied and services rendered therein.

In *Toogood's* case (3), Lord Thankerton quoted the passage I have read, and went on, at p. 674:

> In the recent Scottish case of *Glasgow Assessor* v. *Henderson & Co.* (4), at p. 146,

LORD SANDS says: "It is quite true that in the case of *Turpin* v. *Middlesbrough Assessment Committee* (1), LORD DUNEDIN speaks of 'buildings to which the public can resort for the purpose of having particular wants supplied and services rendered therein.' I think that when he used the word 'can,' he must have meant 'do,' because there are comparatively few manufacturers who would not, on occasion, welcome members of the public to their premises." I think this paraphrase is inaccurate, and that the true element is in the provision of accommodation in the premises for the public who may so resort, even if, in fact, the business is so unsuccessful that the public do not A resort.

Here no member of the public as such has any right whatever to enter the premises. In fact, the public do not and may not resort there. No goods are on offer to the public nor can be bought by the public. The feature of a shop is its appeal to the public, or some section of the public. The feature of these premises is privacy. If the canteen had been in the main premises, the point B would be covered by authority. In *London Co-operative Society* v. *South Essex Assessment Committee* (5), the question was whether a similar canteen carried on in a laundry for the purpose of supplying food to the workers in the laundry was an industrial hereditament. It was contended that it was not to be deemed to form part of the factory, because it was solely used for some purpose other than the manufacturing process carried on there, namely, a retail shop. The Rating Appeal Committee of Quarter Sessions had held that the C canteen was occupied and used not for industrial purposes, but as a retail shop. On a case stated for this court, that view was overruled. It was held that the canteen was not solely used for some purpose other than the manufacturing process or handicraft carried on in the laundry and, *per* TUCKER, J., that it was necessary and essential for the welfare and efficiency of the workers, and was a necessary and essential part of the factory. It was implicit in this decision that the canteen was not a retail shop. The fact that the canteen is on a D separate plot of land seems irrelevant in determining whether it is in fact, or has the characteristics of, a shop.

There remains the question whether the canteen is within sect. 3 (1) (*f*). Is the canteen primarily occupied and used for purposes which are not those of a factory or workshop? It is necessary to see with some particularity what are the matters which bring the canteen within the definition of a factory or E workshop. In addition to the fact that much manual labour is exercised for the purpose of making articles of food and for the purpose of adapting food for sale, it is plain that much manual labour must be exercised upon matters which are incidental to these purposes. The definition includes manual labour exercised in or incidental to the specified purposes. These words must cover the washing-up and cleaning of all the cooking utensils so that they are available when wanted for the preparation of the next meal to be provided. So, too, F doubtless some labour is expended in arranging the food for sale so that it may look the more attractive. In *Fullers*' case (6), such preparation was held to be covered by the words "adapting for sale." Large quantities of food in a raw state must be delivered to the canteen; and the real purpose and use of the place is to put it or turn it into an edible and, therefore, saleable form or condition for the benefit of the appellants' employees. It seems to us that the canteen is primarily occupied and used for that purpose; and that that purpose G is a purpose of a factory or workshop within the definition and further that it is so used in order to comply with the order referred to in para. 5 (14) of the case.

We have not dealt with the question whether the canteen is within the same curtilage as the main factory; if it is, it is to be treated as if part of the main factory. We have great difficulty in seeing how it can be said to be within the same curtilage. But it is unnecessary to decide that point, as we are satisfied that, apart from it, the canteen is an industrial hereditament.

H The appeal, therefore, succeeds, and the determination of the committee is reversed.

Appeal allowed with costs.

Solicitors: *Simmonds & James, Church, Rackham & Co.* (for the appellants); *Wrentmore & Son,* agents for *Spickett & Sons* (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Re GIFFORD (*deceased*), GIFFORD *v.* SEAMAN.

[Chancery Division (Simonds, J.), **January 26, 1944.**]

Wills—Construction—Falsa demonstratio non nocet—"My War Bonds"—Testatrix possessed of Consolidated Inscribed Stock, National Savings Certificates and Defence Bonds.

By her will the testatrix bequeathed all the residue of her estate to her trustees upon trust to pay the income derived from her War Bonds to her grandchild M.A.H. during her life and after her death for all her children. At the date of her death the testatrix did not possess any War Bonds, but she did possess some Consolidated Inscribed Stock, National Savings Certificates and Defence Bonds. Some years previous to the making of her will the testatrix purchased some National War Bonds which had been converted into Treasury Bonds and eventually into Consolidated Inscribed Stock. The National Savings Certificates and Defence Bonds had been purchased by the testatrix after the date of her will. In other parts of her will the testatrix had misdescribed certain of her property. A summons was taken out to determine whether all or any of the above securities passed under the description of War Bonds :—

Held : upon the true construction of the will the testatrix intended to bequeath the Consolidated Inscribed Stock to M.A.H., and that stock passed under the description of "War Bonds" on the principle of *falsa demonstratio non nocet.* However, that principle could not be extended to include the Savings Certificates and the Defence Bonds which the testatrix did not possess at the time of making her will, and which there was no reason to believe she contemplated possessing.

[**EDITORIAL NOTE.** Numerous securities of differing kinds have been issued in raising money for the prosecution of the war and it is necessary in bequeathing these by will that they should be accurately described. The decision here is as to what may be included in a general description of "War Bonds" which testators will no doubt often use to describe various holdings in the above securities.

As to Falsa Demonstratio non Nocet, see HALSBURY, Hailsham Edn., Vol. 34, pp. 228-236, paras. 285-290, pp. 261-263, para. 312; and for Cases, see DIGEST, Vol. 44, pp. 708-709, Nos. 5520-5532, pp. 904, 905, Nos. 7649, 7650.]

Case referred to :

*(1) *Re Price, Trumper* v. *Price,* [1932] 2 Ch. 54 ; Digest Supp. ; 101 L.J.Ch. 278 ; 147 L.T. 351.

Summons by the trustees of the testatrix's will to determine a question of construction arising thereunder. The facts are fully set out in the judgment.

J. A. Reid for the plaintiffs.

C. D. Myles for the residuary legatee.

L. M. Jopling for other interested parties.

Simonds, J. : The testatrix made her will on Jan. 27, 1938, and died on Apr. 4, 1941. She made two codicils which are immaterial for the purpose of this case. By her will, after appointing her executors, she made a number of specific bequests and devises, including devises of a number of houses which she specifically mentions. She then gives, devises and bequeaths all the residue of her estate to her trustees upon trust for payment of her funeral and testamentary expenses and debts ; and then :

> . . . upon trust to pay the income derived from my War Bonds, my shares in the Brompton, Chatham, Gillingham and Rochester Water Co. and the net income derived from my four houses [which she describes] . . . to my said grandchild Mabel Annie Hayhurst during her life and at her decease upon trust for all her children as and when they attain the age of twenty-one years or if only one child then to that child absolutely or if found desirable upon trust to sell the same and divide the net proceeds thereof between all her children absolutely . . .

and upon further trust to pay the income derived from a certain house which she describes as No. 11, Balfour Road to her grandson therein named, and then upon further trusts which are set out in the will. The question that I have to determine is what is the effect and scope of the trusts "to pay the income derived from my War Bonds."

The relevant facts are these. At the date of her will the testatrix did not possess anything which could be described as a War Bond. She was possessed of £740 12*s.* 2*d.* 4 per cent. Consolidated Inscribed Stock. That inscribed stock represented £600 5 per cent. National War Bonds, which she had purchased in 1920 and which, under the option given by the Treasury, had been, first, converted into £633 5 per cent. Treasury Bonds and, subsequently, into the £740 12*s.* 2*d.* 4 per cent. Consolidated Stock in 1928. She also possessed at the date of her death but not at the date of her will 500 National Savings Certificates and £200 3 per cent. Defence Bonds. The question that I have to determine is whether all or any of those three holdings, £740 12*s.* 2*d.* 4 per cent. Consolidated Inscribed Stock, 500 National Savings Certificates and £200 3 per cent. Defence Bonds, passed under the specific bequest.

With regard to the Inscribed Stock, if that is to pass it passes under the principle of *falsa demonstratio non nocet*, which means this, that, if upon consideration of the relevant parts of the will you come to the conclusion that the testatrix intended to pass something and can determine what that something is, then the fact that a testatrix has given it a wrong description will not prevent her will taking effect in regard to that thing which is wrongly described. Is there here any material upon which I can come to the conclusion that when the testatrix referred to "my War Bonds" she intended to refer to the £740 odd 4 per cent. Consolidated Inscribed Stock? As has been pointed out, not only in this but in other descriptions the testatrix has made mistakes in description. She has referred to "my shares in the Brompton, Chatham, Gillingham and Rochester Water Co." In fact she held not shares but stock in a company which no longer at the date of her will bore that name. She has referred to a house belonging to herself as No. 11, Balfour Road. In fact it was No. 12, Balfour Road. That is relied upon as a pointer to the fact that the testatrix was not accurate in her description of the property which she was describing and intending to pass by her will, and it is said that, just as she had misdescribed those properties, so also she was misdescribing a property which represented what could fairly be described as War Bonds.

I have felt a great deal of difficulty about these points, but on the whole I think I can follow EVE, J., in *Re Price* (1), where, finding a legacy of "my £400 5 per cent. War Loan 1929/47," and finding that the testatrix never had any War Loan but some time before the date of her will had acquired £400 National War Bonds which had been converted into Conversion Stock and Treasury Bonds, he held that those converted stocks passed under the description "War Loan." After dealing with those facts, EVE, J., said this, at p.p 56, 57:

> The conclusion seems irresistible that the testatrix regarded any investment she made in securities created for the purpose of helping the country during the war as "War Loan," and I think I should be shutting my eyes to what everybody must in his own mind regard as obvious if I were to hold that the misdescription is fatal to the gift. Even if it involves carrying the rule of *falsa demonstratio* further than it has yet been carried, I feel bound to hold that this clause operates to vest in the legatee the two sums of £284 32 per cent. Conversion Stock and £211 5 per cent. Treasury Bonds . . .

I feel some little doubt whether I am not carrying the rule even a little further than EVE, J., did, but, if I do, it is so little further that I think I should be justified in doing it. Accordingly, I must hold that the testatrix, by her reference to "my War Bonds," intended to pass the Inscribed Stock representing by reason of the conversion, the National War Bonds which she had theretofore held.

Then I come to the question of the War Savings Certificates and the Defence Bonds. Those, as I pointed out, were purchased after the date of the will, and, however much I may extend the rule of *falsa demonstratio non nocet* to property which the testatrix had at the date of her will, I see no ground for assuming that she was falsely describing property which she did not then possess and, so far as I know, she did not contemplate possessing. Accordingly, it does not appear to me that there would be any justification for extending the rule so as to cover the Savings Certificates and the Defence Bonds.

Even if I were inclined to accede to counsel's proposition that the Wills Act, 1837, s. 24, would operate in this case to include within the scope of the gift War Bonds which at the date of her death the testatrix possessed, I see no ground for using that section so as to cover property which was not War Bonds and could only pass as War Bonds if the principle of *falsa demonstratio non nocet* were applied to them.

Accordingly, I must answer the question put to me by declaring that the £740 12*s.* 2*d.* 4 per cent. Consolidated Inscribed Stock passes under the trust contained in the will "to pay the income derived from my War Bonds . . . to my said grandchild Mabel Annie Hayhurst during her life," and also by declaring that the National Savings Certificates and the £200 3 per cent. Defence Bonds do not so pass.

The costs of all parties as between solicitor and client will come out of the estate.

Declaration accordingly.

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *Wood, McLellan & Williams*, Chatham (for all parties).

[*Reported by* R. L. Ziar, Esq., *Barrister-at-Law.*]

HALSTED *v.* CLARK.

[King's Bench Division (Lawrence, Lewis and Wrottesley, JJ.), **January 13, 1944.**]

Criminal Law—Autrefois acquit—First summons incorrectly framed—Leave to amend summons refused on ground that amendment would be useless—Plea of autrefois acquit to second summons.

The respondent was charged with making a statement which was incorrect in a material particular. At the hearing the prosecution adduced evidence of the act complained of and at the close of the case for the prosecution it was submitted on behalf of the respondent that the summons disclosed no offence in law because it did not allege that the false statement had been made either knowingly or recklessly, which was material to the commission of the offence charged. The prosecution then asked for leave to amend the summons by inserting the word "recklessly." Leave was refused and the summons was dismissed on the ground that the evidence would not have supported a conviction even if the amendment had been allowed. The prosecution then laid a second and correctly drawn information against the respondent, to which the respondent entered a plea of *autrefois acquit.* He contended that he had been in peril of conviction on the first information since the magistrates had refused to amend because in their view it was useless to amend the summons having regard to the evidence given for the prosecution. The prosecution contended that the court had no power to grant leave to amend in a case where the summons as drawn disclosed no offence:—

Held: since the magistrates had refused leave to amend the first summons because the evidence of the prosecution did not prove that the respondent had committed the offence, the accused was in jeopardy at the first hearing and the plea of *autrefois acquit* was, therefore, good.

[**EDITORIAL NOTE.** The court in this case have been careful to confine their judgments to the particular facts of this case; but it would appear that where the merits of the prosecution's case are gone into and it is held that the evidence is insufficient to support a prosecution, a plea of *autrefois acquit* can be set up although some technical objection may be taken to those proceedings.

As to Plea of *Autrefois Acquit*, see HALSBURY, Hailsham Edn., Vol. 9, pp. 152-154, para. 212; and for Cases, see DIGEST, Vol. 14, pp. 336-349, Nos. 3550-3653.]

Appeal by the prosecution by way of case stated from a decision of the justices of the peace for the borough of Luton who allowed a plea of *autrefois acquit* by the respondent. The facts are fully set out in the judgment of Lawrence, J.

Valentine Holmes for the appellant.

G. O. Slade, K.C., and *A. L. Gordon* for the respondent.

Lawrence, J.: An information was issued against the respondent for contravening the provisions of the Defence (General) Regulations, 1939, reg. 82 (2), in that he, in furnishing information for the purposes of the Control of Rubber Tyres (No. 4) Order, 1942, made a statement which was false in a material particular. The information which we are now considering included the allegation that the statement was made recklessly. On the hearing of that information the respondent entered a plea of *autrefois acquit,* and it was proved that the appellant had previously preferred an information under the same regulation, but the information had omitted the word "recklessly." Apparently the summons also issued in pursuance of that information had omitted the word "recklessly."

Evidence was called by the appellant on the hearing of this first information and summons, and, at the close of the case for the prosecution, counsel for the respondent submitted that there was no case to answer, as the summons disclosed no offence in law, because it did not allege that the false statement had A been made knowingly or recklessly. Counsel for the respondent proceeded, according to the case, to submit that, if and when an application were made by the prosecution for leave to amend the summons by the insertion of the word "recklessly," such application should be refused upon the ground that no evidence of recklessness had been adduced by the prosecution, or, alternatively, that any evidence so adduced was wholly insufficient to sustain a charge of B recklessness in the making of the statement complained of and, accordingly, that in either case no useful purpose would be served by allowing the amendment.

After that submission by counsel for the respondent, counsel for the prosecution then asked for leave to amend the summons by the insertion of the word "recklessly," whereupon counsel for the respondent renewed his second submission which I have read out, and upon that the justices refused leave to amend the summons and accordingly dismissed it.

C The appellant then preferred the present information and upon the hearing of this information the appellant contended—in spite of the fact that he had applied for leave to amend the original information and summons—that there was no power to amend that summons.

The case proceeds to state that it was argued on behalf of the respondent that the respondent had been in peril of conviction on the earlier information since the amendment might have been allowed and counsel assumed that it had D in fact been refused upon the ground that the prosecution had failed to discharge the burden of proving recklessness on the part of the respondent in the making of the statement complained of. The opinion of the justices was that the contention of the respondent, which I have just read, was right and they held that the plea of *autrefois acquit* was a good plea and dismissed the information.

We have heard argument upon the question, which is one of general importance, E as to how far there would have been a right to amend the information and the summons in the circumstances of this case, but I do not think that it is necessary for me to express any opinion upon that question of general importance. Before the magistrates on the hearing of the first information there was no issue between the parties as to the right of the magistrates to amend the summons, and it is not contended before us that the magistrates had not the power to give leave for the issue of a new summons. In my opinion, upon the facts stated in this F case, it is clear that the magistrates really refused leave to amend the summons on the ground which had been argued before them, namely, that it was useless to amend the summons having regard to the evidence which had been given for the prosecution which did not satisfy them that any offence had been committed. If that is the true view of the magistrates' decision on the first information, it follows that the respondent had been in peril, because the magistrates might have taken the opposite view and have held that there was evidence G that the respondent had recklessly made a false statement in connection with these rubber tyres.

I take that view on the words of this particular case stated and I hold that para. 7 of the case stated adopts the contention of the respondent which is set out in para. 6. I am, therefore, of opinion that the plea of *autrefois acquit* was a good plea and that this appeal ought to be dismissed.

H LEWIS, J.: I agree and, as LAWRENCE, J., has done, I confine my remarks to the special case with which we have to deal and the facts which are disclosed in it.

I am satisfied that the justices had refused the amendment of the earlier information, for which application had been made, on the ground that it would have served no useful purpose to have allowed the amendment because no evidence had been adduced before them to prove the charge of recklessly giving information which was false.

WROTTESLEY, J.: I agree with what the other members of the court have said. It appears to me that the reasons for this decision are fortified by looking carefully at the case stated which clearly shows what took place at the hearing. There was, it is true, an objection to the amendment. That was not on the ground that the justices had no power to amend, but only on the ground that it would be a waste of time, because there was no evidence to justify such an amendment. Therefore, on the narrow grounds stated in this case, I think that the plea of *autrefois acquit* in this case was a good plea.

Appeal dismissed with costs. A

Solicitors: *Treasury Solicitor* (for the appellant); *Gibson & Weldon*, agents for *Neve, Sons & Co.*, Luton (for the respondent).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

B

CONCENTRATED FOODS, LTD. *v.* CHAMP.

[King's Bench Division (Lawrence, Lewis and Wrottesley, JJ.), **January 17, 1944.**]

Food and Drugs—Label calculated to mislead—Prosecution of manufacturer—Limitation of time—Subsequent offence—Material date of offence—Label submitted to public analyst—" Reasonable diligence "—Food and Drugs Act, 1938 (*c.* 56), *ss.* 6 (1), 79, 80, 83 (3). C

The appellants, the manufacturers and suppliers of an article of food described as "orangette," were charged under the Food and Drugs Act, 1938, with selling this orangette with a label calculated to mislead as to its nature, substance or quality. The act upon which the prosecution was D based was a retail sale by a grocer on Sept 4, 1942. The bottle then sold had been supplied by the appellants on May 27, 1941. The prosecution was brought against the appellants as wholesalers under the provisions of sect. 83 (3) of the Act of 1938. The appellants had taken the opinion of a public analyst before using the label, but at the hearing before the magistrates another public analyst gave it as his opinion that the label E was objectionable. The appellants had already been convicted of a number of similar offences, all of which had taken place after the date on which the orangette was supplied to the retailer in the present case. On convicting the appellants in the present case, the magistrates had imposed a fine greater than that for a first offence. It was contended on behalf of the appellants (i) that, since they had taken the opinion of a public analyst before using the label, they had discharged the onus on them, under the F Food and Drugs Act, 1938, s. 6 (1), of proving that they could not with reasonable diligence have ascertained that the label was calculated to mislead; (ii) that the prosecution was out of time under sect. 80; (iii) that it was illegal for the magistrates to impose a fine as for a second or subsequent offence:—

Held: (i) there was ample evidence for the magistrates to find that the appellants had not discharged the onus resting on them under sect. 6 (1). G

(ii) since the prosecution was brought against the appellants under sect. 83 (3) of the Act, the date of the offence with which they were charged was the date of the resale by the retailer and not the date on which the appellants supplied the retailer, and the prosecution was, therefore, not out of time.

(iii) on the true construction of sects. 79 and 83, the appellants were H rightly convicted as for a second or subsequent offence.

[**EDITORIAL NOTE**. This case contains three important and practical points. The first is whether the opinion of a public analyst is in such a case any safeguard to the manufacturer and the reasons why this is not so are very clearly given in the judgment of Wrottesley, J. The second is a question of limitation of actions. The only question here is the date to start from and this is decided to be that of the sale by retail. The third is also concerned with the choice of a date and is whether the offence here was the first offence or subsequent to the other convictions.

As to Misleading Labels, see HALSBURY, Hailsham Edn., Vol. 15, p. 161

para. 263; and FOR CASES, see DIGEST, Vol. 25, pp. 84, 85, Nos. 122-131.]

Cases referred to:

(1) *R.* v. *South Shields Licensing Justices*, [1911] 2 K.B. 1; 30 Digest 82, *637*; 80 L.J.K.B. 809; 105 L.T. 41.

*(2) *Collins Arden Products, Ltd.* v. *Barking Corpn.*, [1943] 1 K.B. 419; [1943] 2 All E.R. 249.

APPEAL by way of case stated from the decision of the magistrates for the A county of Berkshire. The facts are fully stated in the judgment of LAWRENCE, J.

W. Harvey Moore for the appellants.

R. C. Hutton for the respondent.

LAWRENCE, J.: On a prosecution under the Food and Drugs Act, 1938, s. 6 (1), for selling an alleged article of food described as orangette with a label calculated to mislead, the magistrates convicted the appellants and imposed B a fine of £35 with 15 guineas costs. This fine was higher than that provided for a first offence and was for a subsequent offence.

The offence was committed by a grocer, who retailed a bottle of this orangette on Sept. 4, 1942. This bottle had been supplied by the appellants on May 27, 1941. By virtue of the Food and Drugs Act, 1938, s. 83 (3), the prosecution was brought not against the retailer, but against the appellants, who were the original manufacturers or suppliers of this orangette and this label.

C In those circumstances three points have been argued before us. The first point is whether the magistrates could reasonably find, as they have found, that the appellants had not proved that they:

> . . . did not know, and could not with reasonable diligence have ascertained, that the label was of such a character as aforesaid [that is to say, calculated to mislead].

The facts were that the appellants had submitted this label to Mr. Edwards, D the public analyst for the city of Westminster and the borough of Kensington, who approved the label when it was submitted to him by the appellants before use, and said that, in his opinion, it was unobjectionable. At the hearing before the magistrates Mr. Edwards was one of the witnesses called. Another public analyst, Mr. MacLachlan, was also called, and he gave it as his opinion that the label was objectionable on a variety of grounds.

The contention put before us by the appellants is that, as the appellants had E taken the opinion of Mr. Edwards, a public analyst, before they used the label, it was not open to the magistrates to find that they had not discharged the onus which rests upon them of showing, under sect. 6, that they did not know, and could not with reasonable diligence have ascertained, that the label was of a character calculated to mislead.

What the magistrates have found is set out in paras. 5 and 6. They have F set out in para. 5 the evidence that was given before them. In para. 5 (4), after referring to some correspondence to which I need not further refer, they said:

> No person from the appellant company was called to give evidence before us . . . We preferred the evidence of the said MacLachlan to that of the said Edwards, where such evidence conflicted.

In para. 5 (4) (*d*), they said:

> G Notwithstanding the opinions expressed by the said Edwards and the letters C1 C2 and C3 we came to the conclusion from hearing the evidence of all the witnesses and the actual label which was produced that anyone having knowledge of the contents of the bottle in question could have no doubt that the label was calculated to mislead. We found that the said "Orangette" was not a concentrated cordial essence and that the label thereon was calculated to mislead as to the nature, substance and quality thereof, and that this contravention was due to the act or default of the appellant company H and that the appellants had not proved that they did not know and could not with reasonable diligence have ascertained that the label was calculated to mislead.

It is evident, therefore, that the magistrates addressed their minds to the two questions of fact which were before them. First of all, was the label calculated to mislead? They held upon the evidence before them, after considering that evidence, and preferring the evidence of Mr. MacLachlan to that of Mr. Edwards, that it was calculated to mislead. Upon the other question, upon which the onus rested upon the appellants of showing that they did not know and could not with reasonable diligence have ascertained that the label was of that character, they came to the conclusion that the appellants had not discharged the onus. They were not satisfied in fact that to obtain the evidence of one public analyst was conclusive that they did not know and could not with reasonable diligence have known. They point out that no one else from the appellant company was called whom, as counsel for the respondent has said, they might have called. The magistrates thought it was very material for them to have heard the evidence of some officer of the appellant company who could have told them what they knew and what steps they took to ascertain whether the label was of a misleading character or not. They preferred to rest solely upon the evidence of Mr. Edwards. The magistrates had the advantage of seeing Mr. Edwards in the box, and they did not accept his evidence. It appears to me, therefore, that there was ample evidence upon which the magistrates could find as a fact that the appellants had not discharged the onus which rested upon them under sect. 6.

The second question is whether the prosecution was out of time. It is argued on behalf of the appellants that there is a statutory limitation either of six months or of twelve months according to whether the offence is really the offence of giving a false warranty or whether it is not. On the other hand, counsel for the respondent contends that the true limitation which is laid down by the statute is a limitation of 28 days, but the same point appears to me to arise whatever the limitation is. The retail sale having taken place on Sept. 4, 1942, and the appellants having supplied the orangette with its label on May 27, 1941, it is clear that, if the true date to be considered is the date on which the appellants supplied the label, they are out of time on any view of the limitation.

The matter really turns upon sect. 83 (3) of the Act of 1938, under which it is open to the prosecution to prosecute not the retailer but his supplier, if the complaint, in their opinion, is due to the act or default of the supplier. The words of sect. 83 (3) are as follows:

> Where it appears to the authority concerned that an offence has been committed in respect of which proceedings might be taken under this Act against some person and the authority are reasonably satisfied that the offence of which complaint is made was due to an act or default of some other person and that the first-mentioned person could establish a defence under subsect. (1) of this section, they may cause proceedings to be taken against that other person without first causing proceedings to be taken against the first-mentioned person. In any such proceedings the defendant may be charged with and, on proof that the contravention was due to his act or default, be convicted of, the offence with which the first-mentioned person might have been charged.

It is common ground here that the first-mentioned person was the retailer and the other person is represented by the appellants; and the magistrates have found that the offence was due to the act or default of the appellants and they have convicted the appellants. In those circumstances, according to the very words of the last part of that subsection:

> . . . the defendant [that is the appellants] may be charged with and, on proof that the contravention was due to his act or default, be convicted of, the offence with which the first-mentioned person might have been charged.

The offence with which the first-mentioned person might have been charged was committed on Sept. 4, 1942, and the prosecution was undoubtedly brought within 28 days of that offence. Therefore, it appears to me that the very words of that subsection make it clear that the offence with which the appellants were charged was an offence which was committed on Sept. 4, 1942, and was not the offence which it is perfectly true they actually committed on May 27, 1941. So much for the second point.

The third point is that it was improper and illegal to impose a fine of more than £20 by reason of the fact that the appellants had been convicted of a number of offences under the Act, all of which, however, took place after May 27, 1941; and it is said, therefore, that this offence with which the appellants are now charged cannot be a subsequent offence within the meaning of sect. 79 of the Act of 1938, which is in these terms:

> A person guilty of an offence under this Act shall, unless a special penalty for that offence is provided by this Act, be liable in the case of a first offence, to a fine not exceeding £20 and, in the case of a subsequent offence, to a fine not exceeding £100 or to imprisonment for a term not exceeding three months, or to both such a fine and such imprisonment.

This point has already apparently been raised and disposed of by a divisional court. It is true that the case is not reported in the ordinary reports as yet, but there is a note of the decision in JUSTICE OF THE PEACE AND LOCAL GOVERNMENT REVIEW, Vol. CVII, p. 523, and the very point which we have to consider there appears to have been decided. It is contained in this short paragraph :

> A second interesting point arising from the same section was raised in the case heard on Oct. 15—namely, that the conviction had been improperly treated as a second or A subsequent offence and that a fine of £50 had been imposed. The appellant company had sold the milk-powder in September, 1941. It was convicted in a Middlesex court in December, 1941. The Dorset conviction, now appealed against, arose from a sale made by a retailer in June, 1942. The court held that June, 1942, being the date of the offence with which the retailer might have been charged, was the material date of the offence by the manufacturers and that the appellants had been properly convicted of a second or subsequent offence.

B That case, if it is properly reported, would be binding upon us. In any event, in my opinion, the words of sect. 83 (3) are clear and the offence of which the appellants have been found guilty was the offence with which the retailer might have been charged. That was on Sept. 4, 1942, and that was at a time after the various convictions of the appellants which are referred to in the case.

We were referred to a case under the Licensing Act, *R.* v. *South Shields Licensing Justices* (1), but that case is, in my view, clearly distinguishable from C the present because the Licensing Act contains no such provision as sect. 83, and the offence with which the person was there charged was not an offence which was attributed in the way in which sect. 83 attributes the offence of the retailer to the supplier under the Food and Drugs Act, 1938.

I am, therefore, of opinion that this was, on the true construction of the Act of 1938, ss. 79 and 83, a subsequent offence and that the amount of the fine was competent to the justices.

D For all these reasons I am of opinion that the appeal should be dismissed.

LEWIS, J. : I agree with the conclusions and the reasons of my Lord in the judgment he has just delivered. I should like, however, to say two things. One is, it is frequently forgotten that, in cases of appeal by way of case stated this court cannot criticise and reverse a finding of fact of the magistrates. It only comes to this court upon a question of law and where the justices have E directed their minds to the proper question—as I am satisfied they did in this case—and there is evidence upon which they could find the facts which they have, this court has no power to reverse their decision except, as I have said, if they have drawn a wrong conclusion in law on the facts found.

The other observation I would make is with regard to the case which counsel for the appellants cited to us and upon which he placed some reliance, that is, F the case of *Collins Arden Products, Ltd.* v. *Barking Corpn.* (2). That was a decision of a divisional court. If that case is looked at, it is not surprising to find, if I may respectfully say so, that that court reversed the decision of the magistrates on the point of law. The headnote of that case reads as follows :

> Where a person is charged under the Food and Drugs Act, 1938, s. 3 (1), with selling "to the prejudice of the purchaser" any food which is not of the nature, substance or quality of the food demanded, it is not sufficient, to justify a conviction, that an expert G witness, such as a public analyst, should express the opinion that the article in question should contain a certain ingredient. Evidence must be forthcoming that when a member of the general public asks for the food he means, and means only, an article containing an ingredient which is absent in the food in respect of which the charge is brought.

I cannot conceive of anybody quarrelling with that decision which was a decision under the Food and Drugs Act, 1938, s. 3 (1), which reads :

> H If a person sells to the prejudice of the purchaser any food or drug which is not of the nature, or not of the substance, or not of the quality, of the food or drug demanded by the purchaser, he shall . . . be guilty of an offence.

It is true that, in that case there were two charges brought, one under sect. 3 (1), to which I have already alluded, and there was also a charge under sect. 6 (1), the section under which this case with which we are dealing was brought. If the report of that case is read, it will be observed that the magistrates never dealt with the charge under sect. 6 at all, since the report states as follows, at p. 420 :

> A majority of the justices were of opinion that "the preparation was a palatable and harmless beverage, but that in the absence of any ingredient of a tonic, invigorating, restorative, energizing or warming quality, the term 'cordial' was a misdescription."

The court then pointed out that it does not follow at all because the evidence was of that description, that that is what, in that particular case, the purchaser demanded. That was all, as I read it, that that case decided. They never dealt properly, or, indeed, at all, with the charge under sect. 6, and HALLETT, J., in that case, said, at p. 423, [1943] 2 All E.R. at p. 251: A

> I agree. If it appeared from the case that the justices had directed their minds to the right question, and, so directing their minds, had found facts which justified their determination, I should not have thought it right that this court should interfere, but, having perused the case, I am not satisfied on either of those points. Under sect. 6 (1), a person commits an offence who sells food with a label which is calculated to mislead "unless he proves that he did not know, and could not with reasonable diligence have ascertained that the label was of such a character as aforesaid"; that B is to say, that it was misleading. It is plain that the appellants relied on the defence that, even if they had sold this preparation with a misleading label, they did not know and could not with reasonable diligence have ascertained, that the label was misleading. They adduced evidence of a formidable character in support of that defence, yet one finds that the justices never addressed their minds to that defence. There is no determination on it and no reference to it in that case.

That was why, and I again with respect say, it is not surprising to find the C divisional court in that case, both under sect. 3 and under sect. 6, came to the conclusion which they did. In my view, that case has no application at all to the present case. I agree with the judgment delivered by LAWRENCE, J.

WROTTESLEY, J.: I agree with LAWRENCE and LEWIS, JJ. I have only this to add. I notice that considerable argument was based on some evidence which, contrary to the usual practice, found its way into this case stated—the evidence D of a public analyst who is said to have been consulted by the limited company, the appellants here, and who is said to have approved the label and to have told the company that the contents of that label were unobjectionable. The argument was, therefore, this: What, then, could the company do? That is, it was argued, the "reasonable diligence" referred to in sect. 6. That evidence, having regard to the nature of this label which used words with which we are all familiar, seems to be both irrelevant and inadmissible, anyhow in examination- E in-chief. For that question as to whether the label was objectionable meant, of course, whether it offended against the Act. That was a matter not for any expert witness, but for the court. This kind of argument is, in my judgment, founded on a misconception of the true scope and function of expert witnesses. Experts in these cases are, of course, chemists. They are there to inform the court of the composition of the subject-matter of the charge. In addition they are, like all expert witnesses, entitled, if asked, to give their opinion based on F their examination of the subject-matter, provided it is within the scope of their special knowledge. The question whether a label is calculated to mislead means calculated to mislead the public, not the qualified chemist, and so it is a question not for qualified chemists, but for the court. Unfortunately, of course, in these cases we find the manufacturers are very prone to use phrases such as "concentrate," "extract," "essence," "cordial"—phrases which may very well have G a special meaning to the chemist. It is not surprising, therefore, that a chemist should tell the court that an article is not his idea of an essence or an extract. But that is not the test. The test is—what does the ordinary man understand by the language? Was he misled? Not whether the chemist was misled, but whether the ordinary man was misled. That was pointed out in *Collins Arden Products, Ltd.* v. *Barking Corpn.* (2), by STABLE, J., who used the phrase "the ordinary person." Nor is such an inquiry (that is to say, of the analyst) H in a case of this kind, primarily, in my judgment at any rate, the kind of "reasonable diligence" referred to in sect. 6. It savours too much of an inquiry—how close can I sail to the wind? That is not the sort of diligence that Parliament had in mind in sect. 6 or in the corresponding sect. 83.

Different considerations would apply if the subject-matter were a drug or some chemical compound the nature of which would not be known to the ordinary person in the street. If, for instance, this firm had chosen to put up something which they called first class phosphoric acid, it might have been a reasonable inquiry of a chemist as to whether this stuff could be called first class phosphoric acid. That is not the case before these justices. I think in this case these justices took the true meaning of this proviso, that the seller "did not know, and could not with reasonable diligence have ascertained, that the label was of such a character as aforesaid," and I am not surprised at their finding in para. 5 (4) (*d*), which is :

> . . . that anyone having knowledge of the contents of the bottle in question could have had no doubt that the label was calculated to mislead.

That finding of fact disposes of all the defences in this case. I have nothing further to add.

Appeal dismissed with costs.

Solicitors : *S. A. Bailey & Co.* (for the appellants) ; *Peacock & Goddard,* agents for *H. J. C. Neobard,* Reading (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

MILLER *v.* THE OWNERS OF THE SHIP OTTILIE.

[COURT OF APPEAL (Scott, Luxmoore and du Parcq, L.JJ.), **December 9, 1943.**]

Workmen's Compensation—Employments excluded by the Act—Fishing crews remunerated mainly by shares in profits—"Mainly"—Workmen's Compensation Act, 1925 (*c.* 84), *s.* 35 (2).

The respondent was employed by the appellants as a cook on a fishing vessel under a service agreement whereby the respondent was paid a fixed wage and poundage, i.e. a share of the profits earned by the vessel out of its catch of fish. When the respondent entered into the agreement he expected to earn more in poundage than by the fixed wage and on the material voyage his fixed wage was £4 6*s.* 9*d.* and his poundage amounted to £7 9*s.* During the voyage the respondent was injured by an accident which occurred on the vessel and he made an application under the Workmen's Compensation Act, 1925, for compensation. The appellants contended that the respondent was remunerated mainly by a share in the profits of the working of the vessel within the meaning of s. 35 (2) of the Act, and that, therefore, the Act had no application to the respondent. On behalf of the respondent it was argued (i) that the main remuneration was the fixed rate of wage and not a fluctuating amount dependent upon uncertain factors ; and (ii) that one voyage was not a fair criterion of what might be earned as poundage on the average :—

HELD : (i) upon the true construction of sect. 35 (2) a workman is remunerated mainly by a share in the profits or the net earnings where this exceeds the fixed rate of wage.

(ii) upon the facts of the case, the workman's poundage for the voyage was a fair average of the estimated poundage.

[**EDITORIAL NOTE.** This case turns upon the meaning to be given to the word "mainly." Where the wages consisted of a sum certain as wages and a fluctuating amount being a percentage on the profits which in fact was larger than the sum certain, the county court judge thought the main remuneration was the sum certain. The Court of Appeal, however, have decided that "mainly" refers to the amount and not the nature of the remuneration and that the workman was mainly remunerated by a percentage of the profits.

AS TO EMPLOYMENTS EXCLUDED BY THE ACT, see HALSBURY, Hailsham Edn., Vol. 34, pp. 806-810, para. 1144 ; and FOR CASES, see DIGEST, Vol. 34, pp. 242-244, Nos. 2068-2078.]

Case referred to :—

(1) *Costello* v. *Pigeon* (*Owners*), [1913] A.C. 407 ; 34 Digest 243, *2069* ; *sub nom Costello* v. *Kelsall Brothers,* 82 L.J.K.B. 873 ; 108 L.T. 929.

APPEAL by the employers from a decision of His Honour JUDGE LANGMAN sitting at Grimsby County Court as arbitrator in a claim under the Workmen's Compensation Act, 1925. The facts are fully stated in the judgment of SCOTT, L.J.

F. W. Beney, K.C. and *Gilbert Dare* for the appellants.

C. L. Henderson, K.C. for the respondent workman.

Scott, L.J.: The Workmen's Compensation Act, 1925, s. 35 (2) provides as follows:

> This Act shall not apply to such members of the crew of a fishing vessel as are remunerated wholly or mainly by shares in the profits or the gross earnings of the working of such vessel.

Those are the only words that are material to this case.

The respondent was a cook aged 60 on board a Grimsby trawler in Jan., 1943, under a written agreement until June, 1943. His earnings on the voyage amounted to these figures: a basic wage of £2 3*s*. 9*d*., risk money £1 5*s*., 18*s*. in the form of food, and £7 9*s*. under the head of what is called "poundage," making a total of between £11 and £12. The poundage is a share in the profits earned by the vessel out of its catch of fish. The form it took in the agreement was "2*d*. in the £ payable to the cook out of the profits." The phrase contained in the schedule to the agreement is "2*d*.", "£," "net," which I think can be without difficulty translated as "poundage." The county court judge held that, in spite of the proportion of £7 9*s*. to £11 odd, the man was not remunerated "mainly" by shares in the profits or gross earnings of the working of such vessel.

In my view he arrived at a wrong conclusion. The agreement was a common form, printed agreement, a large document the form of which has been in use for a very long time in the fishing trade of this country and which has been the subject of consideration in these courts and the House of Lords. It provided that the members of the crew, including the "skipper" who signed it, engaged up to the end of June, 1943; they agreed to conduct themselves as good members of the crew, in consideration of which services the said skipper, acting for the owner, agreed:

> . . . to pay the said crew as wages and remuneration the sums and/or the share in the profits against their names respectively expressed. . . .

the sums consisting in a stated rate of wages and food money and risk money, as it is called, all naturally called wages, and in addition the share of the profits. The agreement must be read for the purpose of this case with the word "or" deleted, so that it should read "the sums and the share in the profits," etc. It was provided by another clause that the crew should have 2⅝th shares out of 14 parts or shares, the other 11⅜ths going to the owner. It looks, when one reads that clause, as if the poundage was to come out of the crew's 2⅝ths share, but that was not in fact the agreed basis of payment. The poundage was paid direct by the owner out of his 11⅜ths shares, the 2⅝ths shares there mentioned going in their entirety to the skipper and the second hand, 1⅝ths to the skipper and 1 to the second hand.

The county court judge came to the conclusion that the word "mainly" in the subsection must be interpreted not with regard to the ratio between that source of remuneration and the wages source of remuneration, but with regard to other considerations inapplicable, as it seems to me, to a section relating essentially to the *quantum* and form of remuneration. I do not think it necessary to discuss the details of his view. It is sufficient to say that, in my view, sect. 35 (2) is concerned, at any rate primarily, with the ratio between weekly wages of a fixed type, whatever their name, and the uncertain remuneration obtainable by the member of a crew as a kind of co-partner in the adventure out of the net earnings of the adventure. Judged by that criterion, £7 9*s*. out of something less than £12 is obviously the main part of the man's total remuneration, and, if the figures I have given are to be treated as the fair index of the results of his employment which had to be considered by the county court judge for the purpose of subsect. (2), that is an end of the case.

It has been argued that the voyage in question could not be treated as a fair criterion and that the county court judge was justified in disregarding the one voyage; or at any rate that this court ought to disregard the one voyage and look for some other measure. I think the important consideration to bear in mind is that the agreement, which defines the total remuneration which each member of the crew is to have, and has to be signed on his joining the adventure, must necessarily look forward, since an accident might occur on the very first day of the voyage, entitling a member of the crew, who was within the Workmen's Compensation Act, to put forward a claim or, on the other hand, entitling the employers to say: This man is not within the Act at all because of sect. 35 (2). The sources of information available to the parties or to the arbitrator, as to what the nature and amount of the remuneration really was which was contemplated in the agreement, inevitably involved consideration of the future, though possibly also of the past, in regard to the man's own past service with the employing owners or perhaps with other owners. In order to get any common sense interpretation and application of the agreement it must be possible somehow to get at an estimate of what the real ratio is between the man's profit earnings and his wages, however difficult the accidental facts obtaining at the moment of the accident may make it.

In the respondent's particulars, in answer to the question about his earnings, he gave figures of his earnings in the usual form. That answer was not, I think, challenged in the court below; it certainly was not challenged in evidence and it seems to have gone forward as a reasonable measure of the ratio. In my view, that course, in the circumstances, was a reasonable one, particularly in view of the evidence given by the respondent himself in the court below, and of the fact that he was the only witness called. He said that he had been in this form of life at sea for many years and that he had his 2*d.* in the £ in addition to his wages from 1901 forwards; that during the last war poundage went up, that in the inter-war period the poundage was less than wages, but that in this war "it went up beyond wages"; for "poundage depends upon catch." On that evidence it was obviously open to the county court judge, if he interpreted the subsection as I interpret it, to hold that the man did not come within the Act at all, as the employers submitted.

As it was not sought in this court to have the case sent back to the county court judge to investigate the facts any further, it is sufficient for us to say that there was no evidence to that effect, that there was no evidence to contradict it, and that on that we hold that the man's remuneration out of profits was greater than his remuneration by way of weekly fixed wages.

That, I think, is sufficient to dispose of the appeal; but fortunately we are in a postion to get quite definite guidance in the matter from the House of Lords itself. In *Costello* v. *Owners of the Ship Pigeon* (1), there was under consideration a section in the Workmen's Compensation Act, 1906, which contained a provision similar to sect. 35 (2) of the Act of 1925, with the exception that the condition of being "wholly or mainly so remunerated" was not in that Act; but the agreement was the same agreement, and although the House was not unanimous, its conclusion was that the poundage there in question was a remuneration out of profits by a share in the profits. LORD PARKER OF WADDINGTON at p. 415 said:—

> There appear to me to be two substantial questions, the first of which is this: Was Costello, under the contract of service on which he founds his claim to compensation, entitled to a share of the profits? That appears to me to be a question simply and solely of construction, and having regard to the express words of the contract it appears to me that such construction is reasonably clear. He is to have, according to the words of the contract, for wages and remuneration the sum and share of profits specified against his name in the schedule. That contemplates that he will be entitled to a share of the profits, and that alone would I think in equity give him a specific right to the profits themselves as distinguished from a claim for further remuneration measured by those profits.

The agreement being the same, that decision is binding on us, and leaves the meaning of the word "mainly" as the only new question for us to decide. I cannot myself see any ambiguity in the word nor have I any doubt as to its meaning. The subsection lays down a criterion to be measured quantitatively in terms of money, and in my view as the major part of the man's earnings was his share of the profits, he was mainly remunerated by a share of the profits.

That is this case, and the appeal will be allowed with costs, here and below.

LUXMOORE, L.J.: I agree that this appeal should be allowed. The case is said to raise a novel point, namely, what is the meaning of the phrase "remunerated mainly by shares in the profits" in the Workmen's Compensation Act, 1925, s. 35 (2).

The appellants, who were the employers of the respondent workman, owned a fishing vessel, and the respondent was employed on that vessel. I need not read the section in full because it has already been referred to by SCOTT, L.J. In the court below the case was argued on the basis that the respondent's average weekly earnings as stated in the respondent's answer arose from four different sources, a basic wage, a sum for food, risk money and poundage, which is clearly a share in the profits of the business. No application was made to amend that answer either in the court below or in this court, and it is our duty to deal with the case on the same basis.

If these figures be taken, when looking at sect. 35, what is the main part of the respondent's remuneration ? The poundage on the figures given works out at roughly three-fifths of the whole wages. I should have thought it was perfectly clear that in the section the word " mainly " is used in its ordinary meaning. I find in the OXFORD ENGLISH DICTIONARY that " mainly " is defined as meaning : " for the most part ; chiefly ; principally." The county court judge, however, has put a meaning on the word " mainly " which I fail to appreciate and for which I am unable to find any foundation. He says :

> The word " mainly " is to be interpreted in its general sense and not as applying exclusively to the monetary aspect of pay as disclosed at the end of the employment. The main remuneration is that on which a worker knows he can depend from week to week and not the fluctuating addition which is dependent on many uncertain factors.

I do not know what the judge means by " general sense," which seems to be : " principally " or " for the larger part." It seems to me that the test which he is applying to the meaning of those words is one of stability. He has, so far as I can see, no possible foundation on which to base it. I think, taking the ordinary meaning of the words used, if you say : How is a man remunerated, what is his main remuneration ? and you tell the person whom you ask that question how the man's wage is made up and that three-fifths of it come from a share in the profits of the business, the only answer can be : He is mainly remunerated by his share in the profits.

I think the case is without much difficulty, and I have no doubt, for these reasons, that the appeal should be allowed.

DU PARCQ, L.J. : I agree. The question is whether the respondent was remunerated mainly by a share in the profits of the working of the vessel in which he was employed. In my opinion, that question must be answered by ascertaining the facts which were in the contemplation of the parties when the contract of service was entered into. The respondent in his evidence said : " Before this war poundage was less than wages. In this war it went up beyond wages." In addition to that, we have the figures of the actual earnings, the basic wage and other matters, and the poundage for the trip on which the respondent served ; and I think the only possible conclusion upon the evidence was that the respondent's remuneration did consist mainly of a share in the profits. Counsel for the respondent conceded very frankly that the applicant meant by the passage in his evidence which I have read that, " taking it by and large," since the war the respondent expected to get more by way of poundage or a share of profits than he would get in wages. I think, that being so, the only conclusion possible is that he is excluded from the Act by this submission.

I agree with what has been said about the judgment of the county court judge, and I think it is true to say that, in so far as this subsection deals with persons remunerated mainly by shares in profits, it would cease to have any effect at all if the judge's view were adopted. He says this :

> The question what is the main remuneration can only properly be determined by considering all the incidents and chances of the trip and of the employment.

Then he says :—

> The uncontradicted evidence of the applicant shows that when he leaves port after signing the agreement he is not certain whether any poundage will be payable to him at the end of the trip.

Then the county court judge suggests the possibilities of a breakdown in machinery, or a storm at sea, and so on. Then he adds :

> The only certain remuneration is the fixed wage and risk money, and upon that he must mainly depend for the maintenance of himself and family.

To take that view is, I think, to rewrite the subsection and make it read in some such way as this : This Act shall not apply to members of the crew of a fishing vessel whose remuneration in so far as it is certain consists mainly of shares in the profits or the gross earnings of the working of such vessel. That, I think, is not stating the matter unfairly to the county court judge. If one did rewrite the subsection in that form it would at once appear, as it seems to me, that there never could be a case in which remuneration, in so far as it was certain, consisted "mainly" of something which always must depend on a variety of chances. No fisherman can ever be sure that a share in the profits over a period will much exceed, or exceed at all, the basic wage since it is always possible that by a series of mischances he may be deprived of what he expects, and has every reason to expect, when the agreement is entered into.

I agree in the order proposed.

Appeal allowed with costs.

Solicitors: *Smith & Hudson*, agents for *Walter West*, Grimsby (for the employers); *Mott & Parkes*, agents for *H. K. & H. S. Bloomer*, Grimsby (for the workman).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Re JOHN PASCOE, *Ex parte* THE TRUSTEE IN BANKRUPTCY AND NORTHUMBERLAND COUNTY COUNCIL.

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and Luxmoore L.JJ.), **January 31, February 1, 1944.**]

Bankruptcy—After-acquired property—Vesting in trustee—Order at criminal trial that bankrupt's after-acquired property be paid towards costs of prosecution—Claim after order by trustee to recover after-acquired property although he had not intervened—Costs in Criminal Cases Act, 1908 (c. 15), *s.* 6 (5)—*Bankruptcy Act*, 1914 (*c.* 59), *s.* 47.

J.P. was adjudicated bankrupt on Aug. 26, 1920, and at no time obtained his discharge. In Mar., 1942, J.P. handed to B. £2,000 with instructions that, if anything was to happen to him, J.P., B. was to pay the money to J.P.'s wife. In Apr., 1942, B. handed what was remaining of the £2,000, namely, £1,981, to the police. On Aug. 26, 1942, J.P. was convicted of certain criminal offences at the Northumberland County Assizes, and the trial judge ordered that £1,581 out of the £1,981 should be paid to the appellant council towards the costs of the prosecution. On Aug. 31, 1942, and before the money had been paid over to the appellant council, the trustee appointed in the 1920 bankruptcy proceedings claimed the money on behalf of the general body of creditors. The money was, however, paid to the appellant council. On Nov. 24, 1942, a second bankruptcy petition was presented against J.P. and the trustee in the second bankruptcy asked the court to order payment to him of the £1,581 on the ground that the sum was vested in him by virtue of the Bankruptcy Act, 1914, as amended by the Bankruptcy (Amendment) Act, 1926, s. 3. On behalf of the appellant council, it was contended that, whether or not the property in this money was the property of the bankrupt, the trial judge had jurisdiction under the Costs in Criminal Cases Act, 1908, to order that the £1,581 should be handed over to them in part satisfaction of the costs which they had been directed to pay and that such order was valid against the whole world. It was further contended that as between the bankrupt and the trustee after-acquired property belongs to the bankrupt until the trustee claims it:—

HELD: (i) the Costs in Criminal Cases Act, 1908, s. 6 (5) does not allow an order to be made for the payment of costs out of money other than that belonging to the convict.

(ii) after-acquired property of a bankrupt vests in the trustee in bankruptcy under the Bankruptcy Act, 1914, s. 47.

Decision of the Divisional Court ([1944] 1 All E.R. 70) *affirmed.*

[**EDITORIAL NOTE.** It has been suggested that the after-acquired property of the bankrupt does not vest in the trustee until he claims it. This is shown to be a wrong statement. The property vests in the trustee under the Bankruptcy Act, 1914, but, as against third parties with whom the bankrupt had entered into transactions, these transactions are valid unless the trustee has intervened.

AS TO PROPERTY ACQUIRED BY BANKRUPT BEFORE DISCHARGE, see HALSBURY, Hailsham Edn., Vol. 2, pp. 219-222, paras. 290, 291; and FOR CASES, see DIGEST, Vol. 5, pp. 724-740, Nos. 6286-6391.]

Cases referred to :

*(1) *Cohen* v. *Mitchell* (1890), 25 Q.B.D. 262 ; 5 Digest 729, *6324* ; 59 L.J.Q.B. 409 ; 63 L.T. 206.

*(2) *Hosack* v. *Robins* (*No.* 2), [1918] 2 Ch. 339 ; 5 Digest 731, *6334* ; 87 L.J.Ch. 545 ; 119 L.T. 522.

*(3) *Hill* v. *Settle*, [1917] 1 Ch. 319 ; 5 Digest 737, *6372* ; 86 L.J.Ch. 243 ; 116 L.T. 263.

*(4) *Dyster* v. *Randall & Sons*, [1926] Ch. 932 ; Digest Supp. ; 95 L.J.Ch. 504 ; 135 L.T. 596.

(5) *R.* v. *Roberts* (1873), L.R. 9 Q.B. 77 ; 5 Digest 638, *5738* ; 43 L.J.M.C. 17 ; 29 L.T. 674.

(6) *Castrique* v. *Imrie* (1870), L.R. 4 H.L. 414 ; 30 Digest 127, *52* ; 39 L.J.C.P. 350 ; 23 L.T. 48.

(7) *Re Clark, Ex. p. Beardmore*, [1894] 2 Q.B. 393 ; 5 Digest 736, *6366* ; 63 L.J.Q.B. 806 ; 70 L.T. 751.

(8) *Fowler* v. *Down* (1797), 1 Bos. & P. 44 ; 5 Digest 999, *8156*.

(9) *Webb* v. *Fox* (1797), 7 Term Rep. 391 ; 5 Digest 999, *8155*.

Appeal of the Northumberland County Council from an order of the Divisional Court of the Chancery Division (Morton and Cohen, JJ.), dated Dec. 13, 1943, and reported [1944] 1 All E.R. 70, where the facts are fully set out.

Gilbert Beyfus, K.C., and *R. E. Manningham-Buller* for the appellants.

The Solicitor-General (*Sir David Maxwell Fyfe, K.C.*) and *V. R. Aronson* for the respondent.

Beyfus, K.C. : On the authority of *Castrique* v. *Imrie* (6) the order of the trial judge, being an order for the disposition of a particular sum of money, may be treated as a judgment *in rem.* The Costs in Criminal Cases Act, 1908, s. 6, gives the judge a right to make an order *in rem.* The judge has decided that the money in question was, on his apprehension, taken from the person convicted. It would lead to grave injustice if the appellant council were ordered to repay money received by them in accordance with an order of a judge of the High Court. [Counsel referred to *R.* v. *Roberts* (5), *Dyster* v. *Randall & Sons* (4), *Re Clark, Ex p. Beardmore* (7), *Fowler* v. *Down* (8), *Webb* v. *Fox* (9), and *Hosack* v. *Robins* (*No.* 2) (2).

Manningham-Buller followed on the same side.

The Solicitor-General : The existence and content of the Bankruptcy Act, 1914, s. 47, are inconsistent with the proposition that the title to after-acquired property vests in the bankrupt until there has been an intervention. The decision of the court on that point is the only possible decision consistent with sect. 47 and with *Hill* v. *Settle* (3). That case conveniently summarises all the earlier cases on that point. As regards the effect of the order of Cassels, J., I adopt the reasoning of Morton, J., that that order was made *inter partes* and was *res inter alios acta* as regards the trustee. Cassels, J., had no jurisdiction to make the order, because the money in question was not the money of the bankrupt. Also, it was not money taken on his apprehension. In *R.* v. *Roberts* (5) the application was by way of *certiorari.* [Counsel referred to *Dyster* v. *Randall & Sons* (4).]

Manningham-Buller in reply.

Lord Greene, M.R. : I find myself in complete agreement, not only with the conclusion to which the Divisional Court came, but also with the reasons for their decision as expressed in the judgment of Morton, J. I shall confine my observations to the salient points in the argument which has been addressed to us on behalf of the appellants. Morton, J., correctly states the three matters which require to be considered in the following paragraph of his judgment, at p. 73 :

> It is necessary to consider, first, in whom was the title to these £1,581 treasury notes vested at the time when Cassels, J., made his order for payment of £1,581 to the respondent council ; secondly, what was the effect of that order of Cassels, J. ; and, thirdly, what was the effect of Pascoe's second bankruptcy.

The third point has not been argued before us and no criticism has been directed against the judgment of Morton, J., dealing with it. I accordingly say nothing about it, except that I agree with what he said.

The other two points require some consideration. I will take the second one first. The answer to it depends on the true construction of the Costs in Criminal Cases Act, 1908, s. 6 (5). That subsection is, I think, described with sufficient accuracy as a machinery subsection. The scheme of the Act with regard to payment of costs by a defendant in criminal proceedings of the kind dealt with by the Act is, first, that the costs of the prosecution may be directed to be paid out of the funds of the county or county borough. Such an order was made in the present case. Secondly, the court is also empowered, in addition to any other lawful punishment, in the case of indictable offences, to order the convict to pay the whole or any part of the costs of the prosecution. There can, accordingly, be two orders as to payment of costs, one an order against the county council, and the other an order against the convict. Sect. 6 (4) provides that both orders may be made, and that, where an order is made directing payment out of local funds, the costs shall primarily be payable out of those funds. The position then is that the primary liability falls on the county, but it was necessary to provide a method by which the county council could be reimbursed in cases where an order was made against the convict personally, in addition to the order against the county council. That is provided for by subsect. (5), which says this :

> Any order under this section may be enforced, as to any costs primarily paid out of local funds, by the council of the county or borough out of the funds of which they have been so paid . . . in the same manner as an order for the payment of costs made by the High Court in civil proceedings, or as a civil debt in manner provided by the Summary Jurisdiction Acts, and, in the case of costs which a person convicted is ordered to pay, out of any money taken on his apprehension from the person convicted, so far as the court so directs.

The county council, therefore, which has paid the costs which it has been ordered to pay, is given three methods of proceeding with a view to recovering the costs from the convict. They may enforce the order against him as if it were an order for payment of costs in the High Court in civil proceedings, or as a civil debt in manner provided by the Summary Jurisdiction Acts, or "out of any money taken on his apprehension from the person convicted, so far as the court so directs." The subsection, therefore, is concerned, and concerned only, with the method of enforcing the liability of the convict to the county council in respect of these costs.

It would be surprising to find that this personal liability of the convict could be satisfied out of property which was not his property. That, however, is the argument of the appellants in this particular case. It is said that, whether or not the property in this money was the property of the bankrupt, CASSELS, J., had jurisdiction under the subsection to order, as he did, that the £1,581 should be handed over to the local authority in part satisfaction of the costs which they had been directed to pay. It is said that the clear language of the subsection shows that the question of the title to the money taken on his apprehension from the person convicted is not a question with which the legislature concerned itself. It is said that the legislature must have thought that the discretion of the judge would be sufficient protection and could be relied upon to say that, in a case where the money did not belong to the convict, no order would be made. In my opinion, that argument cannot be accepted, because it involves that the discretion of the judge would entitle him to make an order for payment of these costs out of money which did not belong to the convict, and, in deciding whether he would exercise it, he would not have before him the facts necessary to enable him to discover in whom the title to the money was. I cannot myself think of anything quite so unjust as a provision that the appellants in this case should be entitled to satisfy a claim which they have against the convict personally out of money other than money of the convict.

It is said, however, that the language of the subsection is too strong. I cannot so construe it. I think it would require the clearest and most precise language to give a power to a court to make the money of A applicable to the discharge of the liabilities of B in circumstances where the court cannot have before it the evidence necessary to decide who has the title to the money. It seems to me that this part of the subsection must be construed as giving the power only so far as the money belongs to the person convicted. The court which makes the order is not concerned on that basis to enquire into the title to the money. If the money is found on the convict the jurisdiction to make the order arises ; but that jurisdiction, in my opinion, cannot extend to destroy the title of the real owner of the money, and any order made under it must be an order which is valid only in so far as the money with which it deals is in fact the property of the convict. The local authority, which under such an order receives the money, cannot complain of any hardship if it is compelled afterwards to hand it back to the true owner, because the local authority in that case has no merits whatever and no claim in fairness to hold that money against the true owner. In my opinion, therefore, the subsection must be construed in the limited way in which I have indicated, and the order of CASSELS, J., must be construed as an order falling within his jurisdiction under the subsection. A

It was argued by counsel for the appellants that the subsection provides for the making of an order *in rem* which is valid against the whole world. The jurisdiction to make an order *in rem* is one of very limited scope in our jurisprudence. Examples of it are very few indeed, and I certainly cannot construe this as giving any such jurisdiction, when so to hold would mean that a person's money was liable to be taken away from him in proceedings in which he might not have the opportunity of appearing and bringing the true facts before the B court. In my opinion, therefore, that argument fails.

Turning now to the first of the three arguments, a number of cases were referred to, of which *Cohen* v. *Mitchell* (1) is the leading modern authority. Those cases show that, quite apart from the Bankruptcy Act, 1914, s. 47, transactions by an undischarged bankrupt with third persons have a measure of protection. Sect. 47 merely puts into statutory form, with some additions, C what was the law before. That protection operated in two ways. First, third persons who acquired property in a transaction of the kind described had a good title to it which could not be impugned by the trustee. The other way in which it operated was this: a party to such a transaction with an undischarged bankrupt could not set up as against the undischarged bankrupt the title of the trustee, unless, of course, the trustee had intervened; in other words, the bankrupt was entitled to deal with his after-acquired property with third persons D by means of transactions of the kind specified, and as between him and the person with whom he dealt that person could not dispute his title. But these cases quite clearly do not establish the proposition that, as between the bankrupt and the trustee, after-acquired property belongs to the bankrupt until the trustee claims it. I can find no support for that proposition. The precise relationship of the bankrupt to his after-acquired property has been described by various analogies. He has been likened to a factor or some other agent E having authority to pass the title to the goods. He has been likened to a trustee. None of those analogies are really accurate and, of course, they cannot be pressed. He has certain powers to confer a title and he has certain rights in respect of his after-acquired property, the right to protect it against wrongdoers, for instance. But the title of the trustee is there and is only qualified, as it seems to me, by those rights which are given to the bankrupt by virtue of sect. 47, which protects transactions with third parties and does not in any way qualify the title of the F trustee, save in so far as that title is liable to be impaired in cases which fall under the section. It seems to me that the initial proposition on which the argument is based, namely, that the property is in the bankrupt until the trustee intervenes, not only does not find any authority but is quite contrary to the clear language of the statute. Sect. 38 (*a*) provides, in terms, that the property of the bankrupt, which, of course, vests in the trustee, is to comprise: G

> All such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge.

I see no ground whatsoever for writing into that the clause that the property is only to vest in the trustee if and when the trustee intervenes. Again sect. 47 (1) itself recognises the estate of the trustee, because it says:

> . . . any estate or interest in such property which by virtue of this Act is vested in H the trustee shall determine and pass in such manner and to such extent as may be required for giving effect to any such transaction.

The trustee's property is qualified, but is qualified only to the extent of protecting those transactions. Subject to that the property is in the trustee.

I do not think it necessary to examine all the authorities to which we have been referred, but I would like to say a word about two of them. The first is *Hosack* v. *Robins* (*No.* 2) (2), not the earliest in date, but the first one to which I will refer. That was a case where a charging order had been made against shares which had been acquired by an undischarged bankrupt. It was held that that charging order, which was, of course, made *in invitum*, was not a transaction within the meaning of sect. 47, and accordingly it was not subject to the protection given by that section. But it is to be observed that, if the theory put before us is right, the shares belonged to the bankrupt at the date of the charging order and, therefore, it would follow that the charging order was good. The only way of escaping from that result would have been by saying that the intervention of the trustee had a retroactive effect and invalidated something which was a charge imposed on property of the bankrupt before the intervention took place. It is to be observed that in *Hosack* v. *Robins* (2) it was never suggested in argument that the property being in the bankrupt at the time of the charging order, the charging order, therefore, was bound to be good. It seems to me that the decision in *Hosack* v. *Robins* (2) is quite inconsistent with the argument in the present case.

The other case is another case in this court of *Hill* v. *Settle* (3). The main point in the case was whether, where a transaction had been entered into and before its completion the trustee had intervened, a purported revocation of that intervention would be effective. But the court went into the matter of the title, and Lord Cozens-Hardy, M.R., at pp. 324, 325 says this:

> Previously [to the Act of 1883] the property was vested in different persons—the commissioners, or assignees, or whatever they were; it is now vested in the trustee, and after-acquired property, according to the language of the statute, is also vested in him. Then, by a long series of authorities which it is quite impossible, I think, for this court, or any court, to review, it was held that that vesting could not be regarded as operating in the strict and full sense of the term. As long as the trustee did not intervene, the bankrupt himself had power to enter into transactions for value with persons dealing with him *bona fide* in relation to his after-acquired property. That is dealt with in so many cases that I do not think it is necessary for me to refer to any more than *Cohen* v. *Mitchell* (1).

Then, on p. 326, after dealing with the facts relating to the intervention in that case, he says this:

> Assuming as in my view I have stated is the fact, that there was a good intervention, from the date of the notice the property cannot be recovered by or dealt with by the bankrupt.

Then Warrington, L.J., says, at p. 328:

> The law, stated shortly, would appear to be this: Under the provisions of the Bankruptcy Acts, property acquired by the bankrupt, including rights of action under contracts subsequent to the date of the order of adjudication (after the commencement of the bankruptcy) is vested in the trustee. So far the provisions of the Acts of Parliament appear to be clear. But by a long series of decisions it is now settled that, although the property is vested in the trustee, to use the words of Lord Esher in the Court of Appeal in *Cohen* v. *Mitchell* (1): "Until the trustee intervenes, all transactions by a bankrupt after his bankruptcy with any person dealing with him *bona fide* and for value, in respect of his after-acquired property, whether with or without knowledge of the bankruptcy, are valid against the trustee."

It is to be noticed that the thing which is valid is the transaction, and to validate a transaction by an undischarged bankrupt comes nowhere near saying that the title to after-acquired property remains in the bankrupt. The old exception, which is now statutory under sect. 47, dealt with transactions and had nothing to do with the title to property as between the bankrupt and the trustee. It had merely to do with the title to property as between the trustee, on the one hand, and the third person with whom the transaction was carried out, on the other.

The observation of Lawrence, J., as he then was, in *Dyster* v. *Randall & Sons* (4), cannot, I think, be construed as intending to differ in any way from what was said by this court in *Hill* v. *Settle* (3) as a member of which Lawrence, J., sat. If it has the meaning which is attributed to it by counsel for the appellants, all I need say is that it is *dictum* only and cannot stand against the other authorities which I have mentioned. I do not think it would be fair to Lawrence, J., to construe these words as anything but a quite general introduction to the statement of the law, on the matter relevant before him, which he was about to make.

In the result the appeal must be dismissed with costs.

MacKinnon, L.J. : I agree. As to the first of the three questions propounded by Morton, J., I desire to add nothing. As to the second, I am quite clear that the words at the beginning of the Costs in Criminal Cases Act, 1908, s. 6 (5), must be read as though the words " of his " were added, that is to say, " out of any money of his taken on his apprehension," and so forth. That, I think, was clearly laid down by Blackburn, J., as long ago as 1873 under the identical words which then existed in the Forfeiture Act of 1870 in *R.* v. *Roberts* (5). Cassels, J., made this order upon the assumption that this money found in the possession of the convict was his. There was nobody to suggest the contrary. It is true that he was asked not to make this order but to order the money to be paid to the Blyth Company, on the ground that the Blyth Company had been defrauded and this money should be given to them by way of compensation. He disregarded that argument and made his order clearly under the belief that this money was the property of the convict. Any order made under such circumstances ought to be read subject to the implied qualification " unless someone not before the court is able to prove that this money in the possession of the convict was in truth not his property at all." I agree that the appeal fails.

Luxmoore, L.J. : I also agree that the appeal fails and I do not think it necessary to add anything.

Appeal dismissed with costs.

Solicitors : *Sharpe, Pritchard & Co.*, agents for *C. Harold Carter*, clerk to the Northumberland County Council (for the appellants) ; *Solicitor to the Board of Trade* (for the respondent).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

R. *v.* JUSTICES OF LINCOLN (PARTS OF LINDSEY), *Ex parte* TRAFFORD.

[King's Bench Division (Humphreys, Atkinson and Cassels, JJ.), **January 13, 24, 1944.**]

Magistrates—Appeal to quarter sessions—Jurisdiction of appeal committee—Appeal abandoned—Application for costs to new committee—Quarter Sessions Act, 1849 (c. 45), *ss.* 5, 6—*Summary Jurisdiction (Appeals) Act,* 1933 (c. 38), *s.* 7—*Administration of Justice (Miscellaneous Provisions) Act,* 1938 (c. 63), *s.* 3.

On Mar. 27, 1942, an appeal against a conviction at petty sessions came before the appeal committee of quarter sessions for the county of Lincoln. It was adjourned to June 16, 1942, but the appellant thinking that the better course was to appeal by way of case stated to the King's Bench Division, served notice of abandonment of the appeal to quarter sessions on May 30, 1942. In accordance with the statutory requirements a new appeal committee was elected at the Michaelmas quarter sessions, the members of which were in fact the same persons as the earlier committee. The respondent applied to the new committee for an order for the costs of the abandoned appeal. It was contended that the new committee had no jurisdiction to entertain such an application :—

Held : It was clear that under the old practice the Michaelmas or a later quarter sessions would have had no jurisdiction to make any order in this matter since it had never been adjourned beyond June 16, 1942. The appeal committee had no greater powers than quarter sessions under the old practice and, therefore, had no jurisdiction to make any order as to the costs.

[**EDITORIAL NOTE.** Though the quarter sessions is a permanent tribunal, a case has to be completed at a particular sessions unless it is adjourned. It is not possible for the court to deal with an adjourned matter at a subsequent sessions. In 1933 the procedure in appeals was altered by providing that they should be heard by a committee to be appointed by quarter sessions. The jurisdiction of the committee is not affected by the termination of a particular sessions, but it is here held that a new committee, although the same justices are elected, have no power to adjudicate upon a matter which has been before a committee whose appointment has been determined where there has been no adjournment of the case.

AS TO EFFECT OF NO ADJOURNMENT, see HALSBURY, Hailsham Edn., Vol. 21, p. 703, para. 1220; and FOR CASES, see DIGEST, Vol. 33, pp. 389, 390, Nos. 1003-1010.]

Case referred to:

(1) *R.* v. *Staffordshire Justices* (1858), 7 E. & B. 935; 33 Digest 390, *1009*; 26 L.J.M.C. 179; 29 L.T.O.S. 196.

APPLICATION for an order of *certiorari* to remove for the purpose of quashing an order for costs made on Oct. 26, 1942, by the appeal committee of the Quarter Sessions for the County of Lincoln (Parts of Lindsey).

P. E. Sandlands, K.C., and *S. L. Elbourne* for the applicant.

C. E. Rochford for the respondent.

CASSELS, J. (delivering the judgment of the court): This case raises an issue as to the jurisdiction of an appeal committee of quarter sessions. Can a newly elected and appointed appeal committee deal with the costs of an appeal which has been before an appeal committee which previously exercised jurisdiction? For the respondent it was contended that an appeal committee is a continuing body; for the applicant it was contended that, the original appeal committee having ceased to exist, no fresh committee, though composed of a majority or even entirely of the same members, can exercise jurisdiction as to the costs in his case.

Dates are of importance in this matter. On Dec. 24, 1941, the applicant was convicted at Scunthorpe Petty Sessions upon three summonses under the Waste of Food Order, 1940, for wasting food. He appealed to quarter sessions. The appeal came on for hearing on Mar. 27, 1942. His counsel took the point, not raised in the grounds of appeal, that the convictions were bad because the clerk to the justices in petty sessions was also food executive officer for the district. There were doubts as to whether the appeal committee could decide such a point which seemed to be a matter for the consideration of this division of the High Court. At the request of counsel for the respondent an adjournment was granted so that he could bring before the appeal committee evidence to deal with the point, and the hearing of the appeal was adjourned to a special day to be fixed. On May 29 that special day was fixed for June 16, 1942. Before that day had arrived the applicant had decided that an application to this division for *certiorari* was the better procedure after all, and so on May 30, 1942, he served notice of abandonment of the appeal. The appeal committee did not sit on June 16. No request was made to it by either side to sit. On June 15 the applicant applied to this division and obtained leave to issue notice of motion for *certiorari* in respect of the three convictions and this was granted. This motion came before this court on Jan. 13, 1944, and the convictions were quashed.

The respondent took no steps with regard to the costs of the abandoned appeals before the appeal committee of quarter sessions until Oct. 2, 1942, when his counsel applied *ex parte* that the appeals should be put back into the list in order that he might apply for costs consequent on the abandonment of the appeals. This application was acceded to and a sitting of the committee fixed for Oct. 26, 1942.

The appeal committee of the County of Lincoln (Parts of Lindsey) are appointed annually at the Michaelmas Quarter Sessions. On Oct. 2, 1942, certain justices were appointed to be members of the appeal committee. All the members of the appeal committee present at the original hearing on Mar. 27, 1942, were re-appointed members of the appeal committee and six of them sat on Oct. 26, 1942, and made an order against the applicant for the costs of the abandoned appeals. It is against that order that the applicant now brings these proceedings. Had that appeal committee, newly-elected and newly appointed only a few days before, jurisdiction to deal with the costs of an appeal which had been before their predecessors seven months before? If they had, this order must stand; if they had not, then this order must be removed into this division for the purpose of being quashed.

By the Summary Jurisdiction (Appeals) Act, 1933, s. 7, the powers and duties of a court of quarter sessions with respect to appeals are performed by a committee of the justices of the county appointed by quarter sessions and known as the appeal committee. They are a standing committee for the period for which they are appointed, or, if no period is fixed, until their successors are appointed, and their jurisdiction is not affected by the termination of the sessions at which they are appointed. The committee act by a court consisting of not less than three or more than twelve members of the committee, and that court has the same powers with respect to the hearing and determination of appeals and with respect to costs arising out of appeals as they would have if they were a court of quarter sessions. In other words, the appeal committee possess the same powers—no greater and no less—as quarter sessions.

A By the Administration of Justice (Miscellaneous Provisions) Act, 1938, s. 3, the powers of a court of quarter sessions include power to adjourn the sessions generally, and, if the adjourned sessions are not concluded before the next sessions, they shall be deemed to be concluded immediately before the commencement of the sessions to be held on the fixed day and any proceedings which might have been dealt with by the adjourned sessions can be dealt with as if they had been adjourned to the fixed sessions.

B That last statutory provision was urged on behalf of the respondent in order to justify the order made by the appeal committee on Oct. 26, 1942, in this case. In our opinion that argument cannot prevail.

This was a newly elected and newly appointed appeal committee. It sat to deal with this matter on Oct. 26, 1942. It began its life on Oct. 3, 1942. The committee which had seisin of these three appeals had ceased to exist on Oct. 2, 1942. Whether after June 16, 1942, and before Oct. 2, 1942, the earlier C committee had jurisdiction with regard to the costs of the abandoned appeals does not arise in this case, for the simple reason that they did not deal with those costs and we are not called upon to decide that question, but it is to be observed that the only adjournment that took place was from Mar. 27, to June 16, 1942. Can it be said that at any time without limit the respondent could apply to the appeal committee ? We think it cannot. The fact is that the respondent did not apply to the appeal committee between May 30 and Oct. 26, 1942, D and his is the default which led to the position in which he finds himself.

The Quarter Sessions Act, 1849, s. 5, states as follows :

> And be it enacted, that upon any appeal to any court of general or quarter sessions of the peace the court before whom the same shall be brought may, if it think fit, order and direct the party or parties against whom the same shall be decided to pay to the other party or parties such costs and charges as may to such court appear just and reasonable, such costs to be recoverable in the manner provided for the recovery of E costs upon an appeal against an order or conviction by an Act passed in the twelfth year of Her Majesty's reign, intituled an Act to facilitate the performance of the duties of justices of the peace out of sessions within England and Wales with respect to summary convictions and orders.

By sect. 6 of the same Act it is enacted as follows :

> F And for the more effectual prevention of frivolous appeals, be it enacted, that any court of general or quarter sessions of the peace, upon proof of notice of any appeal to the same court having been given to the party or parties entitled to receive the same, though such appeal was not afterwards prosecuted or entered, may, if it so think fit, at the same sessions for which such notice was given, order to the party or parties receiving the same such costs and charges as by the said court shall be thought reasonable and just to be paid by the party or parties giving such notice, such costs to be recoverable in the manner last aforesaid.

G It is to be noticed there that it is at the same sessions.

Our attention was drawn to *R.* v. *Staffordshire Justices* (1), where one quarter sessions made an order as to the costs of an appeal abandoned before a prior quarter sessions which had been silent as to costs, and that order was quashed by this division. In the course of the judgments in that case Lord Campbell, C.J., said, at pp. 938, 939 :

> H There is in this case a seeming hardship that the respondents should not have costs ; but they lose them by their own default. They should at the June sessions have asked for the costs ; and, if that sessions in their discretion thought it a fit case for costs, they would have then been awarded in the order confirming the order of justices, subject to the case. But they did not ask for costs ; and the order was silent as to them. Had the case been proceeded with, and that order brought up with the case, we could not have confirmed that order with costs of the appeal, but only as it was, that is, silent as to costs. So the respondents have not lost these costs in consequence of the abandonment of the case by the appellants. Then it seems to me that when that order was made the sessions were *functi officio*. The order was subject to a case ;

> but the sessions then, as far as they were concerned, confirmed or quashed the order of justices according to what the opinion of this court might turn out to be . . . If the sessions who hear on the merits and grant the case think it a fit case for costs they should give them ; but, if it were necessary, for the purpose of getting costs, to go before a subsequent sessions and ask for them from justices who do not know what happened before, it would be productive of much expense and probably of much injustice. Such a course is not required.

Giving judgment in the same case, ERLE, J., said this, at pp. 940, 941 :

> I also am of opinion that the subsequent sessions had no jurisdiction over this order. No doubt the quarter sessions is for many purposes a permanent tribunal : but still there are many things that can be done only by a particular sessions, as the specific tribunal for that thing. Here the sessions who heard the appeal confirmed the order and were silent as to costs. That was in legal effect the same as if they had confirmed it expressly without costs. The confirmation was subject to a case ; but, so far as this court did not interfere, it was absolute. That being so, it seems to me that the application to the Epiphany sessions clearly was an application to them to alter the judgment of the former sessions, by rectifying the error which they had committed in omitting to give costs in a fit case. But the Epiphany sessions had no jurisdiction to do this.

It is clear from those judgments that under the old practice quarter sessions would have had no power to deal with these costs. Powers to adjourn sessions have now been given to quarter sessions, and, therefore, to appeal committees, but this matter never was adjourned. Quarter sessions could not have dealt with it ; it follows that the appeal committee could not do what quarter sessions had no power to do.

Our conclusion is that the appeal committee which made this order as to costs had no jurisdiction to make it, and that order must be quashed. The applicant is entitled to succeed.

Application allowed with costs.

Solicitors : *Sharpe, Pritchard & Co.*, agents for *William Bains*, Scunthorpe (for the applicant) : *Treasury Solicitor* (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law*].

FAYERS *v.* J. JARVIS & SONS, LTD.

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and Goddard, L.JJ.), **January 27, 1944**.]

Work and Labour—Unemployment insurance—Retention of unemployment book by former employer—Refusal of trade union to nominate employee for job until production of unemployment book—Loss of wages—Whether any right of action against former employer—Undertakings (Restriction on Engagement) Order, 1940 (*S.R. & O.*, 1940, *No.* 877), *arts.* 2, 3.

By the Undertakings (Restriction on Engagement) Order, 1940, art. 2, a person seeking work in a certain undertaking may only do so through the medium of a labour exchange ; or, alternatively, by art. 3, through the medium of a trade union provided this is effected in accordance with arrangements made between an employer or organisation of employers and the trade union, being arrangements which have received the approval of the Minister. On the termination of the appellant's employment with the respondent company, the respondents retained his unemployment insurance book contrary to the Unemployment Insurance Contributions Regulations, 1936. The appellant applied to his trade union under the Undertakings (Restriction on Engagement) Order, 1940, art. 3, for fresh employment and his union, although they had a job available, refused to secure him employment until he produced his unemployment book. The appellant brought an action against his former employers on the ground that his failure to obtain work through his union was the direct result of the respondents retaining his unemployment book. The appellant called in evidence a trade union official who stated that it was the practice of the union to require the production of an unemployment book before submitting a man for a job :—

HELD: in order to maintain his case the appellant would have to prove that an arrangement had been made under art. 3 that he could not obtain the job unless he produced his unemployment book to the trade union, and that such arrangement had been approved by the Minister. Since no such arrangement was proved there was no case against the former employers.

Quaere: whether an arrangement, made under art 3 of the Order, which made the production of an unemployment book a condition of the issue of a permission for a man to take a job would be legal even if it had received the approval of the Minister. A

[**EDITORIAL NOTE.** The former employer, it seems, wrongfully detained the unemployment book. In this case, however, the only question is whether the damage results from the detention of the book. This depended on the proof of an arrangement under art. 3 sanctioned by the Minister. No such arrangement was proved and thus the plaintiff failed to prove any connection between the detention of the book and his loss of a day's work. B

AS TO OFFENCES UNDER THE UNEMPLOYMENT INSURANCE ACT, 1935, see HALSBURY, Hailsham Edn., Vol. 34, pp. 568, 569, para. 669; and FOR CASES, see DIGEST, Vol. 44, pp. 1314, 1315, Nos. 173-176.]

APPEAL by the plaintiff from an order of His Honour JUDGE BEAZLEY, at the Mayor's and City of London Court, dated Mar. 16, 1943. The facts are fully set out in the judgment of LORD GREENE, M.R. C

F. W. Beney, K.C., and *C. T. Salkeld-Green* for the appellant.

H. G. Garland for the respondents.

LORD GREENE, M.R.: In this case the appellant is a workman, a joiner and carpenter, in the employment of J. Jarvis & Sons, Ltd., who are the respondents to the appeal. His claim is based upon the allegation that the failure of the respondents on the termination of the employment to hand back to him his D unemployment insurance book had caused him damage, in that if he was unable to produce it, he could not obtain the necessary authority to take up new employment which is required under the order known as the Undertakings (Restriction on Engagement) Order, 1940. Under the Unemployment Insurance Contributions Regulations, 1936, the employer, at the termination of the employment, is bound to return the book to the employee, and I assume for the purposes of this case that what the employers did, or, rather, did not do, E constituted a breach of that provision. The appellant, in order to establish his case, would, of course, have to show that his failure to obtain other employment was the consequence of the failure of the employer to comply with their duty to return the insurance book. The claim is for damages amounting to one day's wages, and it is put in that form as a test case. In point of fact, I think he lost two, if not three, days' work; but, in order to bring out the point, he claims only one day's wages, amounting to 16*s*. F

The way he puts his case is this. Under the Undertakings (Restriction on Engagement) Order, 1940, an employer is precluded from engaging or seeking to engage a worker except through the local labour exchange. Under art. 2 (1) (*b*):

> A worker seeking to engage for work in any such undertaking or branch or department thereof shall register himself for work at a local office and obtain his employment by means of being submitted to an employer by a local office. G

The appellant, in pursuance of that direction, had he not been a member of his particular union, would have applied to a local office in order to be submitted to an employer, but in point of fact he put his case under a different article. He was a member of a union known as the Amalgamated Society of Woodworkers and he relied on art. 3 of the Order, which he said was the one applicable to his case. That article is as follows: H

> Where the engagement or re-engagement of workers by employers is effected in accordance with arrangements made whether before or after the date of this Order between an employer or any organisation of employers and a trade union, being arrangements approved by the Minister and in accordance with such directions, if any, as may be given by the Minister with respect to the operation of the arrangements, the provisions of art. 2 of this Order shall not apply to the engagement or re-engagement.

Putting it shortly, that is substituting the union, in cases to which it applies, for the local labour exchange as the body to give the permission to a man to seek employment. That is obviously the intention of it. In order that it can apply, there must be arrangements between an employer or an organisation of employers and a trade union and those arrangements must be approved by the Minister.

The appellant, on the termination of the employment, went to his union and asked if they had a job for him. They had a job. Apparently the machinery adopted by the union is to issue a white card to a member, which that member, on taking up his new job, hands over or shows to the new employer as being the union's authority to him to take up that employment. It appears that it was the practice of this union not to give to a member a white card unless that member, at the time when he applied for it, produced his unemployment book; that the appellant was unable to do, because the book had been retained by his former employers at their head office at Epsom, his work being in the City; and that ultimately they sent it to him by post and it arrived three days later. At the time when he was paid off he was asked to sign a receipt for his wages, and the receipt contains the following statement:

> I understand that stamps to the value of . . . for Health and . . . for Unemployment Insurance will be affixed to my book which will be posted to me to-morrow from your office.

Apparently the appellant received a counterpart of that receipt and when he went to the union he produced it to the union official in order to persuade them to give him a white card, but the union official, acting on instructions, declined to pay any attention to it.

The appellant, on those facts, says that his failure to get employment was the direct result of the failure of the employer to hand him back his insurance book when his employment came to an end. The judge took that view. He found as a fact that, under the union arrangements which I have indicated, it was impossible for this workman to obtain employment for which the white card was necessary without production of the unemployment book, but he held that the appellant failed to succeed upon the ground that, on the true construction of the unemployment insurance legislation, including the regulations to which I have referred, the only sanction for the employer's failure to hand him the book back was by way of penalty and that no civil action would lie in respect of that failure. The appellant appeals from that decision.

At the outset of the case it becomes clear that in order to succeed the appellant had upon him at the trial a certain burden of proof. He claimed that the refusal of the union official to issue him the necessary card to enable him to get a job was something which the official was bound to do by virtue of arrangements under art. 3; but no such arrangements were produced. It would have to be shown, in order to make that case good, first that arrangements existed between an employer or an organisation of employers and the trade union in question under which the trade union was not entitled to let a man have employment or submit him for employment unless he first produced his unemployment book. Those arrangements, secondly, are arrangements which, in order to be effective and to take the place of the ordinary arrangement in art 2, required the approval of the Minister. If it had been shown at the trial that arrangements had been made and approved by the Minister and that those arrangements made the production of an unemployment book a condition of the issue of a permission for a man to take a job, the appellant at any rate would have started to get his case upon its feet; but no such document was produced, nor was any evidence that ought to have been accepted as to its contents produced at the trial. The union official who was called referred to his orders and what he could do and what he could not do, but it is to be observed that arrangements under this article when approved by the Minister are arrangements which by this Order, which has the force of statute, are substituted for the ordinary scheme under art. 2. It would be quite improper to prove an arrangement of that character merely by taking its effect from the words of an official in the witness box. The only way in which arrangements, if there were any which affected this matter, could be proved was by production of those arrangements, together with evidence of the approval of the Minister. That was never done. That being so, the plaintiff has not begun to establish the proposition that art. 3 applies at all.

If it does not apply, art. 2 is the relevant clause and art. 2 relates to the obtaining of work through a labour exchange. There is not anything on the face of this Order which empowers the Minister of Labour to introduce as a condition of allowing a man to take a job the requirement that before he gets permission he is to produce his unemployment book. No suggestion was produced that there was any departmental regulation to that effect. Even if it had been produced, I should have hesitated long before taking the view that it was a thing which had any legal force at all. If the legislature intended that the production of an unemployment book should be a condition of a man being entitled to take work, it ought to have said so. There is not a particle of suggestion on the face of the order that anything of the kind was intended. There was some evidence of a very unsatisfactory and very inadequate character as to what the practice of the labour exchange was with regard to the issue of permits to obtain work, in their case green cards. There was a conflict of evidence about it. The way in which it could have been proved and ought to have been proved was by calling an official from the labour exchange. That was never done. In any case, the appellant never went to the labour exchange. He never tried to get a permit from the labour exchange. What would have happened to him if he had, we do not know and we cannot guess. All that he did was to go to his union and his union refused a card, for the reason that I have given. Whether the instructions under which the union official refused the card without production of the unemployment insurance book formed part of some arrangement which they had with the employers' union or whether it was purely a union instruction to their officials, we really do not know. It certainly did not form part of any directions given by the Minister with respect to the operation of arrangements under art. 3, because the directions have been produced to us and there is not a word in those directions relating to any requirement as to the production of unemployment insurance books. It seems to me, therefore, that the appellant's case fails *in limine* because he has not proved the necessary connection between his failure to obtain employment and the act of the respondents or rather the default of the respondents in not returning to him his unemployment book when he left their employment.

The result, therefore, is that the appeal must be dismissed. The decision, as it will be observed, is on a quite different ground from that adopted by the trial judge, who also decided against the workman, but for a different reason from that which appears to me to be the right one.

MACKINNON, L.J.: I agree. I do not think I need add anything.

GODDARD, L.J.: I agree. In fairness to the trial judge, I think it should be noticed that throughout the case his attention never seems to have been drawn to the material Order. He has written a long and very careful judgment and he has not referred throughout to the Undertakings (Restriction on Engagement) Order, 1940. The only Order that he was referred to was a wholly different Order, which was the Essential Works (Building and Civil Engineering) Order, 1941, which, as he says, deals only with permission to leave and not to enter employment.

The only other observation I would make is this: I well understand that it may be of advantage to officials at labour exchanges and at the offices of trade unions that they should know that persons who are applying for work are insured persons. They should consider whether or not the production of the actual book is necessary in all cases, because it must frequently happen that the workman is engaged perhaps hundreds of miles from his employer's office where his unemployment book may be. They might consider, I should think, whether they cannot accept what in this case has been called the paying-off slip, which is a certificate in effect by the employer that the unemployment book is in existence and in the employer's possession, because in this case, for instance, with the man being paid off on a Saturday afternoon, it is very difficult to see how the book could have reached the workman by the Monday morning.

For the reasons given by LORD GREENE, M.R., I entirely agree that this appeal must fail.

Appeal dismissed with costs.

Solicitors: *Arnold Carter & Co.* (for the appellant); *R. L. Mason* (for the respondents).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

Re THE TRUSTS OF THE WILL AND ESTATE OF BERYL KATHERINE GOTT (*deceased*), GLAZEBROOK AND SHEEN *v.* THE UNIVERSITY OF LEEDS AND OTHERS

[CHANCERY DIVISION (Uthwatt, J.), **January 12, February 2, 1944.**]

Charities—Gift for particular charitable object—Uncertainty in description of persons to benefit—" Male students of British and Christian parentage "—Uncertainty as to persons to benefit not fatal to gift.

By her will the testatrix bequeathed to the Council of the University of Leeds a certain sum of money upon trust to utilise the income for the creation of scholarships in connection with the university which should be constituted by the Council of the University and should be for the benefit of one or more male students, of British and Christian parentage, from certain universities desiring to commence, or who should have commenced, some form of post-graduate study at the University of Leeds, such scholarships to be created for such objects and purposes and for such periods as the Council should determine in its discretion. It was contended that the gift was void in that it was for a particular charitable purpose not defined with certainty, it being argued that there was no general but a particular charitable intent extending only to students with the qualifications shown in the will; and that the words " of British and Christain parentage " had no certain meaning :—

HELD : a gift for a charitable purpose whether general or particular will not fail for uncertainty.

[**EDITORIAL NOTE.** The gift in this case includes words referring to the parentage and belief of the persons to benefit by the charity which were held to be uncertain in their meaning in *Clayton* v. *Ramsden* (1). The gift there, however, was a non-charitable one and the words occurred in a condition attached to the gift. Uncertainty is fatal in a condition, but, where the gift is charitable, uncertainty of the nature here discussed can always be avoided by the court settling a scheme. Moreover, in this case, the Council of the University had a discretion within the limits of the gift to determine the purposes and objects of the charity, and it might well be that, when the council in the exercise of that discretion determined those matters, the terms of the gift would be made certain. However, the general rule is that uncertainty of this nature is not fatal to a gift for a particular charitable object.

AS TO UNCERTAINTY OF OBJECT, see HALSBURY, Hailsham Edn., Vol. 4, p. 179, para. 242 ; and FOR CASES, see DIGEST, Vol. 8, pp. 305-306, Nos. 842-864.]

Cases referred to :

*(1) *Clayton* v. *Ramsden*, [1943] A.C. 320 ; [1943] 1 All E.R. 16.
(2) *A.-G.* v. *Drummond* (1842), 1 Dr. & War. 353.
*(3) *Morice* v. *Durham* (*Bp.*) (1805), 9 Ves. 399 ; 8 Digest 293, *705*.
(4) *A.-G.* v. *Syderfen* (1683), 1 Vern. 224 ; 8 Digest 384, *1983*.
(5) *Mills* v. *Farmer* (1815), 1 Mer. 55 ; 8 Digest 348, *1423*.
(6) *Gibbs* v. *Rumsey* (1813), 2 Ves. & B. 294 ; 8 Digest 293, *707*.
*(7) *Re Delmar Charitable Trust*, [1897] 2 Ch. 163 ; 8 Digest 296, *733* ; 66 L.J.Ch. 555 ; 76 L.T. 594.
(8) *Carey* v. *Carey* (1857), 6 I. Ch.R. 255 ; 44 Digest 789, *b*.

SUMMONS by the trustees of the testatrix's will to determine whether a certain charitable gift made thereunder was void for uncertainty. The facts are fully set out in the judgment.

Geoffrey Cross for the plaintiff trustees.

S. Pascoe Hayward for the University of Leeds.

H. O. Danckwerts for the Attorney-General.

E. M. Winterbotham for persons interested under the will.

UTHWATT, J. : By her will bearing date in 1941 the testatrix made the following bequest :

I bequeath to the Council of the University of Leeds (free of duty) the sum of £3,000 upon trust that the same shall be invested in any investments for the time being sanctioned by law for the investment of trust funds and the income thereof utilised for the creation of a scholarship in connection with the said university to be called the " Frank Gott Scholarship " which shall be constituted on such scheme or schemes as shall from time to time be formulated by the said council of the said university and shall be for the benefit of any one or more male students of British and Christian parentage who shall have graduated in honours in one or more of the schools of a university situated in Great Britain or Northern Ireland or in one of the colonies or

> dominions of Great Britain and who shall desire to commence or shall have commenced some form of post-graduate study at the University of Leeds such scholarship or scholarships to be created for such objects and purposes and be tenable for such periods as the said council shall in its uncontrolled discretion determine.

Objection based on uncertainty is taken to the validity of the bequest. It is said first that, as a matter of construction of the will, the words "of British and Christian parentage" are vague and that no certain meaning can be attached to them, with the result that the class of student expressed by the testatrix to be eligible for the scholarships cannot be exactly defined. It is next argued—again as a matter of construction—that no general charitable intent extending beyond students with the specified qualification is shown in the will, and that the gift is, therefore, for a particular charitable purpose not defined with certainty. It is then stated to be a proposition of law that where property is given only for a particular charitable purpose, the gift fails unless that purpose is defined with certainty. If these three propositions are accepted the gift fails.

Upon the first point stress was in argument mainly laid upon the word "Christian," and reliance was placed upon the decision in the House of Lords in *Clayton* v. *Ramsden* (1), and the *dicta* contained in the speeches in that case of LORD RUSSELL OF KILLOWEN and LORD ROMER as to the uncertainty of the meaning to be attributed to the words "of the Jewish faith" which there appeared in a condition of defeasance. Counsel for the Attorney-General was content for the purposes of argument to concede the first point of construction, and I do not propose to decide whether the words "of British and Christian parentage" when used in this will for the purpose of defining the qualification demanded of students as a condition of eligibility for a scholarship at a university in Great Britain are or are not uncertain in their meaning. I propose to assume they are uncertain, only observing that in *A.-G.* v. *Drummond* (2), LORD ST. LEONARDS found himself able to give, for the purposes of construing a charitable trust created by deed in 1710, the meaning borne by the word "Christian" at the date of the execution of the deed.

It is sufficient to state that the validity of the trust as a charitable trust in no way depends upon the acceptance of any particular one of the several meanings of which the phrase in question is assumed to be capable.

Upon the second point, I take the view that the substance of the gift is not a trust for post-graduate education generally, but is the post-graduate education of students possessing the prescribed qualification of parentage and training. The statement as to the class from which scholars are to be drawn is not, therefore, to be treated as a mode for carrying into effect a charitable intent in favour of post-graduate education. The questions whether post-graduate study at the University of Leeds, or administration of the trust by the council of that university also form part of the substance of the trust or merely define a mode for carrying it into effect are not here relevant and I express no opinion upon them. I, therefore, accept the contention of counsel for the residuary legatees upon the second point and (disregarding for present purposes a question of construction with which I deal later) treat the trust as a trust for the benefit of a class not exactly defined in the will.

I turn now to the proposition of law. The argument is that, where there is shown an intention to devote property to a particular charitable purpose only but it is impossible to ascertain that purpose with certainty, the trust intended is not known and there is, therefore, no trust to be enforced. The well-known statement: "A charitable trust does not fail for uncertainty," is said to be a slogan which does not apply save where there is an intent in favour of charity generally.

No doubt, when a purpose is stated, no charitable trust is created unless the purpose is certainly charitable, but given that certainty, uncertainty as to the particular charitable purpose intended is, in my opinion, immaterial. No authority was cited to me which supports the proposition that certainty in the definition of an intended specific charitable purpose is necessary and the proposition appears to be wrong in principle and never to have been accepted in practice. If a gift to charity generally does not fail for uncertainty—and that is a proposition which is not open to dispute—it appears to me to be a natural consequence, though it may not be a necessary consequence, that a specific charitable purpose may be vaguely set out. There is no practical reason why certainty of the exact ambit of a particular charitable purpose should be required, for the court has as regards all charitable trusts jurisdiction to settle a scheme for their administration—I am not referring to *cy-pres* schemes—and it is settled practice that these schemes may deal not only with methods of administration but also with the substance of the trust and define it. The court, as LORD ELDON pointed out in *Morice* v. *Bishop of Durham* (3), has taken strong liberties upon the A subject of charities. The liberties taken are embodied in definite principles, one of which is that a trust for charitable purposes does not fail for uncertainty, and another the assertion of the jurisdiction to give effect to the drift of the ideas embodied in the expression of a gift made on trust for a charitable purpose.

I propose to refer only to three cases. The first case is *A.-G.* v. *Syderfen* (4). In that case the gift was to be applied to such charitable uses " as I have by writing under my hand, formerly directed " and no such directions were found. B The gift was decreed to be a good gift to charity to which, in the circumstances, effect should be given as a gift for charitable purposes generally, and, in regard that, by the decree, the court was compelling the application to one charity of property which might in truth appertain to some other charity, the court provided that the executor should be indemnified against the writing referred to in the will in case it should thereafter be found. Specific charitable purposes were obviously intended but were not known at all. An inference of a general C charitable intent was drawn and it would be impossible to draw such an inference from a trust inherently void for uncertainty. A charitable purpose about which something is known can surely be in no worse position in respect of its validity than one about which nothing is known. That case was approved in *Mills* v. *Farmer* (5), and the principle involved in it is part of the law of England, although I gather that this principle has not been accepted in the law of the D United States of America: see RESTATEMENT OF THE LAW OF TRUSTS, Vol. 11, sect. 395.

The next case to which I propose to refer is *Morice* v. *Bishop of Durham* (3), and I refer to it only for the purpose of citing a passage from the judgment of SIR B. GRANT, M.R., at p. 404, in which he states the principle. The passage is as follows:

> The only question is, whether the trust [for such objects of benevolence and liberality E as the trustee in his own discretion shall most approve] upon which the residue of the personal estate is bequeathed, be a trust for charitable purposes. That it is upon some trust, and not for the personal benefit of the bishop is clear from the words of the will; and is admitted by his Lordship; who expressly disclaims any beneficial interest [see *Gibbs* v. *Rumsey* (6)]. That it is a trust, unless it be of a charitable nature, too indefinite to be executed by this court, has not been, and cannot be, denied. There can be no trust, over the exercise of which this court will not assume a control; for F an uncontrollable power of disposition would be ownership, and not trust. If there be a clear trust, but for uncertain objects, the property, that is the subject of the trust, is undisposed of; and the benefit of such trust must result to those, to whom the law gives the ownership in default of disposition by the former owner. But this doctrine does not hold good with regard to trusts for charity. Every other trust must have a definite object. There must be somebody, in whose favour the court can decree performance. But it is now settled, upon authority, which it is too late to controvert, that, where a charitable purpose is expressed, however general, the bequest shall not G fail on account of the uncertainty of the object: but the particular mode of application will be directed by the King in some cases, in others by this court.

The last case to which I will refer is *Re Delmar Charitable Trust* (7), a decision of STIRLING, J., and I cite it as an application of the principle. In that case:

> A testator gave to trustees a fund to be called the " D. Charitable Trust," and directed the trustees to pay one-tenth of the income thereof to the P. A. Society, " or some one or more kindred institutions " having certain specified objects, and to divide H the remainder of the income between such of the charitable institutions in London or the neighbourhood as they might select, and in such proportions as they might deem fit: Held, that the gift of the one-tenth was alternative and not substitutional; that it was a good charitable gift to one or more institutions of which the society named was a type; that the trustees had no discretion as to what institutions were to benefit under the gift of the one-tenth; and a scheme was directed to be settled.

The contention put forward by the residuary legatees was that the gift was void for uncertainty and that was the way in which STIRLING, J., dealt with the matter. At p. 167 he says:

It seems to me that the object which he intended to benefit was either the Protestant Alliance or some one or more kindred institutions. He selects the Protestant Alliance as the type of institution which he meant to benefit; but I do not think that he meant the benefit to be exclusively confined to it. So understood, the gift is a perfectly good charitable gift, and I have not to face the difficulties which would arise if the gift were in favour of a private individual—difficulties which are so fully and learnedly considered in the judgment given by the Lord Chancellor [of Ireland] in the case to which I have referred [*Carey* v. *Carey* (8)]. It seems to me that this must be dealt with upon the ordinary footing of a charitable bequest.

The gift in this case was specific in its purpose, and in the absence of a power of selection vested in the trustees was as uncertain in its objects as any gift could be, but nevertheless being charitable it was held to be good.

In my opinion, therefore, apart from any question which may arise if the Council of the University decide not to accept the gift, the gift is a good charitable bequest.

I have rested my decision on a broad principle but the same result may be arrived at on a narrow ground. The bequest has in immediate contemplation application of the income of the endowment in accordance with a scheme to be settled by the Council of the University and a test of the eligibility of students could be properly inserted in any scheme. A test dealing with the parentage of students might assume many forms, and the question of the form of the test is left to the Council to decide acting on such material as they find in the will. As a matter of construction of the bequest it is not necessary that any definite test should be such as to embrace all male students possessing the prescribed qualifications. Just as the Council might, if so advised, in the scheme they are authorised to make limit the class of eligible candidates by reference to forms of post-graduate study which appealed to them, so in their scheme they might frame a test of parentage which confined the class of eligible candidates to persons certainly within its ambit, and in framing that test properly take into account any matter which they conceived to affect the University of Leeds. Put generally, the bequest itself contains practicable machinery for getting rid of the supposed vice of uncertainty. And I need hardly add—though this is irrelevant on this point of law—that, if the Council feel difficulties in settling a test of parentage conforming with the provisions of the will, the advice or the directions of the court can always be obtained.

Order accordingly. Costs of all parties to be paid out of residue.

Solicitors: *Patersons, Snow & Co.*, agents for *Dibb, Lupton & Co.*, Leeds (for the trustees); *Maxwell, Batley & Co.*, agents for *Simpson, Curtis & Co.*, Leeds (for the University of Leeds); *Treasury Solicitor* (for the Attorney-General); *Patersons, Snow & Co.*, agents for *North & Sons*, Leeds (for other parties interested under the will).

[*Reported by* R. L. ZIAR, ESQ., *Barrister-at-Law.*]

CUMMINS *v.* HOLLOWAY BROTHERS (LONDON), LTD.

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and Goddard, L.JJ.), **January 28, 1944.**]

Emergency Legislation—Master and servant—Scheduled undertaking closed on day recommended to be holiday by Ministry of Labour—Claim for wages—"Holiday"—Essential Work (Building and Civil Engineering) Order, 1942 (*S.R. & O., No.* 2044 *of* 1942).

On Feb. 27, 1943, the Ministry of Labour issued a recommendation that certain days should be observed as approved holidays in scheduled undertakings within the meaning of the Essential Work (Building and Civil Engineering) Order, 1942. Among them was Saturday, June 12, and Whit Monday, June 14, 1943. The appellants gave notice that their works, which was for all material purposes a scheduled undertaking, would not be open on those dates. On June 12, the respondent presented himself for work and, failing to obtain it, claimed one hour's wages on the ground that Saturday, June 12, 1943, was not a holiday within the definition of "holiday" contained in the Essential Works (Building and Civil Engineering) Order, 1942. The appellants contended that that day was a recognised holiday :—

HELD : on the true construction of the Order, Saturday, June 12, 1943, was not a recognised holiday within the meaning of the definition.

[**EDITORIAL NOTE.** The " holiday " has to be one " recognised as such " in the industry. It seems clear that neither the Minister nor the employer could alter the usage of the industry as to what days were recognised holidays, since that was a matter for evidence. The difficulty here really arises from the fact that an additional holiday was suggested but the Ministry failed to make an order that, for the purposes of the principal order, this additional day should be treated as a " recognised " holiday.

AS TO HOLIDAYS, see HALSBURY, Hailsham Edn., Vol. 32, pp. 125, 126, para. 184 ; and FOR CASES, see DIGEST, Vol. 42, p. 936, Nos. 82, 83.]

APPEAL by the defendants from an order of His Honour JUDGE LILLEY, Bloomsbury County Court, dated Nov. 17, 1943. The facts are fully set out in the judgment of LORD GREENE, M.R.

J. W. Morris, K.C., and *J. R. Ogilvie Jones* (*John Bassett* with them) for the appellants.

F. W. Beney, K.C., and *Gilbert Dare* (*Humfrey H. Edmunds* with them) for the respondent.

LORD GREENE, M.R. : This appeal raises a very short point, the answer to which depends on the meaning of the definition of " holiday " in the Essential Work (Building and Civil Engineering) Order, 1942, art. 1 (2), as applied to the facts of the case as found by the county court judge. The respondent claimed payment of one hour's wages in respect of time on the morning of Saturday, June 12, that being the Saturday before Whit Sunday. He relied on art. 4 (1) (*d*) of the Order under which the person carrying on the undertaking is to pay wages to his specified employees in respect of every prescribed period, on the footing, of course, that the employees are during the normal working hours capable of and available for work and willing to perform services outside the usual occupation in the circumstances mentioned. " Normal working hours " are there defined as meaning :

> . . . in relation to a week 44 hours, in relation to a day other than Saturday 8 hours, and in relation to Saturday 4 hours.

Art. 4 (4) provides :

> Where any holiday occurs on any day or during any week, the normal working hours of that day or that week shall be treated as reduced by the extent of the holiday and the normal working hours attributable to that holiday.

The appellants contend that Saturday, June 12, was a holiday and, accordingly, that the normal working hours of the week were to be treated as reduced by the extent of the holiday, which would be 4 hours.

The way in which the trouble arose was this. The Ministry of Labour, taking the view that it would be in the public interest in the fourth year of the war that workers should have more holidays than they had been having, issued a recommendation on Feb. 27, 1943, suggesting that :

> . . . on the occasion of public holidays in England and Wales the following days should in general be approved holidays . . . Saturday, June 12 and Whit Monday, June 14 . . .

That recommendation was taken into consideration at a meeting of the National Joint Council for the Building Industry and the procedure committee of that body suggested as a matter of guidance to those who belonged or who were affiliated to it that, in accordance with the Government's request, works and shops should not normally be open on the Saturdays, Apr. 24, June 12, and July 31. The appellants gave notice beforehand that they proposed to treat June 12 as a holiday and that the works would not be open. No doubt the Ministry in issuing that notice thought that the workers would be glad to have an extra holiday, and, if all the workers had been of that frame of mind, no difficulty in practice would have arisen. Events, however, turned out otherwise, because a number of employees of the appellants in connection with the particular job in question were not willing to give up the opportunity of earning a wage on that particular Saturday and they presented themselves for work accordingly. The respondent was one of them. The appellants, apparently, although the matter is not strictly proved one way or the other, were not a scheduled undertaking within art. 2 of the Order. A scheduled undertaking is an undertaking whose name is entered on a schedule kept by the Minister, but, if they are not a scheduled undertaking, they are for present purposes in the same position by virtue of art. 9, which deals with scheduled works and scheduled sites, and for present purposes it is immaterial into which category the appellants came.

The appellants say that Saturday, June 12, must be regarded as having been a holiday and that, accordingly, under art. 4 (4), the working hours of that Saturday ought to be deducted from the normal working hours. The word "holiday" in the Order is defined as meaning : A

> . . . a day recognised as such in a particular scheduled undertaking either generally or as regards any persons or classes or descriptions of persons . . .

and in that latter case the day is only to be taken as a holiday for those persons or those classes or descriptions of persons. For the purpose of that definition the appellants are, I think, clearly to be regarded as a particular scheduled B undertaking referred to and the definition, therefore, means a day recognised as a holiday in the undertaking of Holloway Bros. (London), Ltd. It was not suggested that the recommendation issued by the Ministry was sufficient to make June 12 a "recognised" holiday.

The county court judge, after hearing the evidence, held, and, indeed, on the evidence it was impossible for him to hold otherwise, that the Saturday before Whitsuntide had never in the normal way been regarded as part of the Whitsun C holiday. He says :

> There is some conflict of evidence with regard to the Tuesday after Whit Monday, but until the year 1943 there appears to have been no question but that the Saturday was part of the ordinary week. The holiday on the Saturday was therefore a novelty.

In those circumstances the judge held that the Saturday, June 12, was not a day recognised as a holiday within the meaning of the definition, and, in my D opinion, he was perfectly right. He did not misconstrue the definition, nor is his finding of fact to be assailed. The only ground on which the appeal is rested is that the county court judge misconstrued the definition. It was said that that definition meant that, whenever an employer decided that a particular day should be a holiday, that decision made that day a day recognised as a holiday. Putting it in another way, it is said that the Order did not take away from the employer the right which it is said he had under the ordinary E contract of employment to decide what day should be a holiday. I need not go into the question as to what the position would be apart from the provisions of this Order ; all we are concerned with is what the Order means. In my opinion, it is quite impossible to construe the words "recognised as such" as referring to a unilateral decision by the employer as to what day should or should not be a holiday. If the construction contended for is the right one, I can see no means by which a limit could be put on the power of the employer F to proclaim a holiday on any day he pleased. It was said that the construction did not lead to that extreme result, because it might then be said that he would be going too far and would be defeating the purpose of the Order and that he might be said to be in the wrong if he did that. I cannot see any justification for imposing any limit of that kind if the construction contended for is right. If the construction contended for is right, it must, in my opinion, go the whole G way. The word "recognised" is a very common word, particularly in connection with the phrase "recognised holidays" in many industries, and it is to be found in industrial agreements and industrial awards. "Recognised" must, in my opinion, mean that a day is recognised as a holiday in the industry or in the particular occupation of the person carrying on a branch of industry —a day in respect of which a worker in the industry or in the enterprise would say without doubt, "Why, of course we always treat that as a holiday." That H could be said of August Bank Holiday. There must be very few industries in which August Bank Holiday is not by common consent treated as a recognised holiday. There is no need to attempt to give an exhaustive definition or place an exhaustive construction on the word. It is quite sufficient for the purposes of this appeal to say that the argument that "recognised" means that the employer can himself decide what day is to be a holiday is quite wrong. The county court judge in his judgment seemed to think that a day which it was agreed by both the employer and the employee should be a holiday would be a recognised holiday within the meaning of the definition. I do not propose to express any opinion upon that. It may very well be—I do not express this as an opinion but as a warning—that the matter is not free from doubt. It might be that an employer might agree with his men to take an extra day a week off through the year. It would require to be argued on the facts of any such case as to whether or not an agreement of that kind could convert the day in question into a recognised holiday. I can see a great deal to be said on both sides, and I express no opinion about it ; I merely refer to it because the county court judge appears to have thought that an agreement would be sufficient and I merely say that I reserve my opinion upon that point. I only say on the present appeal which is before us that the county court judge put a perfectly correct interpretation on the definition clause, and, in my opinion, his judgment is unassailable. The appeal must be dismissed with costs.

MACKINNON, L.J. : I agree. This is a very hard case on the appellants, who did their best to obey the Order, and also did their best to comply with the advice or recommendation of the Government issued by the Ministry of Labour on Feb. 27, 1943, but we must not allow a hard case to make bad law. As to the construction of the Order, upon its terms I am constrained to hold that this Saturday was not a holiday within the ambit of the definition in the Order, and, therefore, the appeal fails.

GODDARD, L.J. : I agree.

Appeal dismissed.

Solicitors : *Kenneth Brown, Baker, Baker* (for the appellants) ; *Arnold Carter & Co.* (for the respondent).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

Re WHITBY, PUBLIC TRUSTEE *v.* WHITBY AND OTHERS.

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and Luxmoore, L.JJ.), **February 3, 4, 1944.**]

Wills—Construction—Bequest of unmounted cut diamonds—"Jewellery"—Articles "now" deposited at stated place—Will speaks from death—Contrary intention—Wills Act, 1837 (*c.* 26), *s.* 24*—Administration of Estates Act,* 1925 (*c.* 23), *s.* 55 (1) (*x*).

A testator, by the first codicil to his will, gave to the appellant, E.R., with certain exceptions, " all the residue of my personal chattels as defined by the Administration of Estates Act, 1925, s. 55 (1) (*x*)." The testator had a collection of unmounted cut diamonds which he kept at his bank. The point at issue was whether cut diamonds fell within the word " jewellery " or, if not, were they " articles of personal ornament." By the fourth codicil to his will, the testator said " I exclude from the bequest of all the residue of my personal chattels . . . bequeathed to E.R. all articles of jewellery and other chattels belonging to me and which are now deposited at the Manchester Safe Deposit Co., and I bequeath the said articles of jewellery and other chattels and effects to my trustees to be held by them as part of my residuary estate." The question was whether or not the testator had by the use of the word " now " shown a sufficient contrary intention to exclude the operation of the Wills Act, 1837, s. 24, which provides that a will speaks from the death of the testator :—

HELD : (i) the unmounted cut diamonds were covered by the use of the word " jewellery " contained in the Administration of Estates Act, 1925, s. 55 (1) (*x*).

(ii) the use of the word " now " in the fourth codicil indicated a sufficient contrary intention to exclude the operation of the Wills Act, 1837, s. 24.

[**EDITORIAL NOTE.** In the ordinary way it is probable that the majority of people associate with the word " jewellery " the idea of something in a form that can be worn as an ornament. Here, it will be noticed, the jewels were cut and in a form that could be made up into an ornament and they are held to be jewellery within the definition in the Act. On the second point it is held that, if a contrary intention is not shown, the word "now" would be wholly redundant and have no meaning given to it.

As to Contrary Intention, see HALSBURY, Hailsham Edn., Vol. 34, pp. 236-238, para. 291; and for Cases, see DIGEST, Vol. 44, pp. 648, 649, Nos. 4880-4893.]

Appeal by the defendant, E. Rudd, from an order of Uthwatt, J., dated July 22, 1943. The facts are fully set out in the judgment of Lord Greene, M.R.

Harold Lightman for the appellant.

Wilfrid M. Hunt for the respondents, the residuary legatees.

H. A. Rose for the respondent, the Public Trustee.

Lord Greene, M.R.: The first question arising on this appeal is a very short one. The testator was a gentleman who, at his death, was possessed of articles of jewellery which apparently he had collected. He also possessed certain other things which are in dispute, namely, some unmounted cut diamonds, which he kept at his bank. He bought them in the year 1941. By the first codicil to his will he gave to his niece, the appellant, Ethel Rudd:

> . . . all the residue of my personal chattels as defined by the Administration of Estates Act, 1925, s. 55 (1) (*x*) [with certain exceptions].

The definition of personal chattels in that paragraph is, of course, a definition for the purpose of that Act, but it is used conveniently by this testator, and the codicil must be read as though he had written out this definition at length. Omitting irrelevant words it is as follows:

> "Personal chattels" mean . . . jewellery, articles of . . . personal . . . ornament . . .

The question which arises is whether unmounted cut diamonds fall within the word "jewellery" or, if they do not, whether they fall within the words "articles of personal ornament." Uthwatt, J., held that they were not jewellery, but apparently the question whether they were articles of personal ornament was not argued before him.

The definition of "jewellery" in the Oxford English Dictionary is as follows:

> Jeweller's work, gems or ornaments made or sold by jewellers; jewels collectively or as a form of adornment.

From that definition it seems to me pretty clear that in the ordinary use of English language the word "jewellery" would cover jewels collectively and would cover gems sold by jewellers just as it covers the case of jewels made up into an article of adornment such as a brooch or anything of that kind. I cannot see any justification in this case for excluding from the meaning of the word the sense of it as jewels collectively or as gems sold by jewellers. The words are wide enough to cover that, and I see no justification for cutting them down.

If the contrary view were taken, some curious results might follow because a man might very well as a hobby collect cut stones and make them up into articles of adornment, bracelets and so forth, a hobby in which I believe that not a few people engage. Would it have to depend on whether he had actually made up his stones into a bracelet as to whether or not they passed by a gift of jewellery in his will? It seems to me that that would be introducing a quite irrational distinction. That, nevertheless, would be the result which would follow if the construction which appears to me to be the right one were not the right one. Taking, as I do, that view of the meaning of the word "jewellery," I do not consider it necessary to deal with the question whether these are articles of personal ornament. The appeal on that matter must be allowed.

The second question relates to the construction of the fourth codicil of the testator. By his first codicil he had bequeathed his personal chattels to the appellant. His fourth codicil is dated June 13, 1940, and para. 1 of it is in the following terms:

> I exclude from the bequest of all the residue of my personal chattels contained in cl. 4 (*j*) of the first codicil dated Jan. 25, 1939, to my said will bequeathed to my niece Ethel Rudd all articles of jewellery and other chattels and effects belonging to me and which are now deposited for safe custody at the Manchester Safe Deposit Co., and I bequeath the said articles of jewellery and other chattels and effects to my trustees to be held by them as part of my residuary estate.

The testator, therefore, is excluding from the earlier gift the articles there referred to.

It is said, and Uthwatt, J., so held, that this is a case governed by the Wills

Act, 1837, s. 24, which is in the following terms :

> Every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.

What we have to consider then is whether or not in this will a contrary intention appears, the result of which will be to confine the articles referred to to those which were in the situation mentioned at the date of the codicil. If no such contrary intention appears, these words of exclusion would cover only those articles which were in the safe deposit at the date of the death. We have been referred to a number of cases. Speaking for myself, so far from obtaining any assistance from them I find them calculated to confuse. In them are to be found paraphrases—in some cases in my humble judgment inaccurate—of the language of the section. In other cases, we find language of quite a different character from this construed in such a way as to exclude a contrary intention within the meaning of the section. Those cases, in my opinion, cannot really afford us any assistance in this case where we have to construe the particular language of this particular codicil. I myself prefer to approach that task by reading the section—and everybody familiar with these things knows what is meant by a contrary intention appearing by a will—and by examining the precise language of this particular codicil. Why these other decisions on other wills are supposed to help me I do not know. I am not saying that in any sense of criticism of counsel for the defendants, the residuary legatees, for referring us to them, because he was bound to do so and he was quite right in doing so. I merely say that I find no assistance from them.

Looking at this provision, in the first instance it is not a gift pure and simple, but it operates as an exclusion from an earlier gift. The exclusion falls into three parts. One is the description of the type of subject-matter ; another is its location, namely, the Manchester Safe Deposit Co. ; the third is a reference to the time of such location, namely, the word " now." I myself cannot see why, when a testator has defined the objects to which he has referred both by time and by place, we should be forced to strike out from the will the reference to time as being an immaterial part of the description. Reading this simply as a piece of straightforward English I should have thought that the reference to time is just as essential a part of the description as the reference to place. The contrary view involves in effect striking out of this codicil the word " now." On the argument of the respondent the effect would have been precisely the same if the word " now " had not been there, and indeed that is indisputable, because, if the word " now " were not there, sect. 24 clearly would have applied. Therefore, on this argument " now " is redundant.

However rightly it may have been held in other cases where the word " now " appeared in quite different contexts that that word was not an essential part of the description, the question we have to decide is whether in this codicil and in this context it is an essential part of the description. Speaking for myself I find it impossible to construe these words in any other sense. It seems to me that the testator was thinking of a particular time, namely, the date of his codicil, just as he was thinking of a particular place. In the result, therefore, I am of opinion that sect. 24 does not apply and that this exception is limited to those articles which, at the date of the fourth codicil, were deposited in the place mentioned.

On the evidence it appears that it is very difficult, and that it may be impossible after this lapse of time, to ascertain what those articles were. If it prove impossible to identify them the result is, of course, that this exception from the legacy will fail to have any operation. It is for residue to show what was in fact deposited at that time in the place mentioned, and in so far as that cannot be shown the original gift in the first codicil has effect.

MACKINNON, L.J. : I agree.

LUXMOORE, L.J. : I also agree.

Appeal allowed. Costs to be paid out of residue.

Solicitors : *Fielder, Le Riche & Co.*, agents for *Biscoe-Smith & Blagg*, Portsmouth (for the appellant) ; *Gregory, Rowcliffe & Co.*, agents for *Marriott & Co.*, Manchester (for the residuary legatees) ; *Gregory, Rowcliffe & Co.*, agents for *Bullock, Worthington & Jackson*, Manchester (for the Public Trustee).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

HOBDAY *v.* NICOL

[King's Bench Division (Humphreys, Asquith and Cassels, JJ.), **January 25, 26, 1944.**]

Land Drainage—Bye-law—Bye-law prohibiting structure upon bank of river—Row of tanks filled with earth kept in position by own weight—"Structure."

A bye-law made by the Lee Conservancy Board under the Land Drainage Act, 1930, provided that no person should, without the consent in writing of the Board, construct any building, fence, post, pylon, wall or structure on the bank of the main river. The respondent placed a number of tanks filled with earth or hard-core in a row along the bank of the river, in some places in two tiers. The tanks were kept in position solely by their own weight. It was contended that this row of tanks was not a "structure" within the meaning of the bye-law:—

Held: the tanks so placed were a "structure" within the meaning of the bye-law.

[**EDITORIAL NOTE.** This decision is of importance to boards exercising powers under the Land Drainage Act, 1930. They are responsible for the upkeep of the banks of the river and entitled to prevent any interference with those banks unless they give their consent to what is intended to be done. No doubt what was here done was in fact helpful in the prevention of flooding, but, upon the proper construction of the bye-law, the Board were entitled to prevent the erection of the tanks without their permission.

As to Powers of Drainage Boards, see HALSBURY, Hailsham Edn., Vol. 30, pp. 84-86, paras. 157-159; and for Cases, see DIGEST, Supp., Sewers and Drains, Nos. 399b, 399c.]

Cases referred to:

(1) *Hoddinott* v. *Newton Chambers & Co., Ltd.*, [1901] A.C. 49; 24 Digest 923, *161*; 70 L.J.Q.B. 150; 84 L.T. 1.

(2) *Maude* v. *Brook*, [1900] 1 Q.B. 575; 24 Digest 924, *172*; 69 L.J.Q.B. 322; 82 L.T. 39.

(3) *Lavy* v. *London County Council*, [1895] 2 K.B. 577; 26 Digest 503, *2102*; 64 L.J.M.C. 262; 73 L.T. 106.

Appeal by way of case stated from the decision of justices sitting as a petty sessional court at Edmonton on May 21, 1943, dismissing an information preferred by the clerk to the Lee Conservancy Board. The facts are fully stated in the judgment.

Roland Burrows, K.C., and *W. E. P. Done* for the appellant.

H. J. Astell Burt for the respondent.

Humphreys, J.: It will be convenient first to read the bye-law. It is No. 3 of the Bye-laws of the Lee Conservancy Board, made under the provisions of the Land Drainage Acts. The bye-law runs as follows:

> No person shall, without the consent in writing of the Board, erect or construct or cause or knowingly suffer to be erected or constructed any building, fence, post, pylon, wall or structure on the bank of the main river, or within 10ft. measured horizontally from the foot of the bank (or flood embankment) on the landward side or where there is no bank (or flood embankment) from the brink (or natural bank) of the main river.

The case finds that Pymme's Brook forms part of the main river Lee, that the respondent is owner of the land adjacent to Pymme's Brook; and proceeds as follows:

> Some months before Dec., 1942, the Board had constructed on the respondent's land a concrete wall to form the bank of the stream. In that month the Board's engineer paid a visit to the site and found that a row of galvanized iron tanks had been erected along the line of the concrete wall and immediately behind it. In some places the tanks were in a single line and in others in two tiers one above the other. The tanks were filled with earth and hard core. The ground behind them had been made up to the level of the top of the tanks and at one point there was a considerable heap of rubbish or ash rising to about 4 or 5 ft. higher than the top of the double layer of tanks.

The only point raised by the case is whether or not that erection or construction, or whatever is the right word to use in regard to it, which had been placed behind the concrete wall, was a structure within the meaning of the bye-law.

Counsel for the respondent submitted to us that there was no point of law for this court to decide, on the ground that it was a question of fact and only a question of fact for the decision of the justices. To a considerable extent I agree with that contention ; but I would prefer to state the law which I think is applicable to this matter in this way. " Structure " is an English word in common use. If I may adopt the language of Lord Macnaghten in the House of Lords in *Hoddinott* v. *Newton Chambers & Co., Ltd.* (1), to which I am going to refer in a moment, everybody knows what a structure is, and everybody speaks of a particular thing as a structure.

So far as the question is whether a particular construction is a structure or not, I agree that the justices are the only proper persons to decide it, for they hear the evidence, they are told what it looks like, what it is made of, and in that way are able to decide what it is. But when the question which is put to a court of justice, as in this case, is not the simple question : Is this a structure ? but : Is it a structure within the meaning of a particular bye-law ? then different considerations apply, because, in addition to considering the nature of the thing itself, somebody has to consider and decide upon the language of the bye-law, upon the terms of the bye-law, upon the terms of the statute under which the bye-law is made ; probably upon the object of the bye-law ; and in this case certainly, upon the mischief intended to be prevented by the bye-law. In that state of things, I think it is quite obvious that the question which has to be decided on the case is a mixed question of law and fact.

If any authority is required for that somewhat elementary proposition, it will be found in the *dicta* of Lord Macnaghten and Lord Brampton in *Hoddinott's* case (1), which was cited to us by counsel for the appellant. It is quite unnecessary to deal with or to refer to the many intricate matters decided in that case. It is merely the *dicta* of two of their Lordships, uttered in the course of delivering their opinions, which are material in this case. Lord Macnaghten at the bottom of p. 55 observes :

> There was one point made by the learned counsel for the respondents which ought, I think, to be noticed. The learned counsel did not contend that the arrangement of boards and ledgers and trestles, which for want of a better word I have called a staging, was not a scaffolding [" scaffolding " was the word used in the section under discussion there] in the common acceptation of the word. Everybody called it a scaffolding. But they argued that it was not such a scaffolding as was contemplated by the Act. Taking the view which commended itself to Collins, L.J., both in the present case and in *Maude* v. *Brook* (2), they said that the scaffolding " must have some relation to the height of the building." And when pressed to submit a more definite proposition they proceeded to contend that it must be a scaffolding adequate for the construction or repair of a building exceeding thirty feet in height " as a whole," or, to use the language of Collins, L.J., in *Maude* v. *Brook* (2), " One system of scaffolding for the whole building " . . . I ought perhaps to add that I agree with my noble and learned friend, Lord Brampton, and with Collins, L.J., in thinking that the question whether a temporary staging is a scaffolding within the meaning of the Act is not a mere question of fact on which the finding of the county court judge is final. It is a mixed question of fact and law. When the facts are ascertained it is a question of law on which the Court of Appeal is entitled, and I think bound, to express an opinion.

At p. 68 Lord Brampton observed as follows :

> I thoroughly agree that the arbitrator or county court judge is the proper tribunal to find every fact which is necessary for the determination of the question whether the arrangement in the particular case before it is or is not " scaffolding " within the meaning of the Act. Such, for instance, as the mode in which the arrangement is put together, the component parts of it, the materials used for its construction, the use to which it is applied, the place and the size of the place in which it is used, the dimensions of it, etc. ; and his finding upon such facts is, according to the general rule, final ; but whether upon the facts so found, the arrangement so constructed is a scaffolding sufficient to satisfy the requirements of sect. 7 is, in my opinion, a question of law, which in the first instance must be adjudged by him to enable him to determine the case before him, his judgment on the question of law being open to review by the Court of Appeal.

Therefore, I come to the conclusion that it is a question of mixed fact and law which this court has to decide, as to whether this particular arrangement was a " structure " within the meaning of the bye-law which I have read. Upon that question I for my own part can entertain no doubt whatever. " Structure," as I understand it, is anything which is constructed ; and it involves the notion of something which is put together, consisting of a number of different things which are so put together or built together, constructed as to make one whole, which then is called a structure.

What was this thing ? We see from the photographs, and from the admirably clear description in the case, that it was a thing of very considerable size. We were told by counsel for the appellant, who has been at pains to add them up, that there were 53 of these separate receptacles. They are called "tanks." They were originally probably water-tanks ; but they are receptacles. They were put in in a certain form, in some places a single line of them, and in some places two tiers one above the other, with some object : they were put there so that they might be permanent ; and for that purpose they were filled with earth or rubble or hard core so as to make them heavy and keep them in the place where they were. The whole thing when constructed to my mind, looking at the photographs and paying attention to the description, is remarkably like a wall : and "wall" is one of the words which is used in this bye-law. I do not say it is necessary—indeed, it is not necessary—to find that they were a a wall ; but I say that, if that which we see in the photographs is not a structure, then I do not myself know what would amount to a structure. I think it is perfectly obvious that this arrangement of tanks is a structure in the ordinary acceptation of the word.

Next comes the question : Is it a structure within the meaning of the bye-law which is material here ? I think it is a little unfortunate that the justices (who I am sure were very anxious to decide this question in the right way) have not given us the advantage of knowing why they came to the conclusion that it was not a structure within the meaning of the bye-law. I think it would have been useful if they had explained in the case what were the grounds upon which they came to the conclusion that something which I venture to think is so obviously a structure that no ordinary person could doubt it, was yet not a structure within the meaning of the bye-law.

I turn to the bye-law in order to see what sort of thing is dealt with, and for what purpose it is that these sorts of things are dealt with. Perhaps it may be convenient first of all to look at the statute under which the bye-law is made. It is the Land Drainage Act, 1930, s. 47 (1), which provides as follows :

> A drainage board may, subject to the provisions of this Act, make such bye-laws as the board consider necessary for securing the efficient working of the drainage system in their district, and in particular and without prejudice to the generality of the foregoing provisions may make bye-laws for any of the following purposes, that is to say (*a*) regulating the use and preventing the improper use of any watercourses, banks or works vested in or under the control of the board or for preserving any such watercourses, banks or works from damage or destruction.

It was under that section that these bye-laws were made. As has already been observed, this bye-law forbids, "without the consent in writing of the Board," which in this case was never asked for, any person from erecting or constructing, among other things, "any structure on the bank of the main river." It is found in the case, and is quite obvious from the photographs, that this row of galvanized iron tanks had been erected on the bank of the river. The bank in this case is an artificial bank which had been constructed (for the purposes, it must be assumed, of the duties cast upon the Lee Conservancy Catchment Board) by a concrete wall. It is not actually on, but just behind and, so to speak, adjoining the concrete wall that, for some purpose or other, this arrangement has been constructed. So it is on the bank of the main river ; and it is prohibited from being "on the bank of the main river or within 10ft. from the foot of the bank."

I do not think it is material to consider the object of the landowner, who is the respondent in this case, in building this thing. Counsel for the respondent said that his object was to prevent flooding. If so, the answer is that that is peculiarly the duty of the Lee Conservancy Catchment Board. It is one of the things they are required to look after and attend to. It is not for any other person without their consent—which it may well be would have been granted if asked for—to interfere with the bank of the river, however laudable his object may be in preventing his land from being flooded. Other reasons were suggested on behalf of the Board why this gentleman had put these things there ; but, as I say, it seems to me to be quite immaterial.

I can only say, regretting as I always do regret to have to come to a conclusion different from that of the justices, that I have come to the conclusion that, not only is this arrangement a structure, but it is precisely the type of structure which is expressly forbidden to be put upon such a place as it was put on without the consent of the Board.

For these reasons, I am of the opinion that this appeal should be allowed.

ASQUITH, J. : I agree.

CASSELS, J. : I agree.

Appeal allowed with costs.

Solicitors : *Sharpe, Pritchard & Co.* (for the appellant) ; *H. B. Wedlake, Saint & Co.* (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

LACE *v.* CHANDLER

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and Luxmoore, L.JJ.), **February 10, 11, 1944.**]

Landlord and Tenant—Lease—Term—Certainty—Termination defined with reference to termination of war.

A house was let for the duration of the war and it was contended that such a term was sufficiently certain because at some future time its duration would be made certain :—

HELD : such a term was uncertain and no valid tenancy was created.

[**EDITORIAL NOTE.** The decision in *Great Northern Ry. Co.* v. *Arnold* (1) has often been questioned, and in *Swift* v. *MacBean* [1942] 1 All E.R. 126, BIRKETT, J., did not find himself called upon to express a final view on the matter and was no doubt bound to follow it if it were in point. The Court of Appeal in this case have, however, now expressed the view that a term for the duration of the war is invalid as the duration of the term is not sufficiently certain. This decision will no doubt render void a number of tenancies created in reliance upon *Great Northern Ry. Co.* v. *Arnold* (1). The difficulty can be overcome, as suggested in *Arnold's* case (1), by creating a long term determinable by notice after the termination of the war. If parties can agree, it is better to adopt some more definite expression than " the termination of the war."

AS TO TERM DEFINED BY REFERENCE TO DETERMINING EVENT, see HALSBURY, Hailsham Edn., Vol. 20, pp. 148-150, para. 161 ; and FOR CASES, see DIGEST, Vol. 30, pp. 462-466, No. 1245-1292.]

Cases referred to :

*(1) *Great Northern Ry. Co.* v. *Arnold* (1916), 33 T.L.R. 114 ; 30 Digest 463, *1249*.

*(2) *Zimbler* v. *Abrahams*, [1903] 1 K.B. 577 ; 30 Digest 438, *989* ; 72 L.J.K.B. 103 ; 88 L.T. 46.

APPEAL by the tenant from an order of His Honour JUDGE ALLSEBROOK, Barrow-in-Furness and Ulverston County Court, dated Dec. 2, 1943. The facts are fully set out in the judgment of LORD GREENE, M.R.

L. F. Sturge (*H. H. Maddocks* with him) for the appellant.

Gilbert Dare for the respondent.

LORD GREENE, M.R. : In the action out of which this appeal arises, the landlord, who is the respondent in this court, was seeking to recover possession of a dwellinghouse in Barrow-in-Furness. Her case, as set out in her particulars of claim, was that the tenancy was a weekly tenancy ; and that it had been duly determined by notice to quit. The defence raised points under the Rent and Mortgage Interest (Restrictions) Acts which are not relied upon now. In para. 4 it said :

> The said dwellinghouse was let to the defendant for the duration of the war.

The agreement between the parties was partly oral and partly in writing. The written terms are to be found in the rent-book ; the oral terms were referred to in the evidence. The landlord said that the tenancy was to be a weekly tenancy. The evidence for the tenant was that the house was taken furnished for the duration of the war.

The county court judge found that the landlord sublet the dwellinghouse furnished to the tenant on a verbal agreement at the rent of 16*s.* 5*d.* a week, to include the use of furniture. He then found that it was a condition of the verbal agreement that certain articles of furniture, the property of the landlord and her husband, should not be touched or interfered with. He then found that the tenant had broken this condition; and on that ground he made an order for possession. We have not heard arguments in support of that judgment. The reasons given invite criticism, because the county court judge apparently held that a right of re-entry was to be implied on breach of that condition which he found and it is to be observed that no notice under the Law of Property Act, 1925, was ever served by the landlord.

The question might have arisen whether in those circumstances there was any jurisdiction in the court to make an order for possession on the ground of breach of covenant. However, it is not necessary to go into that matter, because, in my opinion, the judgment is perfectly correct for a different reason: namely, that the notice to quit was a good notice to quit and effectively brought the tenancy to an end.

Apart from one circumstance, there could be no question that this was an ordinary weekly tenancy, duly determinable at a week's notice. But the parties in the rent-book agreed to a term which appears there expressed by the words "furnished for duration"—which must mean the duration of the war. The question immediately arises whether a tenancy for the duration of the war creates a good leasehold interest. In my opinion, it does not. A term created by a leasehold tenancy agreement must be a term which is either expressed with certainty and specifically, or is expressed by reference to something which can, at the time when the lease takes effect, be looked to as a certain ascertainment of what the term is meant to be. In the present case, when this tenancy agreement took effect, the term was completely uncertain. It was impossible to say how long the tenancy would endure. Counsel for the tenant in his argument has maintained that such a lease would be a good lease; and that, even if the term is uncertain at the beginning of the term, when the lease takes effect, the fact that at some future time it will be made certain is sufficient to make it a good lease. In my opinion, that argument is not to be sustained.

I do not propose to go into the authorities on the matter; but in Foa on Landlord and Tenant, 6th Edn., at p. 115, the law is stated in this way and, in my opinion, correctly stated:

> The *habendum* in a lease must point out the period during which the enjoyment of the premises is to be had; so that the duration as well as the commencement of the term must be stated. The certainty of a lease as to its continuance must be ascertainable either by the express limitation of the parties at the time the lease is made, or by reference to some collateral act which may, with equal certainty, measure the continuance of it, otherwise it is void. If the term be fixed by reference to some collateral matter, such matter must either be itself certain (*e.g.*, a demise to hold for "as many years as A has in the manor of B") or capable before the lease takes effect of being rendered so (*e.g.*, for as many years as C shall name"). Consequently, a lease to endure for "as many years as A shall live," or "as the coverture between B and C shall continue," would not be good as a lease for years; although the same results may be achieved in another way, by making the demise for a fixed number (ninety-nine, for instance) of years determinable upon A's death or the dissolution of the coverture between B and C.

It is important to observe that where the term is capable of being rendered certain, it must be so "before the lease takes effect." In the present case, in my opinion, this agreement cannot take effect as a good tenancy for the duration of the war. Can it take effect in any other way? It was suggested that the difficulty would be got over by construing the document—thus making it a good tenancy—as an agreement for a long period, for instance, 99 years, determinable on the termination of the war. In my opinion, it is quite impossible to construe this agreement in that way.

It is perfectly true that in *Great Northern Ry. Co.* v. *Arnold* (1), Rowlatt, J., had before him a case of a letting for the duration of the last war, the rent being payable weekly; and the judge found it possible in that case to treat the tenancy as though a lease for 999 years had been created terminable on the conclusion of the war. He had some assistance in arriving at what, on the face of it, seems a rather strong conclusion in the fact that there was a definite undertaking by the landlord not to serve a notice to quit during the period. The actual words, as stated in the head-note, were:

> . . . they [the landlords] said that they did not intend that he should be subject to a week's notice.

That case, if it can be supported, can, in my opinion, only be supported on the ground that that term of the agreement justified the rather strained construction which the judge put upon the agreement. However that may be, in the present case it seems to me to be completely illegitimate to construe this agreement as an agreement for a long term determinable if the war comes to an end earlier.

Is there any other possible construction ? It is not contended that this can be construed as though it were a grant of a freehold interest. That admission was rightly made, because the only way in which you could convert this into a freehold interest would be by construing it as an agreement for a life tenancy terminable at the end of the war. It is quite impossible to construe this document A as anything of the kind.

Lastly, counsel for the tenant argued that the agreement could be construed as an agreement to grant a licence. In my opinion, it is quite impossible to construe it in that sense. The intention was to create a tenancy and nothing else. The law says it is bad as a tenancy. The court is not then justified in saying : " We will treat this contract as something quite different from what the parties B intended, and regard it merely as a contract for the granting of a licence." That would be setting up a new bargain which neither of the parties ever intended to enter into and would be quite illegitimate.

The result is that the relationship between these parties must be ascertained on the footing that the tenant was in occupation and was paying a weekly rent : therefore, the relationship must be the relationship of weekly tenant and landlord and nothing else.

C There is one case to which I should have referred, because some reliance was placed upon it. It was a decision of this court in *Zimbler* v. *Abrahams* (2). There the landlord let a house at a weekly rent and agreed not to raise the rent as long as the tenant lived in the house and paid the rent regularly, and also agreed not to give him a notice to quit. The decision of this court was that the tenant was entitled to specific performance. But of what there should be specific performance is left very obscure. The alternative interpretations which appear D to have been put upon it were that it was either an attempt to create an immediate demise for the life of the defendant, or an agreement to grant a lease for the life of the defendant. If the contract was construed as an agreement to grant a lease for the life of the defendant, then one can understand it being so treated. I need not make any comment upon that decision more than to say that the *ratio decidendi*, if I have rightly unravelled it, does not appear to afford E any assistance in this case, because it was based upon a construction placed upon that particular contract which cannot be placed on this one. I have already said that this cannot be construed as an agreement to grant a lease for the life of the tenant subject to earlier determination if the war should end before he died.

In the result, therefore, the judgment of the county court judge was in effect right and the order for possession was properly made. I say nothing more than F what I have said about the reasons he gave ; but, assuming that those reasons were not good reasons, then the ground originally relied upon by the landlord namely, the determination by notice to quit, was a perfectly valid ground ; and the appeal must be dismissed.

MACKINNON, L.J. : I agree. A hard case and a good case may equally lead to bad law. The county court judge granted the order because of his G disapproval of the tenant's conduct. I think that is bad law. Whether the same tendency led ROWLATT, J., to a similar result in *Great Northern Ry. Co.* v. *Arnold* (1), it is not necessary to determine : but it may be noted that he expressly said that his conclusion in favour of the plaintiff was arrived at " by hook or by crook " rather than upon legal principles.

Though the reason given by the county court judge, whose judgment is now under appeal, was bad, that does not prevent counsel for the landlord from H supporting his judgment for a reason that is good in law, though not mentioned by the judge below. That good reason has, I think, been given by LORD GREENE, M.R. ; and on that ground I agree that the appeal should be dismissed.

LUXMOORE, L.J. : I agree; and I do not think it is necessary to add anything.

Appeal dismissed with costs.

Solicitors : *Maddocks & Colson*, agents for *P. Kemp Lee*, Barrow-in-Furness (for the appellant) ; *Hargreaves & Crowthers*, agents for *Hart Jackson & Sons*, Barrow-in-Furness (for the respondent).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

COMMISSIONERS OF INLAND REVENUE *v.* L. B. (HOLDINGS), LTD. (IN LIQUIDATION).

[Court of Appeal (Scott, Luxmoore and du Parcq, L.JJ.), **November 30, December 1, 2, 3, 1943, February 1, 1944.**]

Income Tax — Sur-tax — Undistributed income — Apportionment according to members' interest in assets—" Likely to be able to secure "—" Any means whatsoever "—Finance Act, 1922 (*c.* 17), *s.* 21—*Finance Act,* 1936 (*c.* 34), *s.* 20 (1)—*Finance Act,* 1937 (*c.* 54), *s.* 14 (2)—*Finance Act,* 1939 (*c.* 41), *ss.* 14, 15.

L.B. (Holdings), Ltd., was an investment company within the meaning of the Finance Act, 1936, s. 20 (1), and as such came within the provisions of the Finance Act, 1939, ss. 14, 15. It was contended by the appellants that the income on the interest held as a trustee by B., the principal shareholder and managing director, should not have been apportioned to him. On behalf of the Inland Revenue Commissioners it was contended *inter alia* that such income had been correctly apportioned to B., since as sole trustee of the trust (which was for the benefit of his wife and children) he had been in a position to ignore the terms of the trust and deal with the interest for his own benefit :—

Held [Luxmoore, L.J., *dissenting*] : the words " by any means whatsoever, whether he has any rights at law or in equity or not " authorise the Commissioners to deem a person to be " likely to be able to secure " his ends although he is not armed with any enforceable right, provided they are reasonably satisfied that he can obtain the concurrence or co-operation of beneficiaries which is necessary for the attainment of his ends. It is immaterial whether the unlawful method of attaining those ends is a breach of trust, a breach of contract or a tort, so long as, by the acquiescence of, or release by, the beneficiaries, he can be put in as good a position as if his conduct had been lawful from the first.

[**EDITORIAL NOTE.** The statute enacts that income shall be deemed to be taxpayer's income if by any means whatsoever he can secure that it shall be applied for his benefit. It is agreed by everyone that means amounting to a criminal act must be excluded and the substantial question is whether a breach of trust is included. The majority, whose view differs only slightly from that of Luxmoore, L.J., have come to the conclusion that a breach of trust is only included where it is certain that the beneficiaries will concur and release the trustee from all liability and approve his action.

For the Finance Act, 1939, s. 15 (3), see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, p. 185.]

Case referred to :

*(1) *Penang and General Investment Trust, Ltd.* v. *Inland Revenue Comrs.*, [1943] A.C. 486 ; [1943] 1 All E.R. 514.

Appeal by the company, L.B. (Holdings), Ltd., from a decision of Wrottesley, J., dated Nov. 3, 1942, on a case stated by the Board of Referees pursuant to the Finance Act, 1922, for the opinion of the High Court of Justice.

The material parts of the case stated are as follows :

26. It was contended on behalf of the Commissioners of Inland Revenue that the whole of the income of the Holding Company for the two years in question had been properly apportioned to Mr. Brady pursuant to section 15 of the Finance Act, 1939, and that the powers of the Special Commissioners had been properly exercised under that section for the following reasons :—

(1) That the declaration of trust dated Mar. 22, 1934, was never intended to bind Mr. Brady by creating the strict relationship of trustee and beneficiaries, and was a sham.

(2) Alternatively, that Mr. Brady was, or was likely to be, able to secure that the income or assets of the company or of Luke Brady, Ltd., would be applied either directly or indirectly for his benefit in view of the following :—

(*a*) Mr. Brady by virtue of his voting control of the Holding Company, and his position as governing director, could ensure that its income or assets could be paid or transferred to himself or his wife by way of remuneration under art. 22.

(*b*) Similarly by reason of his voting control of the Holding Company, which owned all the shares in Luke Brady, Ltd., and his position as governing director of Luke Brady, Ltd., Mr. Brady could ensure the payment of the income or assets of Luke Brady, Ltd., to himself or his wife by way of remuneration by amending art. 81 of the Articles of Association of Luke Brady, Ltd., or under art. 83.

(*c*) Any dividends declared by the Holding Company were payable to Mr. Brady as the sole shareholder, and although he was so entitled as trustee he was at all material times the sole trustee, and in such relationship with the beneficiaries, that he was in fact in a position substantially to ignore the terms of the trust, and to deal with the said dividends for his own benefit.

(3) Alternatively that the requirements of the Finance Act, 1939, s. 15 (3) (*a*), were satisfied, as was admitted on behalf of the company.

(4) Alternatively that the requirements of the first part of subsect. (3), or alternatively of subsect. (3) (*a*) and of subsect. (3) (*b*), were satisfied by reason of the position of governing director of the Holding Company and of Luke Brady, Ltd., held by Mr. Brady, and of the provisions of the articles of the two companies which operated to vest the control of the two companies and the exercise of its powers exclusively in Mr. Brady.

It was therefore contended on behalf of the Crown that the apportionments as originally made by the Special Commissioners should be restored.

27. It was not contended on behalf of the Crown that, even if the children were not likely to consent to anything more, they had consented or were likely to consent to forgo any claim that Mr. Brady should be charged interest on his loan from Luke Brady, Ltd., and that this brought the case within the Finance Act, 1939, s. 15, and justified some small apportionments appropriate to the benefit obtained by the avoidance of interest. It was agreed that no useful purpose would be served by apportioning to Mr. Brady any part of the income due to Mrs. Brady.

28. It was contended on behalf of the Holding Company :—

(1) That the declaration of trust of Mar. 22, 1934, was always intended to bind Mr. Brady to the beneficiaries in relationship of a trustee to them ; that it was not a sham, and that the relationship of trustee and beneficiaries was recognised during the material years, and has continued to be recognised since ;

(2) That Mr. Brady was not in such a relationship with the beneficiaries that he was in a position to ignore the terms of the trust, and to deal with the dividends from the Holding Company for his own benefit ;

(3) That Mr. Brady was not, nor likely to be, able to secure that the income or assets of the Holding Company would be applied directly or indirectly for his benefit ;

(4) That the requirements of the Finance Act, 1939, s. 15 (3), were not satisfied :

(5) That the determination of the Special Commissioners should be affirmed.

29. We the members of the Board present at the hearing found the following facts :—

(*a*) That Mr. Brady did not intend to deprive his children permanently of the trust income or any substantial part of it ; but he did intend, so long as his children allowed him to do so, to retain control over the income and to use most of it temporarily to increase the liquid assets of Luke Brady, Ltd., depleted by his own borrowing. He took a lax view of his duty as a trustee and as a director, and, although he knew that he was liable to account, he did not expect that his children would ever call upon him to account strictly ;

(*b*) That prior to the deed of release none of the children who were of age had agreed to forgo any of their rights, and the rights of the infant children could not be released. Mr. Brady's assets were sufficient to enable him to make good any claim by the beneficiaries. We therefore held that the declaration of trust was not a sham ;

(*c*) That it was likely that the children who were of age would consent to a substantial part of the trust income being lent to Mr. Brady, if he asked for it :

(*d*) That there was not sufficient evidence to satisfy us that any of the children were likely to have consented to assets or income of the company being given to Mr. Brady, unless he had been in serious financial difficulty. That event had not occurred, and up to the date of the direction appeared to be unlikely to occur. We considered it likely that, in that event, some of the children would have helped their father, but there was too much uncertainty to make it appropriate to apportion any of the income to Mr. Brady.

30. We held that the words " able to secure " in the Finance Act, 1939, s. 15, mean " able to secure by lawful means," and that the consent of the beneficiaries was necessary before Mr. Brady could secure that assets or income of the Holding Company could lawfully be applied for his benefit.

J. Millard Tucker, K.C., and *N. E. Mustoe* for the appellant company.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*), *J. H. Stamp* and *Reginald P. Hills* for the respondents.

Scott, L.J. : In this case du Parcq, L.J., will deliver the judgment of himself and myself, but I will ask Luxmoore, L.J., to deliver his judgment first.

Luxmoore, L.J. : On Dec. 1, 1939, the Special Commissioners made apportionments of the actual income from all sources of L.B. (Holdings), Ltd., hereinafter called " the Holding Company." The apportionments were made for the year of assessment 1938-39 and for the part of the year of assessment 1939-40 between Apr. 6, 1939, and July 22, 1939, the last-mentioned date being the day on which the Holding Company was put into voluntary liquidation. These apportionments were made in pursuance of the Finance Act, 1939, s. 15, consequent upon directions made pursuant to the Finance Act, 1922, s. 21, the Finance Act, 1937, s. 14 (2), and the Finance Act, 1939, s. 14. Notice of appeal was given by the Holding Company against the directions, but such notice was withdrawn on June 17, 1940. Consequent upon the directions the actual income of the Holding Company was computed for the year of assessment 1938-39 to be £18,585 and for the period from Apr. 6, to July 22, 1939, to be A £5,569. The whole of both these sums were apportioned to one Luke Brady (hereinafter called Brady). The Holding Company appealed against these apportionments, and the Special Commissioners allowed both appeals and the apportionments were discharged. The Commissioners of Inland Revenue required the appeals to be reheard by the Board of Referees (hereinafter referred to as "the Board"). The Board affirmed the determination of the Special Commissioners, and a case for the opinion of the High Court was stated at the B request of the Commissioners of Inland Revenue. The Board found certain facts which are set out in para. 29 of the case stated, and came to a conclusion with regard to the construction to be placed upon the Finance Act, 1939, s. 15. This conclusion is set out in para. 30 of the case stated. The Board further found, as stated in para. 31 of the case, that having regard to the findings of fact as set out in para. 29 and the conclusion of law as set out in para. 30, Brady C was not able and was not likely to be able to secure that the income or assets of the Holding Company would be applied directly or indirectly for his benefit.

The questions raised by the case for the opinion of the court are: (i) Whether there was any evidence to support the findings of fact as set out in paras. 29 and 31 thereof, and (ii) Whether the conclusion of law as set forth in para. 30 was correct.

The case was heard by WROTTESLEY, J., who decided that there was evidence D to support the findings of fact set out in para. 29 of the case, but that the conclusion of law set out in para. 30 was erroneous and that consequently the determination of the Board affirming the decision of the Special Commissioners was erroneous, and he allowed the appeal and remitted the case to the Board to do what was consistent with his decision. The Holding Company has appealed to this court with regard to the conclusion of law.

The first question to be decided is what is the true construction of the Finance E Act, 1939, s. 15. The section so far as material is in the following terms:

> (2) In apportioning for the purposes of [the Finance Act, 1922,] s. 21, the income of an investment company . . . (c) to any person who is a member of the company and in their [that is, the Special Commissioners'] opinion is, or is likely to be, able to secure that income or assets, whether present or future, of the company will be applied either directly or indirectly for his benefit to a greater extent than is represented in the value for apportionment purposes of his relevant interest in the company, considered F in relation to the value for those purposes of the relevant interests of other persons therein; the Special Commissioners may apportion to him such part of the income of the company as appears to them to be appropriate and may adjust the apportionment of the remainder of the company's income as they may consider necessary.

Obviously the power conferred on the Special Commissioners to make an apportionment under the provisions set out is only exercisable if the Special G Commissioners are of opinion that the person against whom an apportionment is to be made "is, or is likely to be, able to secure that income or assets, whether present or future . . . will be applied" in the manner defined. It is said that the words "is, or is likely to be, able to secure" are limited and must be construed as referring to ability to secure by lawful means and consequently cannot apply to a case where the benefit can only be obtained in breach of trust. There would appear to be much force in this contention if the section had not contained H any definition of the phrase "is, or is likely to be, able to secure." The section, however, contains such a definition in subsect. (3), which so far as is material provides:

> For the purposes of this section, a person shall be deemed to be able to secure that income or assets will be applied for his benefit if he is in fact able so to do by any means whatsoever, whether he has any rights at law or in equity in that behalf or not . . .

Pausing here, it seems to me that the crucial words are "by any means whatsoever, whether he has any rights at law or in equity . . . or not." The express reference to rights at law or in equity in my opinion covers all lawful means, for I am unable to call to mind any right which can exist except at law or in equity. The words "by any means whatsoever" are necessarily of much wider import and include means which are neither legal nor equitable, and this is emphasised by the use of the words "or not." But the definition clause does not end here, for it proceeds to define the phrases "able to secure" and "likely to be able to secure." The latter phrase, apart from any definition, is of wider import than the former. "Able to secure" must, I think, depend on the existence of particular facts, while "likely to be able to secure" must of necessity depend on the weighing of probabilities and even possibilities. The definition of the latter phrase depends on the drawing of inferences which do not require to be considered in construing the phrase "able to secure." This is made clear by the subsequent part of subsect. (3), which is as follows:

> . . . the Special Commissioners may draw the inference that a person is likely to be able to secure that assets or income [will be applied for the benefit of a person in the manner stated] if and only if [and these are limitations on the meaning of the phrase] they are satisfied (*a*) that he has . . . transferred assets to the company [as there stated] and (*b*) that the persons who, whether as directors or shareholders or in any other capacity, have, or will at any material time have, powers or rights affecting the disposal or application of the income or assets of the company are likely to act in accordance with his wishes or that he is able to secure that persons who at the material times will have such powers or rights will be persons likely to act in accordance with his wishes.

These words in their ordinary significance are not applicable if the person whose wishes are referred to has any legal or equitable right. In any such case his wishes do not come into the picture, for he can direct the other persons to act in accordance with his legal or equitable rights and is independent of their wishes. I am, therefore, of opinion that the judge was right in holding that the conclusion of law arrived at by the Board that the words "able to secure" are confined to and must be construed as meaning "by lawful means only" is erroneous. It is to be observed that the Board does not attempt to differentiate between the phrases "able to secure" and "likely to be able to secure." In my judgment the latter phrase has, in the manner I have endeavoured to explain, a wider import than the former.

The judge said:

> In the circumstances of this case we are not concerned with breaches of the criminal law. When the Board speak of lawful means, they mean acts which were not breaches of trust, not acts in respect of which the beneficiaries of the trust could, by taking the proper proceedings, have caused Brady to make restitution.

The Attorney-General, on behalf of the Crown, in his argument clearly stated—as I gather he did also in the court below—that it was not and never had been the contention of the Crown that the possibility that a criminal action might be committed was sufficient to bring any particular case within the section. In my judgment the section only applies and must be limited to cases in which the unlawful act is likely to be condoned by the beneficiaries, for plainly, on the true construction of the section, it is not every trustee who acts in breach of his trust and uses trust money for his own purposes that can be said either to be able to secure or to be likely to be able to secure that trust money may be applied for his own benefit. It must be borne in mind that a trustee who so uses trust money cannot be assailed if he obtain the *ex post facto* assent of his beneficiaries or an *ex post facto* release from them in respect of his liability. This point of view seems to be in accord with the judgment of the judge. It was argued both in the court below and in this court that the words "able to secure" must be construed as meaning "able to secure permanently," and it may well be that this is right in the case of the phrase "able to secure" but it cannot in my view apply to the wider phrase "likely to be able to secure," for the word "likely" seems to me to negative any idea of certainty. It might well happen that on the evidence the probability might be established, but later events might upset the probability, as in other spheres of activity what I believe is described as a dead certainty does not always fulfil expectations. This, I think, is what the judge meant when he said:

> Nor do the words mean able to secure permanently, and so that the person securing the benefit can retain it, and not be compelled by appropriate proceedings to disgorge it,

On the facts of the present case it seems to me that Brady in his capacity as trustee might well be likely to be able to secure an *ex post facto* assent or release from his beneficiaries, although no one can say that he will certainly do so. It is difficult to understand why the various arrangements made were so made unless it was with some such prospect in view. Let the facts speak for themselves. They are as follows: Brady was a rich man, his main interests being in the public house business. On Mar. 17, 1934, he caused to be incorporated the Holding Company to carry on the business of an investment trust company within the meaning of the Finance Act, 1936, s. 20 (1). Its issued share capital was originally £500 divided into 500 shares of £1 each. 499 of these shares were issued to him and the remaining one share was issued to his wife as his nominee. So far he had the whole beneficial interest in the Holding Company. A further 105 shares of £1 each were issued to Brady on Oct. 21, 1935. Brady and Mrs. Brady were at all material times the sole directors of the Holding Company, Brady being the governing director and as such invested with the widest possible control and powers. On the same date Brady caused to be incorporated another company under the name of Luke Brady, Ltd., with a capital of £50,000 divided into 50,000 shares of £1 each. Again Brady and Mrs. Brady were the first directors, and again Brady was the governing director, with control and powers of the same nature as that which he had in the case of the Holding Company.

Five days later Brady agreed to sell his public house businesses other than book debts then owing to him to Luke Brady, Ltd., for a total consideration of £49,988, which was satisfied by the allotment to him of 49,988 shares credited as fully paid up. The debts owing by Brady in respect of the public house business remained his personal liability. Shortly afterwards Brady sold the 49,988 shares in Luke Brady, Ltd., the consideration being the 500 shares in the Holding Company already allotted to him and his wife. On the same day as that on which Luke Brady, Ltd., was incorporated Brady executed a declaration of trust in favour of his wife and children. Subsequently 605 shares of the Holding Company (the whole of its issued capital) were, with other investments, included in the declaration of trust. From the beginning the whole of the trust income was paid into the account of Luke Brady, Ltd., and was in the books of that company credited to an account entitled "Mr. Brady's personal account." No trust accounts were ever kept, although some payments were made by Brady to the beneficiaries or for their benefit. This state of affairs continued until the Holding Company went into liquidation on July 22, 1939. The liquidator distributed the assets in *specie*, transferring them to Brady. The reason of the liquidation was the legislation then contemplated which was subsequently embodied in the Finance Act, 1939, s. 15, the section under consideration in this litigation.

On July 31, 1940, Brady appointed two additional trustees of the declaration of trust to act jointly with himself, and for the first time the trust was put on a proper basis and proper trust accounts were opened. Three of the children beneficiaries were then of full age, but two were still infants. A release was prepared to which all of the five children beneficiaries (including the two children under age) are expressed to be parties. This document purports to release Brady from liability for all income received by him and not paid or applied to or for the benefit of the children beneficiaries, which plainly is a not inconsiderable amount. Strictly speaking, the present trustees of the settlement ought on behalf of the infant beneficiaries to take proper steps to protect their interests and to have the breaches of trust committed by Brady made good at once. Obviously there is no such intention and the breaches of trust are to be allowed to stand unremedied, at any rate until the infant beneficiaries respectively attain their majority. Why is this? Surely the answer must be because the infant beneficiaries are likely to act in accordance with Brady's wishes and to execute the release in due course. In that event Brady will have secured the benefit of the trust income retained by him in the past.

Having regard to the manner in which the affairs of the trust were dealt with, it seems material to consider why were the several transactions entered into, and was it in order to avoid to any extent Brady's liability to sur-tax. Brady would clearly have avoided such liability if he contemplated using either the whole or part of the income derived under the declaration of trust in reliance upon the likelihood of his children ultimately releasing him from all liability, and they in fact executed such a release. In my judgment the Board are bound to consider this aspect of the case in arriving at a conclusion on the question whether Brady is a person likely to be able to secure the application of income or assets for his benefit in the manner described in the material section. The Board does not appear to have done so.

It is said Brady does not fall within the section because, although he is a member of the Holding Company, the income or assets of the company cannot be applied for his benefit to a greater extent than is represented in the value for apportionment purposes of his relevant interests in the company (see sect. 15 (2) (*c*)), because he is the legal owner of all the shares in the Holding Company, and therefore the value for apportionment is the full value, and consequently he is not a person able or likely to be able to secure that the income or assets would be applied for his benefit to a greater extent than is represented by the value for apportionment purposes of his relevant interest.

Interest in this connection means interest in the capital or profits or income of the company, and consequently Brady as the trustee of and the beneficiaries under the settlement are for the purposes of the Acts in the position of and deemed to be members of the company (see the Finance Act, 1922, s. 21 (7)); and so, when the Special Commissioners come to apportion income in accordance with the interests of members, having both Brady and the beneficiaries before them and finding (if they do so) that Brady is within the Finance Act, 1939, s. 15 (2) (*c*), after weighing his interest, they can apportion to it the appropriate part of the income.

For these reasons I am of opinion that the judgment of Wrottesley, J., is correct and that he was right in ordering that the case should be remitted to the Board for reconsideration in the light of the construction laid down in his judgment. In my opinion this must necessarily involve further findings of fact.

An important question arises with regard to the form of the order drawn up to give effect to the judgment of Wrottesley, J. The material part provides as follows:

> It is ordered that the case be remitted to the Board of Referees for them to do what is consistent with the judgment of this court.

An order in this form leaves it to the reader to discover for himself what are the directions given by the court, and may result in a misinterpretation of those directions. The proper function of an order is to state clearly and without ambiguity what the court has ordered to be done. In the present case the court has interpreted the material section of the Act (the Finance Act, 1939, s. 15), and the order should embody that interpretation in an appropriate declaration or series of declarations. In framing the declaration or declarations, it must be borne in mind that the court has not attempted to formulate an exhaustive list covering all cases which may fall within the section. In the first place the judge has held that the section is not limited to lawful means, and has proceeded to hold that a breach of trust may fall within the purview of the section if the case falls within the definition of either of the phrases " able to secure " or " likely to be able to secure " and the other conditions required by the section are fulfilled. I think the proper order to be made on the appeal is to vary the order of Wrottesley, J., by inserting in it the appropriate declaration or declarations, followed by an order directing the reconsideration of the case by the Board in accordance with those declarations. This only goes to form and does not affect the judgment of the judge.

In my opinion, subject only to this question of form, I would dismiss the appeal with the usual consequences. I gather my brethren take a different view and think that the appeal should be allowed. My criticism of the form of order applies in either event.

du Parcq, L.J. [reading the judgment of Scott, L.J., and himself]: The principal question in this case was whether Brady, at the material time, was able, or likely to be able, to secure that income or assets whether present or future of L.B. (Holdings), Ltd., would be applied either directly or indirectly for his benefit. Both the Special Commissioners and the Board of Referees have answered the question in the negative. It is conceded that there was evidence to support the findings of fact of the Board of Referees. It is contended, however, that they came to wrong conclusions of law and WROTTESLEY, J., has upheld this contention. An important question arises as to the construction of the Finance Act, 1939, s. 15.

That section was enacted, as appears from the words of subsect. (1), in order to extend the provisions of the Finance Act, 1922, s. 21, which itself was introduced into the code:

> With a view to preventing the avoidance of the payment of super-tax through the withholding from distribution of income of a company which would otherwise be A
> distributed. . .

Stated broadly, the object of the extension was to enable an appropriate apportionment to be made to persons who, though not members of the company, "for the purposes of the Finance Act, 1922, s. 21, and the enactments relating thereto" were in a position to enjoy the benefit of some part of its income or assets, and to persons who, being members of the company, could enjoy such a B benefit to a greater extent than their apparent interest in the company would warrant. It is, we think, plain that Parliament meant to tax not only those who would, or were likely to, enjoy such benefits, but those who had secured the power to enjoy them. It seems equally plain that the object of the legislature was to enable the Commissioners of Inland Revenue to make an earlier intervention than was permitted by existing legislation in cases where the machinery of company law was being used for the avoidance of sur-tax, the C method adopted by the legislature being to tax those who had secured the power to avoid sur-tax even though they had not used it, and even if it were not proved that they intended to use it. The purpose of the enactment is, from one aspect, remedial, from another penal: remedial in the sense that it seeks to cure the evil of tax evasion and to remedy a defect in earlier legislation which had become apparent, thus relieving from an excessive burden the more scrupulous or less ingenious tax-payer; penal, in the sense that it exposes those who are D regarded as seeking to avoid the payment of tax to the penalty of paying tax, which is nominally a tax on income, when in fact they have never received the income. It is not surprising, therefore, that it should be argued on the one hand that the section should be construed in a wide sense so that no loop-hole may be left for the evader of tax, on the other, that it should be construed with the strictness appropriate in the case of a penal Act. The various canons E of construction which were cited to us do not, we confess, give us much assistance. The only safe rule, we think, is to give the words of the section, reading it as a whole, their full, and no more than their full meaning. If they are found to be of doubtful meaning, it is proper to have regard to the probable intention of the legislature, in so far as any intention can be inferred from the section itself, and from any other relevant sections in the code.

The words "able to" must clearly be interpreted with reference to the object F which the person concerned is to be able to achieve. Here the object is:

> . . . to secure that income or assets, whether present or future, of the company will be applied either directly or indirectly for his benefit . . .

The words "to secure" necessarily import certainty: he must be able to make sure of the application for his benefit of the company's income or assets, though the application may be indirect and may be postponed for a time. It is not G enough that he is able to put himself in a position where there is a mere possibility that he may obtain and retain the benefit. The benefit of one person's income or assets is no doubt secured by another when such income or assets are transferred to that other so that he may himself enjoy them without any obligation to return them. That benefit, in our opinion, is also secured when it is reasonably certain that such income or assets, though not transferred, will be used for his advantage, for instance to produce money's worth for him. What of a mere loan of income H or assets? In our opinion this question cannot be answered simply. A loan at a commercial rate of interest, repayment of which the lender intends to exact and the borrower knows he must make, does not, in our judgment, represent a transfer of income or assets by the lender to the borrower. The man who borrows from a banker is not securing that income or assets of the bank will be applied for his benefit. Nor can it be said that a banker secures that the income or assets of a customer who has a current account with him will be applied for the benefit of the banker. If, on the other hand, there is no intention of demanding repayment of the loan, or it is made for so long a term and at so low a rate of interest that the borrower is in effect enjoying part of the income of the lender, the borrower may, we think, be considered to be securing the application of that part of the lender's income or assets for his benefit. The question in such cases is one of fact and degree. What is to be "secured" is the application for the benefit of the person concerned of income or assets of the company in the sense that he derives as much advantage from some part of that income or of those assets for a substantial period of time as if that part of the income or assets were his own.

In what circumstances, then, may a man be said to be able, and in what circumstances may he be said to be likely to be able, to secure the object envisaged by the section ? The answer is in part supplied by the section itself. It is, of course, obvious that he is within the section if he has a legal or equitable right which will enable him to secure that object. But though he may have no such right, he is to be deemed to be able to secure it "if he is in fact able so to do by any means whatsoever." These are wide words and the power which they confer on the Special Commissioners is correspondingly wide. On the other hand the inference that a man is "likely to be able to secure" the object in question is not to be drawn unless the Special Commissioners are satisfied of the matters set out under subsect. (3) (*a*) and (*b*), which we need not here transcribe. In our opinion the legislature has made its intention reasonably plain in that subsection. A man who has transferred considerable assets to a company is likely enough so to arrange matters that he can exercise dominion over the company, whether he is a member of it or not. It is not difficult for him to arrange that all the shareholders, or the shareholders with voting rights which give them control of the company, shall be persons who are subservient to him. An obedient wife, or a complacent friend, or a relative or employee who depends on his bounty may be trusted to act in accordance with his wishes. If the shares are held in trust, he may himself be the trustee and may be reasonably certain that the beneficiaries, if *sui juris*, will acquiesce in the use of what is rightfully theirs for his own purposes. He may have good reason to know, if some other person is a trustee, that the trustee and the beneficiaries will unite in assisting him to accomplish his purpose. Such cases seem clearly to be covered by the section.

We can now deal with the precise point which was submitted by the Board of Referees for the consideration of the court. Was their conclusion of law correct when they held that the words "able to secure" in the section meant "able to secure by lawful means" ?

As we understood the argument of the Attorney-General, he did not suggest that even the wide words "by any means whatsoever" were wide enough to cover a case in which a man could only be said to be able to secure the object aimed at by the commission of a crime. That this concession was rightly made we do not doubt. For reasons which we have already indicated and will presently recapitulate, we are of the further opinion that no one is brought within the section if he is only able to secure his object in the sense that he might obtain a temporary and precarious hold on income or assets of the company by resorting to unlawful means. We include in the expression "unlawful means" torts, breaches of contract, and breaches of trust, with the reservation that, wherever the acquiescence or condonation of the parties concerned can put the wrongdoer in as good a position as if his conduct had been lawful from the first, the unlawful nature of the means employed will not preclude a finding that he was able to secure the end if there is evidence which satisfies the Commissioners (or Board of Referees) that the acquiescence or condonation of those parties will not be withheld. Unless the tribunal is so satisfied the inference of ability to secure cannot, in our opinion, be drawn.

We may summarise our reasons shortly as follows : (i) Criminal means are plainly excluded because to say that a man was "able to" enjoy the benefit of another's income or assets merely because he could do so by stealing it, or by embezzling it, or by a fraudulent and criminal breach of trust, would be to use the language of the thieves' kitchen, not of honourable men. If Parliament had meant the words "by any means whatsoever" to be the equivalent of "*per fas aut nefas*" this would assuredly have been more clearly expressed. (ii) No one can be said to secure the application of money or property for his benefit if he possesses himself of it wrongfully and has no right to retain it, unless his wrongdoing has been condoned, or it is reasonably certain that it will be condoned, by such persons (if any) as may have the power to condone it. (iii) The section itself precludes the Special Commissioners from inferring that a man is "likely to be able to secure" the end in question if all that is likely is that he will be able to do so wrongfully, and without the acquiescence or condonation of those who have a right to complain of his wrongdoing. This we think is plain from subsect. (3) (*b*).

There is clearly a distinction to be drawn between the various kinds of unlawful acts. A crime can be neither licensed nor condoned, though it is true, of course, that some acts are criminal only in the absence of consent by the person or persons affected by them. The King alone can pardon a crime. A breach of contract may be condoned by the other contracting party and so, in some cases, may a tort by the party who is aggrieved. A breach of trust gives to the *cestui que* trust an equitable right, which he is in no way bound to exercise; he may acquiesce in or condone the breach of trust, which then entails no ill consequences for the peccant trustee. When an unlawful act is in a strict sense venial, and has been pardoned or condoned, it may properly be regarded as a means by which the end in question can be "secured."

In our judgment the words "by any means whatsoever, whether he has any rights at law or in equity in that behalf or not" authorise the Commissioners to deem a person to be "able to secure" his ends although he is not armed with any enforceable right to secure them, provided that they are satisfied that he can count on the concurrence or co-operation of all those whose concurrence or co-operation is necessary to his achievement of those ends. It matters not whether those persons will be induced to do so by persuasion, or from motives of benevolence or affection or of self-seeking, or by reason of some unenforceable promise, for instance of the kind of pact which is sometimes called a "gentleman's agreement." We cannot, however, construe the words which we have quoted as if they were equivalent to "by any means whatsoever, whether those means are lawful or unlawful." We do not regard this as a possible construction, and, even if the words were susceptible of it, as we do not think they are, we should hesitate to adopt it if another were possible, since its adoption would involve taxing a man on the ground that he was able to enjoy income which he could only enjoy if he were prepared to take advantage of opportunities to appropriate to himself unlawfully the money of others.

It remains to consider the findings of fact in the present case, which this court must accept, in the light of the conclusions of law at which we have arrived. We do not propose to recapitulate those findings. It is apparent from them that Brady was in a position in which he might, as trustee, secure the application for his benefit of dividends of the company, in the sense in which we understand those words, provided that the consent or acquiescence of the beneficiaries who were of full age, or of some of them, were obtained. It must, however, be borne in mind in this connection that such consent or acquiescence could avail him nothing unless the beneficiaries, when they were induced to accord it, were fully informed of the circumstances, and that even a formal release is inoperative unless the beneficiaries executing it are so informed. The finding contained in para. 17 of the case raises a doubt, which it is for the Board of Referees to resolve, whether the beneficiaries who executed the deed of release, dated July 31, 1940, were so informed, and whether the misleading representation made to them by Brady vitiates the deed of release. If these questions be answered in a manner favourable to the adult beneficiaries, it will follow that he remained liable to them in respect of what was undoubtedly a breach of trust, namely, the payment of trust income which consisted of dividends of L.B. (Holdings), Ltd., by way of loan to Luke Brady, Ltd., for Brady's personal advantage. Thus there is at present no clear finding that any of the beneficiaries effectively concurred or acquiesced in Brady's borrowing. We call it "borrowing" by reason of the finding (in para. 29 (*a*)) that Brady "did not intend to deprive his children permanently of the trust income or any substantial part of it."

So far as the interests of the infant beneficiaries were concerned, it is clear that Brady was not at any material time "able to secure that income or assets" would "be applied . . . for his benefit" in the sense in which we interpret these words. Was he at the material times "likely to be able to secure" that end ? The answer to this question depends not solely, or even mainly, on Brady's intentions, but on the probable conduct of the infant beneficiaries when they become of full age. As we read the case, the Board of Referees has answered it in para. 29 (*d*), which (in point of contrast with para. 29 (*c*)) applies to all the children, and not only to those of full age. Perhaps not unnaturally, the Board of Referees did not find it possible to affirm that there was any likelihood that the infants would consent to any assets or income being "given to" Brady unless he were "in serious financial difficulty," an event which there was no apparent reason to apprehend. This finding is conclusive, subject only to one matter, relating both to the infant and the adult beneficiaries, which on our construction of the section calls for further consideration. We refer to the question whether or not any of the beneficiaries were likely to consent to a temporary use of the trust income (represented by dividends of the company) by Brady (or, in other words, a loan of the trust income to him) which might fairly be said to amount to an application of income of the company for his benefit.

For the reasons which we have given it is necessary that the case should be remitted to the Board of Referees for their further consideration of the facts in the light of the principles which we have stated. It is further to be observed that we know, as a fact, what Brady did, and there can be no better evidence that he was able to do at least that. The question remains open whether, by doing what he did in fact do, he "secured" the object stated in the section, and we do not find in the case a completely satisfactory answer to that question.

There is one other matter which calls for consideration in connection with what we have called the principal question in the case. Brady had wide powers as governing director of L.B. (Holdings), Ltd. He could in effect have determined what his remuneration should be, under art. 22. He could have procured that the company should lend him money (art. 8), or guarantee the performance of any contract of his (art. 10), and make payments to others which would indirectly benefit himself (art. 16). If he took no more than a fair and reasonable remuneration for his services, he was not, in our opinion, securing the application for his benefit of income or assets of the company. It would, we think, be a misuse of language to say that a salaried employee of a company paid reasonably and not excessively, is securing that advantage. The company was wound up in July, 1939, and it is not suggested that Brady at any time so exercised his powers as governing director as to do any such irregular things as those which we have mentioned. In these circumstances it ought not, we think, to be held against him that he was able or likely to be able to secure the application of income or assets of the company for his benefit by doing them, since there is nothing to suggest that, if he had the inclination to do them, he was in a position to obtain the consent of the beneficiaries or of the other shareholders, without which he could not have succeeded in "securing" (in the sense in which we understand the word) any advantage for himself. Without such consent he would necessarily have been exposed to the risk that the court would deprive him of any such ill-gotten gains. In our opinion, therefore, the Board of Referees were justified in making no finding averse to Brady on this aspect of the case.

One other point was argued, on behalf of the appellants. It may be stated shortly. Brady is clearly not within sect. 15 (2) (*a*) since he was a member of the company, holding 499 out of its 500 shares, albeit as a trustee. It was submitted that he was equally clearly not within subsect. (2) (*b*) since he had "relevant interests" in the company, as is clear from the decision in the *Penang* case (1). Does he then come within subsect. (2) (*c*) ? No, said counsel for the appellants, because the *Penang* case (1) shows that an apportionment could rightly be made to him in respect of the whole of his holding, so that "the value for apportionment purposes of his relevant interests in the company, considered in relation to the value for those purposes of the relevant interests of other persons therein" is as 499 to 1. It is irrelevant for this purpose (counsel for the appellants contends) that the apportionment to Brady would be followed up by an assessment on the beneficiaries ; what the section is concerned with is not the assessment but the apportionment.

This argument certainly has a flawless appearance, but we do not think that it can prevail. In our opinion the beneficiaries had "relevant interests" in the company. They had, that is to say, "interests by reference to which income of the company could be apportioned to" them. There is not, it must be admitted, binding authority for this view, but it was at least tentatively expressed by VISCOUNT SIMON, L.C. (at p. 495 of the *Penang* case (1)). There is nothing in the trust deed in the present case to preclude such an apportionment, as there was in the *Penang* case (1). We think, therefore, that the observations of LORD MACMILLAN (at pp. 501, 502) support the view which we are adopting. If that view is right, it appears to us that as between trustee and beneficiaries, the value of whose relevant interests for apportionment purposes subsect. (2) (*c*) bids us compare, it is impossible to say that the value of the trustee's interest is greater than that of the beneficiary. Nor, we think, are the values equal. We can see no reason why the Special Commissioners should not say: "We will apportion the income of the company wholly among the beneficiaries and regard the value of the interests of the trustee for apportionment purposes as nil." This, if they knew of the existence of the trust, as, by reason of the Finance Act, 1922 First Schedule, para. 11, they were likely to do, would, in our opinion, be a proper course for the Commissioners to take. In this way Brady is brought within the subsection.

The conclusion at which we have arrived is, therefore, that the case should be remitted to the Board of Referees, in order that they may find the further facts which we have indicated and apply the law as we have stated it to those facts. When the further findings are arrived at it may still appear that some apportionment should be made to Brady. What, if any, apportionment should be made to him will depend on the extent to which he was, on our interpretation of the statutory provisions, able or likely to be able to secure the application of the company's income or assets for his benefit.

Although there is much in the careful judgment of WROTTESLEY, J., with which we agree, we think that in some respects he has stated the law too favourably to the respondents. As will have been seen, we disagree with his view as to the meaning of the word "secure" in this context. Further, we think that the proposition:

> A person who is able to secure that income or assets of a company can be applied even temporarily for his benefit is clearly a person who has an interest in them and can derive a profit or advantage from them.

is stated in too wide terms. It might be read, and we think was intended to be read, as applying even to a temporary loan at a commercial rate of interest, or a temporary appropriation of another person's assets which will have to be made good subsequently. So read, it is not, in our view, an accurate statement of the effect of the section.

It follows, in our judgment, that although the respondents were justified in appealing against the decision of the Board of Referees, their appeal succeeded beyond its deserts, and the appellants were no less justified in coming to this court for relief. In these circumstances we think that the judge's order as to costs should be set aside, and that no costs should be awarded to either party here or below.

Case remitted to the Board of Referees to find certain further facts. No costs to either party here or below. Leave to both parties to appeal to the House of Lords.

Solicitors: *Wetherfield, Baines & Baines* (for the appellant company); *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

R. *v.* HADDY

[COURT OF CRIMINAL APPEAL (Humphreys, Asquith and Cassels, JJ.), **February 4, 1944.**]

Criminal Law—Appeal—Misdirection—Right of court to dismiss appeal notwithstanding misdirection—" No substantial miscarriage of justice has actually occurred "—Criminal Appeal Act, 1907 (*c.* 23), *s.* 4 (1).

At the trial of the appellant the judge in his summing up misdirected the jury. On an appeal under the Criminal Appeal Act, 1907, s. 4 (1), it was contended on behalf of the appellant that, upon the proper construction of the words in the proviso to the section : " no substantial miscarriage of justice has occurred," the court was not entitled, under the proviso, to dismiss the appeal unless it was prepared to hold that the jury, if it had been properly directed, must inevitably have come to the conclusion that it did :—

HELD : upon the true construction of the proviso to the section, the court is entitled to give effect to the proviso if it is satisfied that no reasonable jury, properly directed, would or could have given any other verdict than that which was in fact given and no substantial injustice has been done.

[**EDITORIAL NOTE.** In referring to the power of the Court of Criminal Appeal to dismiss an appeal where, despite the misdirection, the court is of opinion that " no substantial miscarriage of justice has actually occurred," some authorities have said that it is necessary that the jury should inevitably have arrived at the same conclusion. It is a matter of common knowledge that juries sometimes bring in unexpected verdicts and it seems impossible to say that they would inevitably have arrived at any particular verdict. The true view, it is held, is that the court must be satisfied that a reasonable jury properly directed would have given a verdict to the same effect as that actually given in the case under consideration.

AS TO THE LAW ON THE POINT, see HALSBURY, Hailsham Edn., Vol. 9, pp. 273-277, paras. 400-403 ; and FOR CASES, see DIGEST, Vol. 14, pp. 542-544, Nos. 6115-6141.]

Cases referred to :

*(1) *R* v. *Leckey*, [1944] 1 K.B. 80; [1943] 2 All E.R. 665.

(2) *R.* v. *Naylor*, [1933] 1 K.B. 685 ; Digest Supp. ; 102 L.J.K.B. 561 ; 147 L.T. 559.

*(3) *Woolmington* v. *Director of Public Prosecutions*, [1935] A.C. 462 ; Digest Supp. ; 104 L.J.K.B. 433 ; 153 L.T. 232.

(4) *R.* v. *Stoddart* (1909), 2 Cr. App. Rep. 217. 14 Digest 296, *3129* ; 73 J.P. 348 ;

*(5) *R.* v. *Cohen and Bateman* (1909), 2 Cr. App. Rep. 197.

APPEAL from a conviction by the Central Criminal Court, on the ground that the jury were misdirected. The facts are fully set out in the judgment of the court delivered by HUMPHREYS, J.

John Maude, K.C., and *T. K. Edie* for the appellant.

Alban Gordon for the Crown.

HUMPHREYS, J. [delivering the judgment of the court] : The appellant in this case was convicted at the Central Criminal Court of stealing on Aug. 23, in Wilson Street, Finsbury, an attache case and £2,000, the property of a man named Chapman. It is unnecessary to recapitulate the facts of the case beyond saying that Chapman's property was in fact stolen by a trick on the afternoon of that day. The issue at the trial was one of identity, the appellant's case being that he was not concerned in the theft and had been wrongly identified as the man who had gone off with the case and the money. He alleged that at the material time he had been in a cinema in or near Piccadilly, which is a long way from Finsbury. He appealed to this court and the only ground of appeal argued was the ground stated in these terms, that " the learned Recorder," who tried the case, " wrongly invited the jury to infer the appellant's guilt from a consideration of his silence after being cautioned."

It is necessary to see what was the evidence as to the statements made by the appellant when arrested and charged, as he was on Aug. 27. The only police officer called was Detective Inspector Withers who at 11.30 a.m. on that day found the appellant detained at Notting Hill Police Station, where he had been taken earlier in the day by Detective Read. The evidence of Withers was that he told the appellant he would be taken to Old Street Police Station, where he would be put up for identification upon a charge of stealing £2,000 by means of a trick on Aug. 23. The appellant was then cautioned and made no reply. He was then taken to Old Street Police Station for the identification parade, where he was picked out by three witnesses, and thence taken to Commercial Street Police Station, where he was formally charged and again cautioned. His answer was: "I am saying nothing." The appellant gave evidence on oath and agreed that he had made no reply to Withers at Notting Hill Police Station, but added that the reason was that he had already denied the charge to Detective Read, who had arrested him at his home at 9 a.m., his words, according to him, being: "I do not know what you are talking about, I know nothing about it." As Detective Read was not called as a witness, the appellant's evidence on this matter stood uncontradicted. He added that at Commercial Street Police Station he had not said: "I am saying nothing," but "I know nothing," obviously a very different thing, as counsel for the prosecution agreed when cross-examining the appellant.

The passage in the summing up upon which the appeal is based is as follows:

> When he is arrested on the 27th by Detective Inspector Withers he is told he answers the description of one of two men who are wanted for stealing this money. He was cautioned and he made no reply. I only want to say this about that: Of course, a man is not obliged to say anything at all, he need not say anything; sometimes it is of great assistance to him if he does, if he at the first moment gives his explanation.

The Recorder, SIR GERALD DODSON, then went into an interesting historical disquisition as to the form of the caution as it was administered some years ago, and as it had been altered in fact by the Criminal Justice Act, 1925, and, after that, he continued:

> However that may be, this accused man, neither then nor later when he was charged, made any suggestion that there had been a mistake about him. He had nothing to say. "I am saying nothing." What he told you in the witness box to-day was a slight variation of that, I do not think there is very much in it, but not a word upon the lines that he has now put forward in his defence, namely, that he was not the man who was there, knew nothing about this and took no part in it; he was at Piccadilly, at a news reel film on the 23rd, and so on—not a word.

That cannot be considered a satisfactory summing up of the evidence. It was inaccurate in fact. If the jury accepted the appellant's evidence, and it was uncontradicted, he had from the first denied that he was the guilty man, and the jury ought not have been told that the accused—in the words of SIR GERALD DODSON:

> . . . had not said a word upon the lines that he has now put forward in his defence, namely, that he was not the man who was there.

But a more serious allegation is that this part of the summing up offends against the rule so often laid down by this court, and most recently in *R.* v. *Leckey* (1), which is accurately quoted in the grounds of appeal.

In delivering the judgment of the court in *Leckey's* case (1), VISCOUNT CALDECOTE, L.C.J., quoted with approval and adopted the language of LORD HEWART, L.C.J., in *R.* v. *Naylor* (2), at p. 687:

> When one looks at the words of the caution in the Criminal Justice Act, 1925, s. 12 (2), which must be taken to have been framed deliberately, it is obvious that they were intended to convey to the prisoner the information that he is not obliged to say anything unless he desires to do so. We do not think that the words of the caution can properly be construed in the sense that the prisoner remains silent after being cautioned at his peril and may find his silence made a strong point against him at his trial. In our view, the words mean what they say, and a prisoner is entitled to reply to the caution that he does not wish to say anything.

After referring to the passages complained of in the summing up in *R.* v. *Leckey* (1) VISCOUNT CALDECOTE, L.C.J., said at p. 86 ([1943] 2 All E.R. at p. 669):

> In our view, that amounted to a misdirection, and it is proper ground on which this conviction should be quashed. If it were not so, a caution might obviously be a trap instead of the means for finding out the truth in the interests of justice. An innocent person might well, either from excessive caution or for some other reason, decline to say anything when charged and cautioned, and, if that could be held out to a jury as ground on which they might find him guilty, he might obviously be in great peril. However that may be, the law seems to us to have been clearly laid down by this court on more than one occasion, particularly in *R.* v. *Naylor* (2).
>
> We came to the conclusion that the summing-up in this case did offend against the rule, and that it would be our duty to allow the appeal and quash the con-

viction, unless the proviso to the Criminal Appeal Act, 1907, s. 4, applied. Sect. 4 is the section in which are to be found the grounds upon which the Court of Criminal Appeal are to allow an appeal, and there are two of those grounds in particular to which the proviso applies. It will be sufficient to refer to those two grounds. One is that the Court of Criminal Appeal, on any such appeal against conviction, shall allow the appeal if they think that the judgment of the court before whom the appellant was convicted should be set aside, on the ground of a wrong decision of any question of law—that does not apply to this case—or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal. The proviso runs as follows :

> Provided that the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.

The two key words, if I may use the expression, in that sentence seem to be the word "substantial" as a description of the miscarriage of justice, and the word "actually." They may dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.

Counsel for the appellant argued that we could not give effect to the proviso in this case unless the court was prepared to hold that no jury properly directed could have acquitted the appellant. He based that argument upon a passage in the opinion of LORD SANKEY, L.C., in giving his opinion in the House of Lords in *Woolmington's* case (3) ; it is the last effective sentence of his judgment. He observed as follows, after reading the proviso to sect. 4 which I have just read, at p. 482 :

> The Act makes no distinction between a capital case and any other case, but we think it impossible to apply it in the present case. We cannot say that if the jury had been properly directed they would have inevitably come to the same conclusion.

It was the word "inevitably" in that sentence upon which counsel for the appellant relied.

In our opinion, it would be wrong to give effect to that argument. To accept it would be to render the proviso practically otiose, for it can never be said with certainty in any criminal case, however strong the evidence for the prosecution, that no jury could be found to acquit. We are satisfied that LORD SANKEY, L.C., was not referring to a jury who might return a perverse verdict but to a jury of sensible persons anxious to do their duty which is, in the language of the juror's oath, to return a true verdict according to the evidence. If that be the correct view, the word "inevitably" becomes merely an adverb of emphasis designed to express the necessity for the absence of any doubt on the part of the court that a reasonable jury properly directed would have returned the same verdict. In the very early days of this court, LORD ALVERSTONE, L.C.J., used the phrase in delivering the judgment of the court :

> We cannot in this case say that if they had been properly directed the jury must have come to the conclusion which would have supported the conviction.

In a later case in the same year, 1909, his Lordship in dealing with *Stoddart's* case (4) observed as follows, at p. 245 :

> We think it is open to consideration whether the word "must" is not too strong, and whether the proper question is not, whether if properly directed the jury would have returned the same verdict.

It seems to us to matter very little what precise words are used so long as the language of the proviso is satisfied and the court is sure that there has been no substantial miscarriage of justice.

The proper interpretation of the expression "substantial miscarriage of justice" occurring in the proviso was the subject of a considered judgment of this court in *R.* v. *Cohen and Bateman* (5). Reading from p. 207, I find these words used by CHANNELL, J., in delivering the judgment of the court, the other members of the court being JELF and BRAY, JJ. :

> We have had an opportunity of carefully discussing this case, and we have arrived at our conclusion. Under the statute only one judgment is delivered, and we have, therefore, put into writing our judgment upon the construction of the Criminal Appeal Act, s. 4 (1).

Then he reads the section itself and discusses it, and deals first with the ground of appeal that the conviction should be set aside on the ground of a wrong decision of any question of law. He then proceeds as follows, at p. 207 :

> A mistake of the judge as to fact, or an omission to refer to some point in favour of the prisoner, is not, however, a wrong decision of a point of law, but merely comes within the very wide words "any other ground," so that the appeal should be allowed according as there is or is not a "miscarriage of justice." There is such a miscarriage of justice not only where the court comes to the conclusion that the verdict of guilty was wrong, but also when it is of opinion that the mistake of fact or omission on the part of the judge may reasonably be considered to have brought about that verdict, and when, on the whole facts and with a correct direction, the jury might fairly and reasonably have found the appellant not guilty. Then there has been not only a miscarriage of justice but a substantial one, because the appellant has lost the chance which was fairly open to him of being acquitted, and therefore, as there is no power of this court to grant a new trial, the conviction has to be quashed. If, however, the court in such a case comes to the conclusion that, on the whole of the facts and with a correct direction, the only reasonable and proper verdict would be one of guilty, there is no miscarriage of justice, or at all events no substantial miscarriage of justice within the meaning of the proviso . . .

That statement of the law has stood for 35 years and, so far as we are aware, has never been the subject of adverse comment, though judges in giving the decisions of the Court of Criminal Appeal have used varying language and many different expressions, including the word "inevitably," which does not occur for the first time in the opinion of LORD SANKEY, L.C., in *Woolmington's* case (3).

We are convinced that it was not the intention of LORD SANKEY, L.C., in that case, or of the other members of their Lordship's House, who concurred in his opinion, to lay down any different interpretation of the expression "miscarriage of justice."

We have considered the facts of this case, and the evidence given at the trial. In our opinion, the evidence for the prosecution was overwhelming. On Aug. 27 three separate persons picked out without hesitation the appellant as one of the persons who had been in their company for over an hour four days earlier. The summing-up was careful and accurate, apart from the one passage complained of. *R.* v. *Leckey* (1), in which the court declined to apply the proviso, and which in fact was a capital case, was a very different case. As VISCOUNT CALDECOTE, L.C.J., observed on three different occasions, once at the beginning, once a little later on and a third time just before the end of his judgment, the judge seemed to put to the jury the consideration that they might infer the guilt of the accused by considering the fact of his silence after caution. In fact his silence was made a feature of the case against him. In this case we are satisfied that no reasonable jury properly directed throughout would, or could, have come to any other conclusion, and that no miscarriage of justice has actually occurred. We accordingly dismiss the appeal.

Appeal dismissed with costs.

Solicitors: *Smithdale, Rutledge & Co.* (for the appellant); *Solicitor to Metropolitan Police* (for the Crown).

[*Reported by* R. BOSWELL, ESQ., *Barrister-at-Law.*]

LAY *v.* D. & L. STUDIOS, LTD.

[KING'S BENCH DIVISION (Singleton, J.), **December 20, 1943.**]

Factories—Dangerous machinery—Statutory duty—Chain-cutter saw—Guard inaccurately adjusted—Duty to adjust—Duty of workman—Woodworking Machinery Regulations, 1922 (*S.R. & O.,* 1922, *No.* 1196), *regs.* (20), (21), (23).

The plaintiff was employed by the defendants in their woodworking department as an operator of a chain mortising machine. The machine was provided with a guard which was inaccurately adjusted so that $\frac{3}{8}$ths of an inch of the chain-cutter protruded beyond the guard. It was found as a fact that the guard was in that position the entire time that the plaintiff was working for the defendants and that he was not instructed how to make any adjustment, nor did he in fact make any adjustment. The machine had a lever which, when moved to a certain position, cut off the electric power although the chain-cutter took several seconds to lose its momentum. Whilst operating the machine the plaintiff moved the stop lever but, unknown to him, the electric current was not cut off. While adjusting the wood on which he was working his hand came in contact with the cutter and his finger was injured. The plaintiff brought an action on the grounds of a breach by the defendants of the Woodworking Machinery Regulations, 1922, regs. (20) and (21). The defendants contended that the plaintiff had failed to observe reg. (23) which required him to maintain the guard in proper adjustment. They further contended that the accident was caused, or contributed to, by the plaintiff's negligence in not stopping the machine :—

Held : upon the facts of the case, the defendants had failed to carry out their duty under reg. (21) in that they had failed to see from time to time that the guard was properly adjusted.

[**EDITORIAL NOTE**. It is the duty of the employer to provide a machine with a guard properly adjusted. If that is done, the regulations place upon the employee the duty of maintaining a proper adjustment of the guard. Where the evidence is that a guard is known to have been improperly adjusted for a very long time during which the machine has been in use, then it can properly be said that the employer has provided a guard improperly adjusted and not that the employee has failed to adjust it.

As to Fencing Dangerous Machinery, see HALSBURY, Hailsham Edn., Vol. 14, pp. 594, 595, paras. 1130, 1131 ; and for Cases, see DIGEST, Vol. 24, pp. 908-911, Nos. 65-81.]

Case referred to :

-*(1) *Murray* v. *Schwachman, Ltd.*, [1938] 1 K.B. 130 ; [1937] 2 All E.R. 68 ; Digest Supp. ; 106 L.J.K.B. 354 ; 156 L.T. 407.

Action to recover damages for injury caused by breach of statutory duty to fence dangerous machinery. The facts are fully set out in the judgment.

F. W. Beney, K.C., and *G. R. Rougier* for the plaintiff.

John Thompson for the defendants.

Singleton, J. : The plaintiff met with an accident on July 31, 1942, when he was employed by the defendants. His first or index finger of the right hand was cut in a cutting machine and damaged. At the time he was a woodworking machinist, an experienced man earning about £7 or £8 a week.

At the time of his accident he was working what is called a Sagar all-electric chain-cutter machine. Its working has been described to me by several witnesses, among them Mr. Thomas, a member of the Institute of Mechanical Engineers, who gave evidence on behalf of the plaintiff. He told me the machine was driven by an electric motor, which makes the chain-cutter revolve at about 3,000 revolutions per minute, and he explained to me how the machine was brought into operation when a lever is pulled down or forward. When that handle is pushed back into its original position the power is, or should be, cut off, and within a short space of time the electric chain-cutter ceases working. The chain-cutter itself is covered by a box, or guard. When the guard is properly adjusted, no part of the saw or cutter ought to be visible to the eye of anyone facing the machine.

The plaintiff's case is that when working the machine on July 31, 1942, he had on the bench in front of the machine a piece of wood secured by the vice. When he had done the necessary work on one end of the piece of wood, he had to move it so that the other end could come into position under the cutter, or under where the cutter would be when it was brought down to work again. Consequently, the plaintiff, according to him, pushed back the right-hand lever, which had the effect of raising the cutter guard, and which also ought to have cut off the power. Then he put his right hand on the piece of wood, which was too long for the table, and was about to pull the piece of wood along when its weight caused the end on which his hand was to go up by a sort of jerking movement. His right hand was thrown up, quite a small distance, until his first finger came into contact with the chain-cutter. The chain-cutter had not stopped revolving ; it does not stop revolving as soon as the lever is put back, in the ordinary course, for a few seconds. But in this particular case, as far as one can judge, what happened was what had happened before, the pushing back of the lever did not cut off the current, and the machine continued to revolve. In the result, the plaintiff's forefinger was caught by the saw and very seriously injured.

According to the plaintiff, the guard upon the chain-cutter was in the position in which it had been for the 12 months during which he had been working the machine ; and in that he is supported by May, another skilled man, who works upon this machine from time to time. The chain-cutter projected, according to that evidence, some ⅜ths of an inch below the guard. The plaintiff said that it had been in that position all the time that he had worked the machine ; that at no time had he made an adjustment, that he did not know how to make an adjustment, and that he had never been told how to make any adjustment. That evidence was corroborated by May. I find, upon the evidence, that prior to the accident there was some ⅜ths of an inch of the chain-cutter projecting below the guard. In my view neither the plaintiff nor May were in control of the adjustment of the guard. It is true that the foreman gave evidence that he had seen these men adjust the guard, but I accept the evidence of the plaintiff and May, that during the time the plaintiff was working there the guard remained in the same position all the time. He was never instructed how to make an adjustment and he did not in fact make an adjustment.

There are other matters which are mentioned. One is, that the makers of this machine recommended some particular table for use if the piece of wood was a long one ; and, indeed, some time after the accident a trestle was used. There is no need for a table. There were some trestles of this kind in the factory at the time. There were not trestles for every machine, nor do I see really there was any particular need for a trestle at the time this accident happened. The plaintiff had a piece of timber about 7ft. long. He might have had a trestle if he had gone and got one from someone else. There was no need for a labourer because the piece of timber was not very heavy, he could work it himself.

The other matter—which is more important, perhaps—is that the plaintiff said that on this occasion the pushing back of the lever failed to cut off the power immediately. Mr. Thomas explained to me what happened when the lever was pushed right back. He said that when he pushed it right back it had the effect of cutting off the power. On the other hand, if he pushed it lightly there was a position where the bar or pawl held it lightly so that the power was not cut off. It is something like pushing an electric light switch without turning it completely off. That may not be a complete description. The plaintiff and May tested this lever afterwards. They made 20 tests, and said as a rule the power was cut off in eight seconds, but in two out of the plaintiff's tests the pawl did not go completely through, or down, so the power remained on the machine and he had to give it another push.

The plaintiff tells me that, at the time he was putting his right hand on the piece of wood, he did not realise the power had not been cut off, he did not realise the machine was still running. He realised it when his finger was caught, and he then used his left hand to push the lever further back.

There would not have been so serious an accident if the lever had not had that propensity, as Mr. Thomas described it. He said he would rather expect, in a case of that kind, that when you pushed the lever back the weight of the thing would cause it to go all the way back ; you would not expect, in other words, to have to use power to push it back. I am inclined to think that might be held to be a fault, a breach of the regulations. It is much less important than the question of the guard, I think ; it is incidental to what happened and, as I have said, the injury would have been very much less if the power had been cut off ; that is, if the cutter had not been going round pretty quickly at the time of the accident, there might have been a touching by the plaintiff's hand of the cutter or knife, but he would not have been so badly injured.

The real question is the question of the guard. I have dealt with the facts as I find them in relation to the guard. Counsel for the plaintiff relies on the Factory Act, 1937, ss. 14 and 16. I do not think it is necessary to read those sections. He also relies on the Woodworking Machinery Regulations, 1922, which take effect under that Act. The regulations contain the definitions, one of which is of a woodworking machine ; and it clearly covers this machine. Then under " duties " it is laid down :

> It shall be the duty of the occupier to observe Pt. I of these regulations.

> It shall be the duty of all persons employed to observe Pt. II of these regulations.

Pt. I, reg. (1), provides :

> Every woodworking machine shall be provided with an efficient stopping and starting appliance and the control of this appliance shall be in such a position as to be readily and conveniently operated by the person in charge of the machine.

As I have said, it is not the most important part of the regulations.

Then in the same part, Pt. I, regs. (20) and (21) are relied upon. Reg. (20) says :

> The chain on every chain mortising machine shall be provided with a guard which shall enclose the cutters as far as is practicable.

Reg. (21) says :

> The guards and other appliances required by these regulations shall be maintained in an efficient state and shall be constantly kept in position while the machinery is in motion, except when, owing to the nature of the work being done, the use of the guards or appliances is rendered impracticable. The guards shall be so adjusted as to enable the work to be carried out without unnecessary risk.

Counsel on behalf of the plaintiff relies upon these two regulations.

This chain mortising machine was provided with a guard, which guard if it was properly adjusted, would enclose the cutters as far as practicable. There is no dispute about that. The important thing really arises under reg. (21), under the last part of that regulation : " The guards shall be so adjusted as to enable the work to be carried out without unnecessary risk." That is a duty which is placed upon the employers, the occupiers of the factory.

Under Pt. II, " Duties of Persons Employed," reg. (23) provides :

> Every person employed on a woodworking machine shall (i) use and maintain in proper adjustment the guards provided in accordance with these regulations . . .

Counsel on behalf of the defendants calls in aid that regulation, and he submitted that it was the plaintiff's duty, as a person employed, to use and maintain in proper adjustment the guard provided. And I should say that the defendants further—whether this be put as a claim of negligence or a claim of breach of statutory duty—rely upon negligence on the part of the plaintiff and say that the accident was caused, or contributed to, by his own negligence in fixing or refixing the work of the machine without having first stopped the machine.

Accepting, as I do, the plaintiff's evidence as to the position of this guard before the accident, and as to his not having been instructed with regard to adjusting the machine, I find this is a machine which during the time the plaintiff worked on it had a guard, but that that guard, by reason of the adjustment, stopped short, leaving some ⅜ths of an inch of the cutter exposed. In my view, the guard then was not so adjusted as to enable the work to be carried on without unnecessary risk. There was always a risk as long as that portion was exposed, always a risk of danger to workmen ; and, whether it be under that regulation or under the Act itself, the machine was not as safe as it would have been if there had been a guard properly adjusted. I think it is the duty of the employers to see that the guard is properly adjusted ; it is the duty of the occupiers. Once that guard is properly adjusted, it is the duty of the person employed to use and maintain in proper adjustment the guards provided.

The question of the respective duties of the employer and the employee was considered by the Court of Appeal in *Murray* v. *Schwachman, Ltd.* (1), and GREER, L.J., in dealing with these regulations, said, at p. 144 ([1937] 2 All E.R., at p. 72) :

> Therefore what the employer has to do is to provide a properly adjusted guard so as to enable the work to be carried out without unnecessary risk , and then in order that there should be co-operation on the part of the workman once he has been provided with a properly adjusted guard, reg. 23 comes into operation as stating the duty of the persons employed.

That is the nature of this case. The guard was there, but it was not properly adjusted. It had been left for 12 months at least with this ⅜ths of an inch showing, and there had been no instructions to the plaintiff to adjust it. He did not regard it as part of his duty to adjust it, nor did the witness who gave evidence on his behalf.

I think it was the duty of the employers to go and to see from time to time that the guard was properly adjusted, and, if it was seen that there was this exposed place, it was the duty of the employers then to see that that system of work stopped.

In my view, the plaintiff is entitled to succeed in this action. I think he met with his accident by reason of a breach of statutory duty by the employers in the way that I have mentioned. In truth, if it had not been for the bad luck, in a sense, that the wood at the right-hand end went upwards by reason of the weight on the left, and by the further bad luck that from time to time the stopping device did not operate, he would not have had an accident; or so bad an accident, if he had any. It is just that sort of thing the Factory Act is meant to deal with, or to prevent; and, likewise, the regulations made under the Factory Act. The plaintiff is entitled to damages.

Judgment for the plaintiff for £500 *damages and costs.*

Solicitors: *Kenneth Brown, Baker, Baker* (for the plaintiff); *Blount Petre & Co.* (for the defendant).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

DUMBELL *v.* ROBERTS AND OTHERS

[COURT OF APPEAL (Scott, Luxmoore and Goddard, L.JJ.), **January 17, February 14, 1944.**]

Trespass—Trespass to the person—False imprisonment—Arrest without warrant—Charge of unlawful possession under local Act—Inquiry as to name and address a condition precedent to arrest—Failure to inquire name and address—Common law plea of justification not available where plaintiff not charged with felony—Liverpool Corporation Act, 1921, (*c. lxxiv*) *ss.* 507, 513.

The plaintiff while proceeding home dressed in his employers' uniform was stopped by the first two defendants, who were police constables, and questioned concerning a bag containing some 14lbs. of soap flakes which he was carrying. Soap flakes were rationed goods and the constables being dissatisfied with the plaintiff's answers arrested and detained him without a warrant and without making any inquiries as to his name or address. There was no evidence that the plaintiff had stolen the goods or that he had received them knowing them to be stolen. The plaintiff was conveyed to the police station and there charged by the first two defendants with being in unlawful possession of the soap flakes within the meaning of the Liverpool Corporation Act, 1921, s. 507 (1). No other charge was made. At the hearing the charge was dismissed. The plaintiff brought the action for false imprisonment. On behalf of the defendants it was argued that although the pleadings did not specifically raise the common law plea of justification, the words contained therein, "in that the same had either been stolen or unlawfully acquired," did in substance do so:—

HELD: (i) when the first two defendants arrested the plaintiff without a warrant and made no attempt to ascertain the plaintiff's name and address, they failed to comply with the condition precedent to the exercise of their right to arrest without warrant under s. 513 of the local Act.

(ii) the defence that the arrest was justified at common law based on reasonable suspicion of felony or implication in felony could not be raised because it was not pleaded. Had the plea been raised, it could not have been maintained because the plaintiff was not charged with having committed, or with being implicated in, a felony; nor, on the evidence, did the defendants have reasonable ground for suspicion that the plaintiff had been so engaged.

[**EDITORIAL NOTE.** Where special powers of arrest without warrant are granted by a local Act, the police must show that all the conditions of the local Act are fulfilled. Further they cannot rely upon their common law powers unless the defence pleaded clearly shows that they intend to do so.

AS TO ARREST WITHOUT WARRANT, see HALSBURY, Hailsham Edn., Vol. 9, pp. 85-97, paras. 112-122; and FOR CASES, see DIGEST, Vol. 14, pp. 175-186, Nos. 1534-1653.]

Cases referred to:

(1) *Hadley* v. *Perks* (1866), L.R. 1 Q.B. 444; 14 Digest 178, *1561*; 35 L.J.M.C. 177; 14 L.T. 325.

(2) *Walters* v. *Smith* (*W. H.*) *& Son, Ltd.*, [1914] 1 K.B. 595; 14 Digest 177, *1549*; 83 L.J.K.B. 335; 110 L.T. 345.

APPEAL by the plaintiff in an action for false imprisonment. The facts are fully set out in the judgment of SCOTT, L.J.

John Maude, K.C., and *Rose Heilbron* for the appellant.

W. Clothier, K.C., and *A. E. Baucher* for the respondents.

SCOTT, L.J.: The appellant was plaintiff below in an action for damages for false imprisonment against three constables of the Liverpool City Police Force, two of whom, Rothwell and Roberts, had arrested him at about 10.30 p.m. on Sept. 19, 1942, when he was riding on his bicycle along Parliament Street from the garage in Upper Stanhope Street, where he was employed, towards his home in Aigburgh, where he had lived, always in the same house, for 20 years.

The skeleton facts are these. The police overtook the plaintiff and, having stopped him, inquired about his rear light and then asked him what was in a bag or sack which he was carrying on the frame of the bicycle, and on being told soap flakes (which they knew was a rationed article though he did not) asked where he got them. He replied, "from his mate." His mate, called Appleton, was the regular driver of the ambulance of the Merseyside Hospitals Committee, of which the plaintiff was the regular attendant. The plaintiff was dressed in their uniform. It was in issue below whether he told the police Appleton's name. He also told them he had come from "the garage"; so they went back. Again there was an issue of fact as to whether he invited them to go to the garage or whether the police decided of their own motion to go back with him. Anyhow, they did not ask the plaintiff's name and address before arresting him. The garage was the garage of the Hospitals' Committee and some 18 men were employed there. They arrested him outside the garage on his telling them that his mate was not there and before making any inquiries inside the garage. He was, subsequently that night, charged by the first two defendants before the third defendant, Tindall, on a charge of having "unlawful possession" of some 12 or 14lbs. of soap flakes, which he was carrying in a bag or sack on the frame of his bicycle—presumably behind him as it was not on his handle-bars. He was charged under the Liverpool Corporation Act, 1921, s. 507 (1), which has to be read as subject to the provisions of sect. 513 (1) (A), both sections being in the same part of that Act. He was duly bailed that night and brought before the city magistrates on that charge on Sept. 21 and remanded, at the request of the police, for further enquiries. His case was disposed of on Sept. 23, when he was absolutely cleared of the charge and left the court without a shadow of reflection upon his conduct or character.

Before considering either the pleadings or the evidence in the action, it is necessary to refer to the section of the local Act which I have mentioned. The materiality of sect. 507 (2) arises out of the facts of the case. The relevant provisions of sect. 507 are as follows:

> (1) Any person brought before any court of summary jurisdiction charged with having in his possession any thing which there is reasonable ground to believe or suspect has been stolen and who does not account to the satisfaction of the court for his possession of the same shall be liable to a penalty not exceeding five pounds or in the discretion of the court to imprisonment for any term not exceeding two months with or without hard labour. (2) If any person so brought before any court shall declare that he received such thing from some other person or that he was employed as a carrier agent or servant to convey the same for some other person such court shall cause such other person and also if necessary every former or pretended purchaser or other person through whose possession the same shall have passed to be brought before a court and examined . . . (5) For the purposes of this section: . . . The expression "stolen" means stolen or unlawfully acquired or detained.

Sect. 513 provides as follows:

> It shall be lawful for any police constable and all such persons as he shall call to his assistance to arrest and detain without warrant (1) Any person whose name and residence shall be unknown to such constable and cannot then be ascertained by him

and who shall commit any offence against [*inter alia*] (A) the provisions of . . . this part of this Act.

It was only under these statutory provisions that the plaintiff was arrested and charged. He was not arrested or charged at common law upon suspicion of a felony to which he was party. Consequently no plea of justification at common law was put forward in the defence, nor was any application made to the trial judge for leave to amend by adding such plea. None the less, the trial judge purported to decide the case as on a common law plea of justification and disregarded the provisions of sect. 513 (1) of the local Act imposing express conditions precedent to the right conferred by the Act upon the police to arrest without warrant for a misdemeanour under sect. 507. Those conditions were not fulfilled, but the trial judge treated them as irrelevant to the common law justification upon which he decided the case against the plaintiff; and, accordingly, he made no specific finding upon them.

The plea appears in para. 3 of the defence, which I will read :

> On Saturday, Sept. 19, 1942, about 10.30 p.m., whilst the defendants Rothwell and Roberts were on motor patrol duty in Upper Parliament Street, in the City of Liverpool, they observed the plaintiff riding a pedal bicycle along the said street with a long sack fastened to the cross-bar of the said bicycle. The defendants requested the plaintiff to stop, and, upon inquiry by the defendant Rothwell of the plaintiff as to what the said sack contained, received the reply "Some soap flakes." The said soap flakes appeared to be of the approximate weight of 14lbs. and the plaintiff was thereupon asked to account for possession of the same, whereupon the plaintiff stated that he had got them from his mate at a garage but he could not give his name or address, and on proceeding with the defendants Rothwell and Roberts to the said garage in Upper Stanhope Street and on approaching the same the plaintiff stated his said mate was not on duty. The defendant Rothwell, knowing that soap flakes were a rationed commodity and that the ration was of but three ounces or thereabouts weekly, and having regard to what he honestly considered an unsatisfactory account, had reasonable and probable cause for suspecting that the plaintiff was, under the Liverpool Corporation Act, 1921, s. 507, in unlawful possession of the said soap flakes, in that the same had either been stolen or unlawfully acquired, and he conveyed the plaintiff to the said Essex Street Police Station and there charged the plaintiff with being in unlawful possession of about 14lbs. of soap flakes.

Para. 4 of the defence states that the third defendant, Sergt. Tindall, merely recorded the charge. That fact was not disputed at the trial and he ought to have been dismissed from the action; indeed, he should never have been made a defendant; but the addition of his name as defendant to the writ can have caused no real extra costs in fact as the Corporation of Liverpool took over the whole conduct of the case, the town clerk acting as solicitor for all three defendants. Nothing further need be said about him as a party in the action except that he is entitled to be dismissed from it without costs.

The respondents contended before us that para. 3 of the defence, by the words towards the end of the paragraph, "in that the same had either been stolen or unlawfully acquired," in substance raised the common law plea of justification. That contention is untenable for more reasons than one. In the first place, the common law plea, based on reasonable suspicion of felony and of the plaintiff being feloniously implicated in it, is not satisfied by those words; indeed, the alternative "or unlawfully acquired" of itself precludes such a construction, both because those words would make it a bad plea at common law and because they are a direct quotation from sect. 507 (1) and (5) read together. Secondly, the plea of suspicion of felony would undoubtedly have appeared as a primary and all-embracing answer and the plea of the local statute would have followed as a mere alternative, had that been the intention of the pleader. Thirdly, it is plain on the facts of the case that from first to last the police were purporting to act only under their statutory power. In addition (and in this I respectfully differ from the trial judge) I do not think the facts disclosed any such reasonable ground for suspicion of felony as would justify arrest at common law; and I suspect that the pleading was settled by counsel on that footing.

The police made no real attempt before arrest to ascertain the plaintiff's name and address, and thus failed to comply with that condition precedent to the right of arrest without warrant imposed by sect. 513 (1). It follows that for that reason alone the judgment below cannot stand.

But, in my opinion, that is not the only ground on which we ought to set the judgment aside. The power possessed by constables to arrest without warrant, whether at common law for suspicion of felony, or under statutes for suspicion of various misdemeanours, provided always they have reasonable grounds for their suspicion, is a valuable protection to the community; but the power may easily be abused and become a danger to the community instead of a protection. The protection of the public is safeguarded by the requirement, alike of the common law and, so far as I know, of all statutes, that the constable shall before arresting satisfy himself that there do in fact exist reasonable grounds for suspicion of guilt. That requirement is very limited. The police are not called on before acting to have anything like a *prima facie* case for conviction; but the duty of making such inquiry as the circumstances of the case ought to indicate to a sensible man is, without difficulty, presently practicable, does rest on them; for to shut your eyes to the obvious is not to act reasonably. In the present case not only did the police fail to carry out sect. 513 (1), but, in my opinion, they failed to make such inquiry from either the plaintiff himself or those at the garage as would entitle them to think they had reasonable grounds for suspicion either under sect. 507 or at common law. For that reason also I hold that the judgment cannot stand and that there must be a new trial.

The whole issue of liability has, however, been decided by us in favour of the plaintiff and on the new trial the only issue will be the amount of damages, and that should be tried on the pleadings as they stand; and it will be tried afresh, as if there never had been any previous trial. It will, of course, involve the necessity of the trial judge who tries it having all the relevant witnesses before him in order that he may hear the whole story of what happened and form his own opinion on the conduct of the police and on the witnesses. And as the whole story will have to be told afresh, it is better for me to abstain from expressing any opinion I may have formed from having read the transcript of the first trial, lest I should seem to prejudge what has to be judged afresh. This small action, however, seems to me so important in the light it throws on our ancient action for false imprisonment, in connection with a constable's power of arrest without warrant, that I think it right to make certain general observations which will serve to explain my reasons for holding as a matter of law that the defendants in the present case did not have reasonable grounds for suspicion.

The duty of the police when they arrest without warrant is, no doubt, to be quick to see the possibility of crime, but equally they ought to be anxious to avoid mistaking the innocent for the guilty. The British principle of personal freedom, that every man should be presumed innocent until he is proved guilty, applies also to the police function of arrest—in a very modified degree, it is true, but at least to the extent of requiring them to be observant, receptive and open-minded and to notice any relevant circumstance which points either way, either to innocence or to guilt. They may have to act on the spur of the moment and have no time to reflect and be bound, therefore, to arrest to prevent escape; but where there is no danger of the person who has *ex hypothesi* aroused their suspicion, that he probably is an "offender" attempting to escape, they should make all presently practicable enquiries from persons present or immediately accessible who are likely to be able to answer their enquiries forthwith. I am not suggesting a duty on the police to try to prove innocence; that is not their function; but they should act on the assumption that their *prima facie* suspicion may be ill-founded. That duty attaches particularly where slight delay does not matter because there is no probability, in the circumstances of the arrest or intended arrest, of the suspected person running away. The duty attaches, I think, simply because of the double-sided interest of the public in the liberty of the individual as well as in the detection of crime. For that reason, just as it is of importance that no one should be arrested by the police except on grounds which in the particular circumstances of the arrest really justify the entertainment of a reasonable suspicion, so also it is in the public interest that sufficient damages should follow in such a case in order to give reality to the protection afforded by the law. Personal freedom depends upon the enforcement of personal rights; and the primary personal right, apart from *habeas corpus*, is the common law right of action for damages for trespass to the person, which is called "false imprisonment" just because it is for a trespass which has involved interference with personal freedom. By the common law there is no fixed measure of damages for such an interference when unjustifiable because the damages are at large, and in so far as they represent the disapproval of the law—historically of a jury—for improper interference with personal freedom they may be "punitive" or "exemplary," given by way of punishment of the defendant or as a deterrent example, and then are not limited to compensation for the plaintiff's loss. The more high-handed and less reasonable the detention is, the larger may be the damages; and, conversely, the more nearly reasonable the defendant may have acted and the nearer he may have got to justification on reasonable grounds for the suspicion on which he arrested, the smaller will be the proper assessment. The whole of the facts will, of course, be taken into account on the new trial in order to arrive at a proper figure.

There is a minor matter which I think calls for comment. There is, I believe, no statutory sanction for the practice disclosed in the evidence in the present case of the police taking finger prints of a person under a charge before he is convicted or even committed for trial. Such treatment is inconsistent with our British presumption of innocence until proof of guilt; and it is natural for it to be regarded as a slur on a man's character. Without free consent it involves trespass to the person; and, following upon an unjustifiable arrest, it may become an element in the false imprisonment and then, if found on the facts to be a consequence of the arrest, it may properly be taken into account on the assessment of damages. In the present case the plaintiff had, before action brought, been informed officially that the prints, etc., had been destroyed. It was, therefore, wrong for him to ask in the second prayer of the statement of claim, for specific relief, although the real blame for that may rest on the plaintiff's lawyers rather than on the plaintiff. But be that as it may, if it be a common practice to take finger prints before committal or summary sentence, I venture to think that it deserves consideration by the Home Secretary in consultation with the Lord Chancellor.

The appeal will be allowed with costs as against the defendants Roberts and Rothwell and the judgment in their favour set aside; new trial ordered as against them limited to ascertaining the amount of damages for which judgment is to be entered for the plaintiff. These defendants to be at liberty to make a fresh payment into court within 21 days if so advised. If the plaintiff recovers either on the new trial or by acceptance of money paid into court not more than was originally paid into court the costs of the first trial down to payment in are to be the plaintiff's, and the defendants are to have the costs thereafter; if he recovers or accepts more than was originally paid into court the costs of the first trial are to be the plaintiff's. The appeal will be dismissed as against the defendant Tindall without costs, but his costs below to be limited to such if any as were incurred solely by reason of his being added as a defendant.

Goddard, L.J.: **Luxmoore, L.J.**, agrees with and adopts as his own the judgment which I am about to read.

The Liverpool Corporation Act, 1921, s. 507, makes it an offence for a person to be in possession of anything which there is reasonable ground to believe or suspect has been stolen if he does not account to the satisfaction of the court for his possession of the same. "Stolen" means stolen or unlawfully acquired or obtained. Sect. 513 authorises a constable to arrest and detain without warrant any person whose name and residence shall be unknown to him and cannot then be ascertained by him for, among other things, an offence against sect. 507. This latter section is in substance identical with the Metropolitan Police Courts Act, 1839, s. 24. That section is supplemental to and is to be read with the Metropolitan Police Act, 1839, s. 66, which, I believe, was the first Act to enact the offence commonly called "unlawful possession." The offence can only be committed, and consequently a person can only be arrested for being in unlawful possession of goods, in the metropolis and in any other large city or town which has a local Act containing a similar provision. It is not to be found in any general Act relating to criminal law. Its object is obvious; it is to confer additional power of arrest and punishment for being in unlawful possession of goods although it may not be possible to prove that the goods have actually been stolen, or that the person in possession of them stole or feloniously received them so as to justify a charge of felony. If a constable knows that goods have been stolen and shortly afterwards finds a person in possession of them who gives no satisfactory explanation, no doubt he could arrest and charge him at least with feloniously receiving; the doctrine of recent possession would apply. But, if he merely suspects that the goods had been stolen, not knowing when or anything about the theft, if there has been one, there would be no ground for such a charge, as he would not know whether the person's possession was recent or not. In *Hadley* v. *Perks* (1), a case under the Metropolitan Acts, Blackburn, J., dealing with this offence, said, at p. 456:

> Under the common law if a felony were actually committed a person might be arrested without a warrant by anyone, if he were reasonably suspected of having committed the felony; and a constable could go further: if he had reasonable ground for supposing that a felony had been committed, and reasonable ground for supposing that a certain person had committed the supposed felony, he might arrest him, though no felony had actually been committed; but neither a constable, nor anyone else, could arrest a person merely on suspicion of his having illegally obtained goods.

It is clear, therefore, that, if the case of arrest is, to use the common and convenient expression, unlawful possession, the power to arrest without warrant is statutory only.

The next point to observe is that, in action of trespass to the person once the trespass is admitted or proved, it is for the defendant to justify the trespass, and he must justify by plea. Under the former system he could not justify under the plea of the general issue; "Not guilty" operated only as a denial of the wrongful act alleged: see Bullen and Leake, 3rd Edn., p. 791. If, therefore, a defendant pleaded a justification and failed to prove it, he could not take advantage of some fact emerging in the evidence and set up that as a justification under his plea of not guilty. Nowadays amendments are allowed much more freely than formerly, but, in the present case, in our opinion, even had an amendment been sought so as to set up an arrest under common law powers, it could not properly have been granted. It is perfectly clear that the constable arrested the plaintiff for an offence under sect. 507; he said he arrested him for being in unlawful possession of the soap flakes. In *Walters* v. *W. H. Smith & Son* (2), Sir Rufus Isaacs, L.C.J., held, after an elaborate review of the authorities, that, in the case of a private person arresting another, he must show that the particular felony for which he arrested had in fact been committed, and that he had reasonable ground for suspecting that the person he arrested had been guilty of that felony; it was not enough to show that in fact he had committed some other felony. We respectfully agree with that decision. A constable may arrest on reasonable suspicion of felony, but the reasoning of the case would seem to show that, if he had no reasonable cause for suspecting that the felony for which he arrested had been committed he could not turn round and say: "I had reasonable cause for suspecting the commission by you of some other felony." Still less, in our opinion, can a constable who arrests for the charge of unlawful possession say: "I might have arrested you for felony, though I did not."

Throughout the matter was treated solely as one of unlawful possession, the arrest, the charge at the station and the charge before the magistrate. Moreover, although the constable said in his evidence that he suspected the goods were stolen, he never said that he suspected the plaintiff had either stolen them or received them knowing them to have been stolen. Nor was there enough in the evidence to justify such a suspicion; it was exactly the case put by Blackburn, J., in the passage cited above, that no one at common law could arrest merely on suspicion of illegally obtaining goods.

The plea in fact in this case justified the arrest solely under the provisions of the Act, and as there was some criticism of the pleadings, we think it right to say that, in our opinion, the pleader properly confined himself to that plea. Had he pleaded a justification based on a reasonable suspicion of felony committed by the plaintiff, he would have been setting up a case which there was no evidence to support. With all respect to the trial judge he was not, in our opinion, entitled to decide this case on a justification which was not pleaded, nor do we think he was justified in holding that the evidence disclosed a justification at common law, for, as we have already said, the officer, though he suspected the goods had been stolen, never said that he suspected that the plaintiff had stolen them or feloniously received them. It was, we have no doubt, because he had no reasonable ground for suspecting either of these matters that he arrested for unlawful possession, and the whole object of the section is to give a power of arrest when the common law grounds are absent. His evidence was that he thought that, if there were reasonable grounds to suspect the property was stolen, that gave power to arrest. By that he obviously meant power to arrest under sect. 513, and the trial judge should not, in our opinion, have provided him with a justification depending on grounds on which he did not act and did not claim to have acted.

But the plea as it stands is none the less demurrable ; to be effective it ought A to have alleged that the plaintiff's name and residence were not known to the constable and could not have been ascertained by him. Here again we would attach no blame to the pleader, because, though the name and residence of the plaintiff were not known to the constable, there seems to be no ground on which it could properly be alleged that they could not have been ascertained. That it was not alleged, however, destroys the efficiency of the plea. Even if it had been alleged, the evidence of the constable effectively, in our opinion, would B have destroyed it beyond amendment, even had one been sought, which it was not.

In giving this power of arrest Parliament obviously contemplated that it was only to be used if it was necessary to ensure the suspect being brought before the court. If his name and address could be ascertained the police could proceed by summons, which is the proper course to take in the case of misdemeanours or summary offences unless, where there is power to arrest, C there is reason to believe a summons would not be effectual.

This was pointed out by the court in *Hadley* v. *Perks* (1), where the argument that it was necessary under the section that the accused should be brought before the court in custody was rejected. Here the constable arrested the plaintiff before he had even asked him for his name, and he never asked him for his residence. He had invited the officers to go back to the place where he D worked, and he was arrested outside that place before either officer had asked for his name. Then, having only asked for his name, the sergeant went inside and asked if Dumbell's mate was on duty ; he never asked if anyone could identify Dumbell, as, of course, somebody there could have done, or if anyone knew his address, which it is highly probable someone would have been able to give.

But whether they could or not, it is useless for the police to say they could E not ascertain these facts when they did not attempt to do so, and to do them justice, they never have said they could not. The section obviously means that the police can only arrest if they cannot ascertain the name and residence, and, of course, they cannot if they do not enquire, so if there is opportunity for enquiry it is their duty to make it. If the person refuses his name or says he has no residence, if, for instance, he is on the tramp, it is altogether different, but here they had gone back at the plaintiff's invitation to his place of business and F never asked for information about him.

In these circumstances they had no justification for arresting the plaintiff, and the appeal must be allowed and the case sent back for a new trial on damages only. We do not desire to say anything on the merits, as they will be enquired into by the trial judge who retries this issue. This applies only to the two officers concerned in the arrest, Roberts and Rothwell. No case has been G made out against Tindall, and the judgment in his favour should stand, but as he was represented by the same solicitor and counsel he should only have such costs, if any, as were incurred solely by his being added as a defendant.

Appeal allowed with costs as against the first two defendants. New trial ordered on the question of damages. Appeal dismissed without costs as against the third defendant.

Solicitors : *J. H. Milner & Son*, agents for *Silverman & Livermore*, Liverpool H (for the appellant) ; *W. H. Baines*, town clerk, Liverpool (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

MILLER *v.* WILLIAM BOOTHMAN & SONS, LTD.

[Court of Appeal (Scott, Luxmoore and Goddard, L.JJ.), **January 12, 19, 1944.**]

Factories—Dangerous machinery—Absolute duty—Circular saw—Guard provided—Operator injured—Absolute liability under Factories Act, 1937, *s.* 14, *modified by the Woodworking Machinery Regulations,* 1922, *reg.* 10—*Factory and Workshop Act,* 1901 (*c.* 22), *ss.* 10 (*c*). 79, 82 (1), 83.—*Factories Act,* 1937 (*c.* 67), *ss.* 14 (1), 60, 159—*Woodworking Machinery Regulations,* 1922 (*S.R. & O.*, 1922, *No.* 1196), *reg.* 10

The plaintiff, a joiner in the employment of the defendants, suffered personal injuries while working a circular saw during the course of his employment. It was not disputed that the saw complied with the regulations laid down by the Woodworking Machinery Regulations, 1922, reg. 10, but it was contended on behalf of the plaintiff that the Factories Act, 1937, s. 14, imposes an absolute obligation to fence securely even though a machine may as a result be rendered unusable:—

Held: (i) the Factories Act, 1937, s. 60, permits regulations to be made by the Secretary of State modifying the absolute obligation imposed by sect. 14 of the Act.

(ii) there was, therefore, no breach of statutory duty on the part of the defendants since the saw complied with the Woodworking Machinery Regulations, 1922, made by the Secretary of State under the Factory and Workshop Act, 1901, s. 79.

[**EDITORIAL NOTE.** Salter, J., in 1919, said that, if it was impossible to work a machine provided with a guard or fence sufficient to comply with the Act, then such a machine could not be used. It is here pointed out, however, that the Act provides that special regulations may be made in the case of particular machines, and, if such regulations are made, then it is those regulations and not the Act which determine the extent of the duty of the employers. The special regulations here considered qualify the absolute duty to fence securely imposed by the Act and in so far as *Lewis* v. *Denye* (2) and *Whitten* v. *Army & Navy Stores* (3) decide to the contrary, the Court of Appeal say that must now be considered as overruled. Leave to appeal to the House of Lords was, however, given.

As to Absolute Duty to Fence Dangerous Machinery, see HALSBURY, Hailsham Edn., Vol. 14, pp. 594, 595, para. 1130; and for Cases, see DIGEST, Vol. 24, pp. 908-910, Nos. 65-76.]

Cases referred to:

*(1) *Davies* v. *Owen* (*Thomas*) *& Co.*, [1919] 2 K.B. 39; 24 Digest 908, *68*; 88 L.J.K.B. 887; 121 L.T. 156.

*(2) *Lewis* v. *Denye*, [1940] A.C. 921; [1940] 3 All E.R. 299; Digest Supp.; 109 L.J.K.B. 817; 163 L.T. 249; *affg. S.C.*, [1939] 1 All E.R. 310; and [1938] 2 All E.R. 813.

*(3) *Whitten* v. *Army & Navy Stores, Ltd.*, [1943] 1 K.B. 580; [1943] 2 All E.R. 244.

Appeal by the workman from a judgment of Stable, J., dated May 18, 1943. The facts are fully stated in the judgment of the court, delivered by Goddard, L.J.

H. Burton for the appellant.

E. Rosser for the respondents.

Goddard, L.J. (delivering the judgment of the court): The action out of which this appeal by the plaintiff arises was brought by him to recover damages for personal injuries sustained in consequence of an alleged breach of statutory duty by the defendants who were his employers. The breach complained of was the alleged failure securely to fence a dangerous machine, namely, a circular saw, contrary to the Factories Act, 1937, s. 14 (1). The facts, except as to contributory negligence on the part of the plaintiff, were not in dispute. Stable, J., found there was no contributory negligence on the part of the plaintiff, and there being no appeal from that finding we need say no more about it. The plaintiff was a joiner at some saw mills, and while engaged in cutting up timber by means of a circular saw unfortunately got his thumb caught by it. Whether the saw cut off the thumb or whether it had to be amputated as a result of the accident does not clearly appear, but in any case this is immaterial. The saw is one known as a Robinson saw; it is entirely enclosed at the bottom underneath the table and has an adjustable guard over the top; the guard is a standard pattern and, according to the evidence, no better guard exists. Of necessity, if the saw is to be used some part of the cutting edge must be exposed, otherwise the wood to be cut could not be brought into contact with it. To that extent it is not securely fenced, nor was it suggested that there was any device which could be provided and which would, in the words of the section, " automatically " prevent " the operator from coming into contact with that " dangerous " part." Counsel for the appellant submitted that sect. 14 imposes an absolute obligation to fence securely, and that it is no answer to say that, if it were securely fenced, the machine could not be used. He relies on the decision of SALTER, J., in *Davies* v. *Owen* (1), under the Factory and Workshop Act, 1901, s. 10, with which sect. 14 (1) of the Act of 1937 is practically identical, that, if a machine cannot be securely fenced while remaining commercially practicable or mechanically useful, the statute in effect prohibits its use. For reasons which will appear later, it is of importance to notice that the machine with which that case was concerned was not a circular saw, or one to which any particular regulations made under the Act applied. But in *Lewis* v. *Denye* (2), TUCKER, J., held that sect. 14 applied to a circular saw, holding, as we understand his judgment, that the section imposed an absolute obligation to which there were no exceptions. However, he also held in that case that there was contributory negligence, and when that judgment was appealed both to this court and the House of Lords, it was only on the question of contributory negligence. In the House of Lords VISCOUNT SIMON, L.C., at p. 932 ([1940] 3 All E.R., at p. 305), expressly reserved his opinion on the passage in *Davies* v. *Owen* (1), to which we have referred, and the other noble and learned Lords expressed no opinion upon it. It is necessary for us, therefore, to consider whether the obligation imposed by sect. 14 is absolute, or whether, though it may be *prima facie* absolute, there may not be some exceptions provided by the Act.

If sect. 14 stood alone, in our opinion, the obligation would be absolute. The section itself does not admit of exceptions; it does not say that a dangerous machine is to be fenced as securely as possible or only so far as will make it commercially or mechanically useful. A dangerous machine must be securely fenced, but, if a fixed guard cannot be provided because of the nature of the operation, a device may be provided which automatically prevents the operator coming into contact with the dangerous part of the machine, and such a device will satisfy subsect. (1). Subsect. (2) does not, in our opinion, create an exception; it provides for an additional precaution. The object of the section is to secure safety, not merely to provide an injured workman with a cause of action. Prevention is better than cure, and so the Secretary of State is given power to direct the use of a particular sort of guard or device, if he thinks it desirable so to do, in order to eliminate, as far as is humanly possible, the risk of an accident. In other words, he may say to the owner " You shall not only fence but you shall use a particular sort of fence." But sect. 14 is not the only section which deals with the matter. Sect. 60 (1) provides, quoting only the material words:

> Where the Secretary of State is satisfied that any . . . machinery . . . used in factories is of such a nature as to cause risk of bodily injury to persons employed in connection therewith . . . he may, subject to the provisions of this Act, make such special regulations as appear to him to be reasonably practicable and to meet the necessity of the case.

By subsect. (2) (*c*) such special regulations may, among other things:

> . . . modify or extend with respect to any class or description of factory any provisions of . . . Part II [which includes sect. 14] . . . imposing requirements as to . . . safety . . .

So a power to modify is expressly conferred. Sect. 14 (1) of the Act of 1937 reproduces in substance sect. 10 (*c*) of the Act of 1901, though subsect. (2) is a new provision. Sect. 60 in substance re-enacts sects. 79, 82 (1) and 83 of the earlier Act. The object of the legislature in giving power to the Secretary of State to modify the provisions of the Act in respect of safety requirements would seem to be that it was recognised that there are some machines necessary for modern industry that cannot be completely fenced if they are to be used, and circular and band saws afford good illustrations. From the evidence in the present case it seems that, at any rate down to the date of the trial, no guard had been invented which would afford completely secure fencing for these saws; some part of the cutting edge must be exposed or the wood could not be cut. Accordingly, if the prohibition of sect. 14 is absolute, the use of these saws in a factory inevitably renders the owners liable to penalties, and it must follow that they cannot be used at all. It is unnecessary to emphasise the seriousness of such a result. It was, in our opinion, for this very reason that, in 1922, the Secretary of State made the Woodworking Machinery Regulations. These Regulations were made under the Act of 1901, sects. 79, 82 and 83 being the relevant sections. By the proviso to sect. 159 (1) of the present Act, these Regulations continue in force notwithstanding the repeal of the earlier Act and have effect as though made under the present Act, that is, under sect. 60. They contain detailed provisions in regs. 10-16 for the guarding of circular saws, band saws and planing machines. In our opinion, these Regulations must be regarded as modifying the provisions of sect. 14 in respect of these machines and of substituting the prescribed guarding and fencing for the absolutely secure fencing which the section would otherwise require. It is difficult indeed to see what other object these Regulations could have. They clearly contemplate the use of these saws; if saws are securely fenced as required by sect. 14, they could not be dangerous to life or limb, and, indeed, could not be used at all. The use in sect. 60 of the words "as appear to him to be reasonably practicable and to meet the necessity of the case," we think clearly show that it is intended to give the Secretary of State power to modify the otherwise absolute obligation so as to allow the use of the machine, provided that reasonable though not absolute provision for safety is made. These Regulations are, in our opinion, undoubtedly *intra vires* the Secretary of State under the Act, and, if their object and result be not what we have said, they would, indeed, be little better than a trap for factory owners. To any one reading them it could not but appear that, provided he followed the provisions of the regulations and saw that his saws were constructed and protected in accordance therewith, he was fulfilling his duties under the Act. Turning again to the authorities, it follows from what we have said that, in our opinion, *Davies* v. *Owen* (1) was rightly decided, and that, as a general proposition, we agree with the passage in the judgment of SALTER, J., to which we have already referred. It should, however, be qualified by saying that the statute prohibits the use of a dangerous machine which cannot be securely fenced, unless it is one which is subject to special regulations, and is used and constructed in accordance therewith. We are of opinion that so much of the judgment of TUCKER, J., in *Lewis* v. *Denye* (2) as holds that reg. 10 of the Regulations does not affect the absolute obligation otherwise imposed by sect. 10 of the Act of 1901, now sect. 14 of the present Act, must be overruled and so must the judgment of WROTTESLEY, J., in *Whitten* v. *Army & Navy Stores* (3) on this point. As it was not disputed that the saw in the present case complied with the regulations, it follows that there was no breach of statutory duty on the part of the defendants and that, accordingly, the appeal fails. But, though agreeing with STABLE, J., in the result we do not agree with the reason that he gave. He construed the words securely fenced "in relation to the degree of risk the particular machine involved." By this we think he must have been taking into consideration the commercial or mechanical use of the machine, and in effect held that, if all that was left unfenced was what was sufficient to enable the machine to be worked, that was enough to comply with the Act. If that is what he meant we cannot agree with him. Our decision is based entirely on the ground that sect. 60 permits of a modification of the absolute obligation and the Woodworking Machinery Regulations have modified it.

The appeal is dismissed with costs.

Appeal dismissed with costs. Leave to appeal to the House of Lords.

Solicitors: *Sheffield, Powell & Scott Tucker*, agents for *Henry Backhouse & Son*, Blackburn (for the appellant); *William Hurd & Son* (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

RIGBY *v.* RIGBY

[Court of Appeal (Scott, Goddard and duParcq, L.JJ.), **January 31, 1944.**]

Divorce—Summary jurisdiction—Variation by Divisional Court of justices' order—No jurisdiction to substitute a finding on a different charge—Matrimonial Causes Rules, 1937, *r.* 67 (6).

On hearing an appeal from a decision and order of justices who had found the appellant guilty of persistent cruelty to his wife, the Divisional Court of Divorce held that it was impossible to find persistent cruelty since there was evidence of only one act of cruelty. The Divisional Court, however, took the view that there was sufficient evidence to support a charge under the Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 1 (2) (*b*), and that, under the provisions of the Matrimonial Causes Rules, 1937, r. 67 (6), they had power to vary the order of the justices, without remitting the case to them for a further finding on the facts. They therefore made an order under sect. 1 (2) (*b*) of the 1925 Act. The husband appealed to the Court of Appeal:—

Held: the Divisional Court had no jurisdiction to vary the order of the justices by substituting a finding on a completely different charge which had not been considered by the justices.

[**EDITORIAL NOTE.** Here the Divisional Court took the view that the evidence on a charge under sect. 1 (2) (*b*) of the 1925 Act would be the same as that given on the persistent cruelty charge and that they, therefore, had power to substitute a charge under that section. The Court of Appeal, however, point out that the charge was never before the justices and the husband and his advisers had never had an opportunity of meeting it and that, therefore, the Divisional Court had acted without jurisdiction.

As to Powers of Divisional Court, see HALSBURY, Hailsham Edn., Vol. 10, pp. 849, 850, para. 1358; and for Cases, see DIGEST, Vol. 27, p. 570, Nos. 6281-6289.]

Appeal by the husband from a decision of the Divisional Court in Divorce (Lord Merriman, P., and Hodson, J.) allowing an appeal from and varying an order of the justices of the petty sessional division of Hawarden in the county of Flint, sitting as a court of summary jurisdiction.

The appellant was summoned before the justices on August 27, 1943, upon two charges: (i) for that he had been guilty of persistent cruelty to his wife, the respondent, who asked for the custody of the children of the marriage and for maintenance; and (ii) wilful neglect, with an application for maintenance. The first charge alone seems to have been considered. From the evidence it appeared that it was first thought that the husband was suffering from venereal disease in 1942. He then consulted a doctor and went to Chester Infirmary. In December, 1942, he complained of a sore throat and ulcerated tongue. After consulting a doctor again, he went as an in-patient to Liverpool Infirmary and was told that he had syphilis. He was discharged from the infirmary but attended from time to time as an out-patient and was treated for syphilis. At this time according to the wife's evidence, the parties were occupying separate rooms. The wife alleged that on May 27, 1943, in these circumstances the husband insisted upon having sexual intercourse with her and that she left the house next day and never returned. The husband denied these allegations. The medical evidence was that the husband had contracted syphilis 15 years before 1943 and that a blood test showed that the disease was still present. A blood test administered to the wife and children proved negative. Upon this evidence the justices made a maintenance order finding that the husband had been guilty of persistent cruelty to the wife and against this order the husband appealed to the Divisional Court in Divorce. That court held that, since there was evidence of only one isolated instance of cruelty, it was impossible to find persistent cruelty, but at the same time there was evidence to support an order under the Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 1 (2) (*b*) which made it possible for a wife to obtain an order where the husband, while suffering from venereal disease, and knowing that he was so suffering, insists on having sexual intercourse with the wife. The court considered that they had jurisdiction to vary the justices' order and held that such jurisdiction was given by the Matrimonial Causes Rules, 1937, r. 67 (6). This rule provides that the court shall have power to draw all inferences of fact which might have been drawn in the court below and make any order which ought to have been made. The court considered that it was established by the evidence that the husband had committed an offence under sect. 1 (2) (*b*) and that an order ought to be made on that ground and not on the ground of persistent cruelty. In their view it was unnecessary to remit the case to the justices for a further finding on the facts. The appeal was, therefore, allowed and the order of the magistrates varied to read that on May 27, 1943, the appellant, while suffering from venereal disease, and knowing he was so suffering, insisted on having sexual intercourse with the respondent. The court granted leave to appeal to the Court of Appeal.

L. J. Acton Pile for the appellant.

Arthian Davies for the respondent.

SCOTT, L.J.: [His Lordship stated the previous proceedings and continued as follows:] The justices in this case found the appellant guilty of persistent cruelty when all that was proved against him was one isolated act of cruelty. It is clear that an isolated act of cruelty does not amount to persistent cruelty and does not fulfil the statutory requirements under the Summary Jurisdiction (Married Women) Act, 1895, s. 4. There must be more than one act of cruelty or a course of conduct amounting in law to cruelty persisted in over a period of time. Here there was no such evidence. The only evidence was that on one day, May 27, 1943, the husband insisted on sexual intercourse. That in itself is obviously insufficient to prove an allegation of persistent cruelty and the Divisional Court have rightly so held.

However, the Divisional Court considered that they had power to amend the proceedings under the Matrimonial Causes Rules, 1937, r. 67 (6) which provides as follows:

> The court shall have power to draw all inferences of fact which might have been drawn in the court below and to give any judgment and make any order which ought to have been made. No appeal shall succeed on the ground merely of misdirection or improper reception or rejection of evidence unless in the opinion of the court substantial wrong or miscarriage has been thereby occasioned in the court below.

They held that upon the proper construction of that rule they could vary the order of the magistrates as though the charge had been based on a different section altogether. It is provided by the Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 1 (2) as follows:

> Amongst the grounds on which a married woman may apply for an order or orders under the principal Act there shall be included the following grounds. . . . (*b*) that her husband while suffering from a venereal disease, and knowing that he was so suffering, insisted on having sexual intercourse with her.

That is quite a different offence from persistent cruelty and it is not proper that a magistrates' court which has investigated a complaint of persistent cruelty shall be taken to have considered an altogether different allegation, based on a single act within sect. 1 (2) (*b*), and to have made an order thereon. The Divisional Court had no jurisdiction to substitute a finding on the latter charge for a finding on the former. A charge under sect. 1 (2) (*b*) of the 1925 Act may involve consideration of the meaning of the term "insisting"—a word which, in my view, imports something short of compelling. The justices have to be satisfied that the husband did "insist"; and this is essentially a question of fact for them. In the present case the evidence was very meagre and it might well have been that the justices, who saw the witnesses, would not have been satisfied on the issues of facts.

In any event, the wife would not have been in any way prejudiced if the allegation of cruelty had been dismissed by the Divisional Court, since it would have been still open to her to take out another summons based on the provisions of sect. 1 (2) (*b*) of the 1925 Act. In my view, the Divisional Court were wrong in varying the order of the justices in the way they did and acted without jurisdiction.

The appeal must be allowed: but it does not appear that the summons for wilful neglect was in any way dealt with by the magistrates and it may be possible for them to make an order on that which will satisfy the wife.

Goddard, L.J.: The summons in this case was based on the Summary Jurisdiction (Married Women) Act, 1895, s. 4, and alleged persistent cruelty. The justices found on the evidence that the husband had been guilty of persistent cruelty and made an order for custody of the children and the payment of a weekly sum. Only one act of cruelty was alleged and there was in fact no evidence whatever of persistent cruelty. There was, however, evidence of an act that might have been the basis of successful proceedings under sect. 1 (2) (*b*) of the 1925 Act, but no such allegation or claim was made before the justices nor is there anything to suggest that their attention was directed to the section or the necessary evidence to prove an offence under the section. The Divisional Court, however, have held that they have jurisdiction to treat the proceedings as brought under that section and to vary the order of the justices by stating that they found an offence under that section had been proved. In fact there has been no investigation of a charge under that section. If there had been, the husband's advisers might very well have conducted their case on quite different lines. In my opinion, rule 67 of the Matrimonial Causes Rules does not give the Divisional Court in cases on appeal from justices the power it exercised here. It allows the court to give any judgment or make any order that ought to have been made, but that must be limited to what ought to have been made in the complaint which was before the justices. It does not, in my opinion, enable the court to make an order which might have been made on a different complaint—which, of course, would have led to a different summons.

I do not propose in this case to say what evidence is necessary to support a charge of insisting on intercourse. That question does not arise before us and has not been investigated by the justices. The appeal must be allowed.

du Parcq, L.J.: I agree. The question whether a husband suffering from venereal disease has "insisted on having sexual intercourse" with his wife is one which demands full and careful inquiry by the court which hears the evidence. There has been no such inquiry in this case.

Appeal allowed.

Solicitors: *L. Bingham & Co.*, agents for *Ouseley-Smith & Co.*, Chester (for the appellant); *Pritchard, Enfield & Co.*, agents for *G. L. Greene*, Chester (for the respondent).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

Applied. *Re* Keele Estates.
[1952] 1 All E.R. 44.

Re FUCH'S WILL TRUSTS, WESTMINSTER BANK LTD. *v.* CHEW.

[Chancery Division (Simonds, J.), **November 25, 26, 1943, January 25, 1944.**]

Estate Duty—Incidence of duty—Direction by testator to pay legacies out of reversion—Reversion falling in after testator's death—Whether estate duty apportionable between pecuniary and residuary legatees—Finance Act, 1894 (c. 30), s. 8 (4).

The testator by a post-nuptial settlement settled certain funds upon trust to pay the income to his wife during her life and subject thereto in the events which happened upon trust for himself absolutely. Subsequently the testator by his will directed that, in the event of there being no issue of his living at his death, his trustee should pay the residue of his trust estate to the trustees for the time being of his post-nuptial settlement to be held by them so long as his wife should remain a widow and unmarried upon the same trusts. Then he declared that the trustees of that settlement should, from the second marriage or death of his wife and subject to her life estate in the funds originally comprised therein, stand possessed of the trust estate and all other funds then subject to the trusts of the settlement upon trust to pay the same to the trustees of his will. He directed the trustees of his will upon that event happening to pay certain legacies and to hold the residue upon trusts for his residuary legatees. The testator died leaving no issue. In due course the residue of his trust fund was transferred to the trustees of the post-nuptial settlement and held by them upon the trusts therein declared. The widow survived the testator but died without having remarried and upon her death estate duty was duly paid in respect of the funds originally comprised in the post-nuptial settlement. The question to be determined by the court was whether the estate duty so paid was to be borne by the pecuniary legacies and residuary legacies rateably or wholly by the residuary legacies. It was contended by the residuary legatees that the Finance Act, 1894, s. 8 (4), prescribed in such a case an apportionment of the duty rateably between the two classes of legatees :—

HELD : upon the death of the testator's widow the trust fund did not pass to the legatees under the disposition of the reversioner, but vested absolutely in the settlor. The legatees took under his will, or it might have been his intestacy, and in such a case the Finance Act, 1894, s. 8 (4), did not apply.

[**EDITORIAL NOTE.** In *Berry* v. *Gaukroger* (1) it was said that duty such as that in question here was to be borne rateably by the persons ultimately entitled beneficially. This principle is here restricted to those entitled under the disposition in which the reversion is created. If, by a further disposition and in the events which have happened, other beneficiaries become immediately (in point of time) entitled, then the duty does not have to be rateably apportioned.

AS TO APPORTIONMENT OF ESTATE DUTY, see HALSBURY, Hailsham Edn., Vol. 13, pp. 293, 294, para. 309 ; and FOR CASES, see DIGEST, Vol. 21, pp. 38-42, Nos. 244-265.]

Cases referred to :

*(1) *Berry* v. *Gaukroger*, [1903] 2 Ch. 116 ; 21 Digest 27, *155* ; 72 L.J.Ch. 435 ; 88 L.T. 521.

(2) *Re Hicklin, Public Trustee* v. *Hoare*, [1914] 2 Ch. 278 ; 21 Digest 28, *156* ; 86 L.J.Ch. 740 ; 117 L.T. 403.

(3) *Re Drake, Drake* v. *Wilson*, [1926] Ch. 559 ; Digest Supp. ; 95 L.J.Ch. 386 ; 134 L.T. 362.

SUMMONS by the trustees of the testator's will to determine the incidence of estate duty payable on the falling in of a reversion. The facts are fully set out in the judgment.

Russell Gilbert for the trustees.

C. D. Myles for the pecuniary legatees.

A. C. Nesbitt for the residuary legatees.

Wilfred M. Hunt for certain charitable legatees.

SIMONDS, J. : The testator, Daniel Fuch, made a post-nuptial settlement on Apr. 23, 1881, and thereby settled certain funds upon trust to pay the income to his wife, Florence Mary Fuch, during her life and subject thereto in the events that happened upon trust for himself absolutely. He made his will on June 2, 1894, and thereby, after making a number of dispositions, which are not material to this case, directed that, in case there should be no child or issue of his living or *en ventre sa mere* at his death, his trustee should pay the residue of his trust estate to the trustees for the time being of his post-nuptial settlement to be invested and held by them so long as his wife should remain a widow and unmarried upon the same investments and trusts. Then he declared that the trustees of that settlement should from and after the second marriage or death of his wife and subject to her life estate in the funds originally comprised therein stand possessed of the trust estate and all other funds then subject to the trusts of the settlement upon trust to pay, transfer or make over the same to the trustees of his will. He directed the trustees of his will upon that event happening to pay certain legacies, ten in all, of a substantial amount and to hold the residue upon certain trusts for the benefit of his residuary legatees. The testator died on Dec. 19, 1894, having had no issue. In due course the residue of his trust fund was transferred to the trustees of the post-nuptial settlement and held by them upon the trusts therein declared. The widow survived the testator by nearly 50 years and died on Mar. 22, 1940, without having been remarried. Upon her death estate duty became exigible and was duly paid in respect of the funds originally comprised in the post-nuptial settlement.

The question which I now have to determine is whether that estate duty which so became payable in respect of the settled fund upon her death is to be borne by the ten legacies and the residue of the testator's estate rateably or is to be borne wholly by the residue of the testator's estate. It is an accident, which can be ignored for the purpose of answering this question, that the fund set free by the death of the widow and now available for distribution in due course of administration comprises not only the settled fund, a reversion in which was at all times an asset of the estate, but also the residue of the free estate. The questions would be the same if the only asset in the estate had been the reversion. This asset could have been sold before it fell into possession if the circumstances of the estate required it. If it had been so sold no question of the incidence of duty as between pecuniary legatees and residuary legatees could have arisen. Estate duty would have been payable on the death of the widow, but the only effect of this so far as concerns the testator's estate is that the purchaser would have paid so much less for the reversion knowing that what he in due course received would be reduced by the amount of duty exigible.

It could not in such circumstances be contended that, as between pecuniary legatees and residuary legatees, any equity existed in favour of the latter which would enable them to throw any part of the assumed reduction of the trust money on the former so as to reduce the amount of the legacies. If instead of realising the reversion the executors await its falling into possession the position is no different. In due course they receive the trust fund less any duty and less also any costs, charges or expenses which have been properly deducted and what they receive is available like any other asset for distribution in due course of administration. I see no ground for saying that in this case there is any equity in favour of the residuary legatees which entitles them to throw any part of the duty upon the pecuniary legatees.

It was, however, contended that, apart from any equity, an apportionment of the duty rateably between the two classes of legatees is prescribed by statute. This contention rests on the Finance Act, 1894, s. 8 (4), and on two authorities in particular, *Berry* v. *Gaukroger* (1) and *Re Hicklin* (2). It was admitted that, though in the 50 years which have passed since the Finance Act, 1894, there must have been many cases in which a reversion has fallen in, duty has been paid on the death of the tenant for life and the proceeds have been distributable to pecuniary and residuary legatees and, therefore, such a claim might have been advanced, yet there is no trace in the books that it ever has been advanced. In my judgment, a sufficient reason for this is that the contention though specious is quite unarguable. The Finance Act, 1894, s. 8 (4) is not an easy subsection to construe, but it cannot, I think, have any further application when, duty having been paid, the fund upon which it has been paid passes to a beneficiary absolutely. It appears to me to be irrelevant whether the nominal beneficiary is alive and himself receives the fund or is dead and the fund is received by his executors or administrators. In the former case the nominal beneficiary and in the latter his executors or administrators are the persons to whom " the property passes " for a " beneficial interest in possession " within the meaning of the subsection. If, the former having died, the latter receive the fund, they are liable to pay the duty if it has not been paid. At that stage the effect of the subsection is exhausted and there is, in my judgment, no justification for carrying the matter any further and apportioning the duty as between those who claim under or through the beneficiary. If this were not so it is difficult to see why creditors of his estate who might be paid out of the proceeds of the reversion should not also bear their share of the duty. The view which I take of the scope of the subsection is supported by the observations of SARGANT, L.J., in *Re Drake* (3), at p. 573.

The same result is reached by an approach from a somewhat different angle. The subsection contemplates the passing of property from A to B upon the death of A under circumstances in which the executor of A is not liable for duty. Where, under a disposition made by C, a trust fund becomes distributable upon the death of the life tenant A to the reversioner B, it is sufficiently accurate to say that the property in the trust fund passes to B and if B represents more than one person then the several reversioners will bear the duty rateably. But where the reversioner B dies before the reversion falls in and, when it does fall in, it is distributable under his will, or (it may be) upon his intestacy, it is, in my judgment, too great a strain even of popular language, in which admittedly the Finance Act is couched, to say that the property, that is the trust fund, passes from A, the tenant for life, to the persons who take either under B's disposition or in default of such disposition. The right of such a person is not a right in or to any property but solely a right to have the estate of the reversioner including this asset administered in due course. Upon this footing the primary condition of the application of the subsection is not present and it is in this respect that *Berry* v. *Gaukroger* (1) and *Re Hicklin* (2), upon which counsel for the residuary legatees relied, are to be distinguished. In both cases the deceased upon whose death duty was exigible and the persons who disputed their rateable A liability claimed under the same disposition and it could be fairly predicted of them that the same property which the deceased enjoyed during his life passed to them after his death according to their respective interests. They were accordingly liable for a rateable part of the duty. *Mutatis mutandis* the same observation can be made of numerous cases in which the principle of *Berry* v. *Gaukroger* (1) has been held to be applicable. But as I have already pointed out, it is just this element which is absent from such a case as the present B one where the contest is between several beneficiaries who claim not under the original disposition but under a testator who was himself absolutely entitled in reversion under that disposition. In my judgment, there is no room for the application of the principle and I declare that no part of the duty payable on Mrs. Fuch's death in respect of the settled fund is to be apportioned to the pecuniary legatees in exoneration of the residue of the testator's estate.

C *Declaration accordingly. Costs of all parties to be paid out of the estate.*

Solicitors: *M. M. Blyth*, agent for *Dudley M. Paul & Co.*, Liphook (for the trustees and the pecuniary legatees); *Armitage, Chapple & Co.* (for the residuary legatees); *Hanbury, Whitting & Ingle* (for certain charitable legatees).

[*Reported by* R. L. ZIAR, ESQ., *Barrister-at-Law.*]

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N. E. NETER & CO., LTD. *v.* LICENSES AND GENERAL INSURANCE CO., LTD.

[KING'S BENCH DIVISION (Tucker, J.), **January 27, 1944.**]

Insurance—Marine insurance—Perils of the seas—Damage to cargo in rough E *weather usual at the time of year—Whether a fortuitous happening.*

The plaintiffs were the assignees of a policy of marine insurance subscribed by the defendants on 200 tons of china clay on a voyage from Fowey, via Liverpool to Bombay, by the Suffolk Coast and the City of Benares. The policy covered, *inter alia*, perils of the seas. On arrival at Bombay a large part of the cargo of china clay was found to be damaged and stained. The plaintiffs claimed that this damage was due to a peril of the sea in the F shape of rough weather encountered during the voyage which caused some casks of dye-stuff stowed with the clay to be stoved in. The defendants contended that the plaintiffs had not adduced sufficient evidence to establish that the damage was so caused and, in any event, that the rough weather being such as was normally to be expected on such a voyage at the particular time of the year was not a peril of the seas:—

G HELD: (i) on the facts the plaintiffs had not discharged the onus of proving that the proximate cause of the damage to the cargo was the rough weather. The evidence was equally consistent with defects in the casks, accidents during loading, bad stowage, or accidents during or after discharge.

(ii) damage caused by rough weather, although such weather is expected, may be a peril of the sea if the cargo has been properly stowed. In such H circumstances, although the weather is not fortuitous, damage to a large part of the cargo due to the weather is something beyond the ordinary wear and tear of a voyage.

[**EDITORIAL NOTE.** Rough weather is to be expected at some time on almost every voyage and as such cannot be regarded as a fortuitous incident. Rough weather may result in damage to the cargo, but, before it can be said that such damage is due to a peril of the seas, it must at least be shown that the cargo was in good condition and properly stowed before the rough weather was encountered.

AS TO PERILS OF THE SEAS, see HALSBURY, Hailsham Edn., Vol. 18, pp. 298-304, paras. 421-429; and FOR CASES, see DIGEST, Vol. 29, pp. 197-202 Nos. 1566-1611.

Cases referred to :

(1) *Thames & Mersey Marine Insurance Co.* v. *Hamilton Fraser & Co.* (1887), 12 App. Cas. 484 ; 29 Digest 197, *1575* ; 56 L.J.Q.B. 626 ; 57 L.T. 695 ; *revsg.* S.C. *sub nom. Hamilton* v. *Thames & Mersey Marine Insurance Co.* (1886), 17 Q.B.D. 195.

(2) *Wilson, Sons & Co.* v. *Xantho (Cargo Owners)* (1887), 12 App. Cas. 503 ; 29 Digest 197, *1567* ; 56 L.J.P. 116 ; 57 L.T. 701.

(3) *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (1887), 12 App. Cas. 518 ; 29 Digest 203, *1624* ; 57 L.J.Q.B. 24 ; 57 L.T. 726 ; *revsg.* S.C. *sub nom. Pandorf* v. *Hamilton* (1886), 17 Q.B.D. 670.

*(4) *Canada Rice Mills, Ltd.* v. *Union Marine and General Insurance Co., Ltd.*, [1941] A.C. 55 ; [1940] 4 All E.R. 169 ; Digest Supp.

*(5) *The Catharine Chalmers* (1874), 32 L.T. 847; 41 Digest 417, *2602*.

Action by the insured on a policy of marine insurance for damaged cargo. The facts are fully set out in the judgment.

A. J. Hodgson for the plaintiffs.

Patrick Devlin for the defendants.

Tucker, J. : In this case the plaintiffs claim as assignees of a policy of marine insurance subscribed by the defendants and dated June 5, 1940, on 200 tons of china clay, valued at £1,250, on a voyage from Fowey, via Liverpool, to Bombay, by the S.S. Suffolk Coast and the S.S. City of Benares. The policy covered among other risks perils of the seas. The china clay was transhipped from the Suffolk Coast to the City of Benares at Liverpool. The City of Benares left Liverpool on May 14, 1940, and arrived at Bombay on June 20. After discharge on quay a portion of the bags of China clay were found to be damaged and stained. Lloyds' special survey took place on June 28 on quay, when 880 out of 1,200 bags were found to be damaged. Of these 21 were torn and empty, 358 were torn and in slack condition and stained by contact with dye-stuff, and 501 bags were intact but stained by dye-stuff. There was in addition a quantity of loose china clay which was also stained. The survey showed the cause of staining to be due to contact with other cargo, and the tearing to be due to rotting of the bags through the action of their own contents.

The plaintiffs claim that this damage was due to perils of the seas, namely rough weather after rounding the Cape of Good Hope which caused one or two casks of dye-stuff, which was stowed with the china clay in No. 3 'tween deck, to be stoved in and the sacks of china clay to be torn, with the result that the quantity referred to was either lost or damaged by staining from the dye-stuff. The defendants do not admit that the evidence is sufficient to establish that the damage was so caused, and contend that in any event such loss is not due to a peril of the seas. It is agreed that I should deal only with the question of liability and leave the amount, if any, to be subsequently agreed or otherwise ascertained.

The evidence that the china clay was in good condition when transhipped at Liverpool was not contested. The remaining evidence adduced by the plaintiffs consisted of Lloyds' survey, the log book, the stowage plan and the evidence of the chief officer taken on commission in Sept., 1943, more than three years after the voyage in question. This evidence proved that the City of Benares on rounding the Cape encountered rough weather, particularly on June 1, 2 and 3, when the log entries show there was strong wind, rough seas and swell, and that the vessel was at different times described as "plunging" "pitching heavily" and "labouring and straining heavily." This weather was, however, such as was normally to be expected on a voyage round the Cape in the month of June.

With regard to the condition of the casks of dye-stuff at Liverpool and the stowage of the cargo in No. 3 'tween deck, the evidence of the chief officer, after such an interval of time, was, perhaps not unnaturally, not very helpful. Although he said the stowage was proper, it appeared from cross-examination that he had no real recollection of the stowage on that deck on the particular voyage, but was speaking of the system which was normally adopted, and which he assumed was followed in this case. He and his subordinates were responsible for stowage, and they would not have passed bad stowage or accepted defective casks. Similarly with regard to discharge at Bombay, he never actually saw the cargo being discharged from No. 3 'tween deck ; he only saw it on the quay. He did not in fact know from his own observation whether all the damaged bags had come from No. 3 'tween deck. The stowage plan shows that part, and apparently the larger part, of the china clay was stowed in No. 1 hold, but I do not think it safe to draw any inference as to quantities from the stowage plan alone.

The chief officer stated that apart from one or two casks of dye-stuff stoved in he did not remember any other damage to cargo. He said he would expect to find a couple of casks stoved in out of a large shipment at the end of a voyage, and this might be due to bad weather or careless handling when being discharged. The preliminary survey shows that in fact there was some slight damage to other cargo, but the list does not disclose anything beyond what one would expect to find at the end of a normal voyage. It is true that the chief officer attributed the damage to the casks in this case to the rough weather, but that is really one of the issues which I have to decide.

The discharge at Bombay at No. 3 hatch began at 10 p.m. on June 20, and was completed at 3.30 p.m. on June 21. The whole cargo had been discharged by 4 p.m. on June 24. It was showery on June 20, there was heavy monsoon rain late on June 21, after work had ceased, and heavy rain again after 5.30 p.m. on June 22, continuous heavy rain on June 23, and intermittent rain on June 24. The weather during the period of discharge may have some bearing on the condition of the bags of china clay if they were exposed to wet during or after discharge. As to this there was, however, no evidence either way.

On this evidence the plaintiffs invite me to draw the inference that the casks of dye-stuff were in good order when loaded, that the cargo was loaded without mishap, that it was properly stowed, that it was discharged with due care and without accident, and that consequently the casks must have been stoved in with resulting damage to the china clay during and as a result of the rough weather round the Cape, and they submit that this would constitute a peril of the seas.

In my opinion the evidence which I have outlined above is not sufficient to justify me in drawing these inferences. It appears to me equally consistent with defects in the casks, accidents during loading, bad stowage, rough weather, or accidents during or after discharge, and I am unable to hold that the plaintiffs have discharged the burden that lies on them of proving to my satisfaction that the proximate cause of the loss was the rough weather.

In case I am wrong as to the proper inferences to be drawn from the evidence, I think I ought to deal with the defendants' submission that in any event damage so caused could not constitute loss due to a peril of the seas. This point was fully argued on both sides, and is one of some importance. The defendants say there was nothing abnormal or unexpected in the weather experienced on such a voyage in the month of June, there was nothing fortuitous in what occurred, the damage was solely due to the ordinary action of wind and waves, and there was no peril. They contend that a distinction should be drawn between the incursion of sea water in normal weather through some aperture wrongly left open, which is fortuitous, and the ordinary rolling and pitching of a vessel in heavy, but not unexpected, weather, which is wholly lacking in any fortuitous element.

Having regard to *Thames & Mersey Marine Insurance Co.* v. *Hamilton, Fraser* (1), the *Xantho* case (2), and *Hamilton, Fraser* v. *Pandorf* (3), and the recent Privy Council decision in *Canada Rice Mills, Ltd.* v. *Union Marine & General Insurance Co., Ltd.* (4), I think it is clearly erroneous to say that, because the weather was such as might reasonably be anticipated, there can be no peril of the seas. There must, of course, be some element of the fortuitous or unexpected to be found somewhere in the facts and circumstances causing the loss, and I think such an element exists when you find that properly stowed casks, in good condition when loaded, have become stoved in as a result of the straining and labouring of a ship in heavy weather. It is not the weather by itself that is fortuitous ; it is the stoving in due to the weather, which is something beyond the ordinary wear and tear, of the voyage. This appears to me to be " something which could not be foreseen as one of the necessary incidents of the adventure." It was " an accident which might happen, not an event which must happen," to quote the language of LORD HERSCHELL in *The Xantho* (2). In the *Canada Rice Mills* case (4), LORD WRIGHT says, at p. 69 ([1940] 4 All E.R., at p. 177) ;

On any voyage a ship may, though she need not necessarily, encounter a storm, and a storm is a normal incident on such a passage as the Segundo was making, but if in consequence of the storm cargo is damaged by the incursion of the sea, it would be for the jury to say whether the damage was or was not due to a peril of the seas.

If for the words "by the incursion of the sea" there are substituted the words "by the action of the sea," the above passage is applicable to the present case on the assumption that the casks of dye-stuff, though properly stowed and loaded in good condition, had been stoved in as the result of the action of the sea in stormy weather causing the straining and labouring of the vessel. On such facts, sitting as a jury I should have found that this was a loss due to a peril of the seas. It has been decided that it makes no difference whether the sea comes in through a hole or the cargo goes out through a hole into the sea, and I can see no distinction in principle between these happenings and damage to the cargo by the action of the sea without actual contact with the water and not due to action taken to prevent such contact as in the *Canada Rice Mills* case (4). This view seems to be in accord with one of the issues decided in *The Catherine Chalmers* (5), the correctness of which decision on this point has never, so far as I am aware, been questioned.

There must, however, be judgment for the defendants with costs.

Judgment for the defendants with costs.

Solicitors: *Waltons & Co.* (for the plaintiffs); *Middleton, Lewis & Clarke* (for the defendants).

[*Reported by* R. BOSWELL, ESQ., *Barrister-at-Law.*]

WILLIAM LAWRENCE ALLEN *v.* JOHN EMMERSON AND OTHERS.

[KING'S BENCH DIVISION (Humphreys, Asquith and Cassels, JJ.,), **January 21, February 2, 1944.**]

Theatres and other places of entertainment—Licence—Licence under local Act—Funfair—"Theatre or other place of public entertainment"—Barrow-in-Furness Corporation Act, 1868 (*c. civ*), *s.* 166—*Barrow-in-Furness Corporation Extension and Amendment Act,* 1872 (*c. cxiii*), *s.* 33.

By the Barrow-in-Furness Corporation Extension and Amendment Act, 1872, s. 33, it was enacted that "no theatre or other place of public entertainment" could be used as such without licence from the local authority and penalties were provided for breach of this enactment. This Act also incorporated the provisions of the Barrow-in-Furness Corporation Act, 1868, s. 166, which imposed penalties for the use without licence as a theatre of buildings, etc., for public entertainment to which admission could be obtained by payment of money. Informations for alleged offences under the Acts were laid by the town clerk against the managers or owners of "funfairs," places to which the public could obtain admission without payment, and where they could either remain as spectators without payment or make use of the automatic machines and other amusements by paying the appropriate fee. The respondents contended (i) that upon their true construction the Acts, if read together, only applied to places to which admission could be obtained by payment of money; (ii) that the *ejusdem generis* rule would apply to the phrase "theatre or other place" and funfairs would, therefore, not be included; (iii) that, apart from the *ejusdem generis* rule, funfairs were not places of public entertainment:—

HELD: (i) the Act of 1872 was of wider scope than the Act of 1868, and included not only theatres, which charged an admission fee and for which a licence was already required under the Theatres Act, 1843, but also "other" places "of public entertainment."

(ii) the *ejusdem generis* rule was not applicable.

(iii) a funfair is a "place of public entertainment" even though it might be said that, by operating the machines, the public provided their own entertainment.

[**EDITORIAL NOTE.** The question whether a funfair is a place of entertainment here arises under a local Act, but this form of amusement is so wide-spread that the decision even apart from the discussion of the *ejusdem generis* rule and its application, must be of some general importance.

As to Licences for Public Entertainments, see HALSBURY, Hailsham Edn., Vol. 32, pp. 64, 65, paras. 73, 74; and for Cases, see DIGEST, Vol. 42, p. 905, Nos. 13-22.]

Cases referred to:

*(1) *Anderson* v. *Anderson*, [1895] 1 Q.B. 749; 17 Digest 274, *893*; 64 L.J.Q.B. 457; 72 L.T. 313.

(2) *A.-G.* v. *Southport Corpn.*, [1934] 1 K.B. 226; Digest Supp.; 103 L.J.K.B. 117; 150 L.T. 273.

Appeal by way of case stated by the Town Clerk of Barrow-in-Furness from a decision of the justices of Barrow-in-Furness, dated June 4, 1943, dismissing informations against 10 respondents for a number of alleged offences under the Barrow-in-Furness Corporation Extension and Amendment Act, 1872, s. 33, and the Barrow-in-Furness Corporation Act, 1868, s. 166. The facts found by the justices and the relevant sections of the Acts are fully set out in the judgment of the court delivered by Asquith, J.

Sydney G. Turner, K.C., and *G. Glynn Blackledge* for the appellant.

T. Dawson (*C. Q. Henriques* with him) for the first respondents.

Alban G. Gordon for the second respondents.

Asquith, J. [delivering the judgment of the court]: The respondents fall into three groups. Each group includes the proprietor or manager (or both) of premises known as a "funfair." The first group, that associated with the funfair in Rawlinson Street, further includes a number of persons to whom the owner had sublet parts of the premises in question. But the issues raised in all these prosecutions were identical. They were all tried together and all dismissed.

The facts as found or admitted, so far as material, may be summarised as follows: (i) The respondent Emmerson was the proprietor of the funfair premises in Rawlinson Street. Part of these he retained in his own possession. In this part there was a round-about or merry-go-round. The rest of the floor space he sublet to seven of the respondents, each of whom acquired or occupied a "stall" thereon. In these stalls there were automatic slot machines, pin-bagatelle tables, target machines, shooting ranges and the like. The public could obtain admission to the funfair as a whole without paying any fee; if they desired to go on the merry-go-round or operate any of the machines they would, of course, have to pay the appropriate charge, but they were at liberty without making payment to wander about the place in the character of spectators. (ii) The same conditions prevailed at the funfair premises of the Barrow Arcade, Ltd., known as the Play Beach Arcade, and at the funfair premises of Frederick Newbury Smith, known as the Sportland Funfair, Dalton Road, with this difference, that at neither of these places did the owner work a roundabout or merry-go-round of his own.

None of the three sets of premises were licensed by the Barrow-in-Furness Corporation. The Barrow-in-Furness Corporation Act, 1868, s. 166, provides as follows:

> Any justice may, by order in writing, authorise any constable to enter into any building or part of a building or any place kept or used or suspected to be kept or used for stage plays or dramatic entertainments, into which admission is obtained by payment of money, and which is not a licensed theatre, at any time when the same is open for the reception of persons resorting thereto, and to take into custody any person found therein without lawful excuse; and every person keeping, using, or knowingly letting any building or part of a building or any place for the purposes aforesaid, or any of them, shall be liable to a penalty not exceeding £20; and every person performing or being therein without lawful excuse shall be liable to a penalty not exceeding 40*s.*; and the burden of proving that any such place is a licensed theatre shall be upon the person keeping the same.

This provision applies only to (i) buildings, etc. (not being licensed theatres) used for stage plays or dramatic performances, (ii) into which admission is obtained by payment of money.

The Barrow-in-Furness Corporation Extension and Amendment Act, 1872, s. 33, provides as follows:

> No theatre or other place of public entertainment (other than such places of entertainment as are now subject to the provisions of "the Barrow-in-Furness Corporation

> Act, 1868," s. 164, and which last-mentioned places are to continue subject to the provisions of that Act) shall be opened or used unless the same shall first have been licensed by the corporation, who shall have absolute discretion as to the duration of every licence from time to time to be granted for the use of any such theatre or other place, and all other the terms and conditions whatever of such licence; and the provisions of "the Barrow-in-Furness Corporation Act, 1868" cl. 166, shall apply to every such theatre or other place which shall not for the time being be licensed under this clause.

It will be observed that the last four lines incorporate sect. 166 of the earlier Act; whether they incorporate the whole of that section, or part only and, if so, which part, is among the questions raised by the case.

The justices held that the respondents had not offended against these provisions by reason that the respective funfairs were not licensed by the Barrow-in-Furness Corporation. They dismissed the informations on the ground that none of these funfairs was within the words "other place of public entertainment" in sect. 33 of the 1872 Act. The question raised by the case is whether this conclusion is well-founded in law.

The respondents sought to support it in this court by three contentions in particular, any one of which, if established, would have been sufficient for their purpose, namely: (i) that, if sect. 33 of the 1872 Act and sect. 166 of the 1868 Act are read together, the result, upon a true construction, is to limit the requirement of a licence from the corporation to places of public entertainment to which admission can only be obtained by payment of money; whereas admission to the funfairs could be obtained without any such payment; (ii) that when sect. 33 of the 1872 Act speaks of "theatre or other place of public entertainment," the words "other place", etc., must be read subject to the *ejusdem generis* rule and, so read, would not include the funfairs in question; (iii) that read, apart from the *ejusdem generis* rule and in their ordinary unrestricted sense, the words "place of public entertainment" would not include such places as the funfairs.

The justices, in reaching their conclusion, may have approved one or more or all three of these propositions. The appellant in this court (the town clerk, representing the mayor and corporation) sought to disprove them. We are of opinion that the appellant has succeeded on all three issues, with which we will proceed to deal in turn.

(i) Sect. 166 of the 1868 Act provides for penalties (and rights of entry by the police) applicable to buildings and places:

> . . . kept or used . . for stage plays or dramatic entertainments, into which admission is obtained by the payment of money . . .

unless licensed as a theatre. Sect. 33 of the 1872 Act (whether read subject to, or free from the *ejusdem generis* rule) extends the subject-matter to which the requirement of a licence applies. The licence is to be one from the corporation of Barrow-in-Furness. The extended subject-matter is theatres and places of public entertainment. So far as theatres are concerned, therefore, two licences are required, one under the Theatres Act, 1843, and a second from the corporation.

So far as the expression "other place of public entertainment" is concerned, this on any construction includes more than the places covered by the 1868 Act, namely, places for the performance of stage plays and dramatic entertainments. If, in respect of this wider subject-matter, the 1872 Act had been intended to limit the requirement of a corporation licence to such of them as charged a fee for admission, nothing would have been easier than to say so explicitly in the first line or two of sect. 33—to speak, there, of "theatres or other place of public entertainment admission to which can only be obtained by a payment of money." The inference from this omission, if the first lines of the section stood by themselves, would be that its framers intended that "other" places "of public entertainment" must obtain corporation licences whether they charged an admission fee or not. It is sought by the respondents to displace this inference by praying in aid the last four lines of sect. 33:

> . . . and the provisions of "The Barrow-in-Furness Corporation Act, 1868," cl. 166, shall apply to every such theatre or other place which shall not for the time being be licensed under this clause.

In our view this sentence merely applies the provisions as to entry by the police and penalties, which sect. 166 of the older Act authorises in regard to certain buildings and places admission to which can only be obtained by a payment of money, to the wider subject-matter, namely, theatres and other places of public entertainment, whether, in respect of the latter, a fee for admission is charged or not.

(ii) Are the words " theatre or other place of public entertainment " in sect. 33 of the 1872 Act to be read subject to the *ejusdem generis* rule or not ? We are
A satisfied on the one hand that, if they have to be read subject to the restriction of this rule, a funfair of the kind involved in this case is not a kind of " public entertainment " of the same *genus* as a theatre. We are not, however, of opinion that the *ejusdem generis* rule applies to the words in question, and this for the following amongst other reasons : (*a*) The words in question are followed by words in brackets :

> . . . (other than such places of entertainment as are now subject to the provisions
> B of " The Barrow-in-Furness Corporation Act, 1868," s. 164, and which last-mentioned places are to continue subject to the provisions of that Act) . . .

Words excepting a species from a *genus* are meaningless unless the species in question *prima facie* falls within the *genus*. " All hats other than top hats " makes sense. " All top hats other than bowler hats " does not. Equally little does " All top hats and other articles except gloves," if " other articles " are to be read as *ejusdem generis* with " top hats." Here the " places "
C covered by sect. 164 of the 1868 Act—the places excepted—do not fall within the assumed *genus* " theatre or other " similar " place of public entertainment," although there may be an overlap between the two. (*b*) No case was cited to us in which a *genus* has been held to be constituted, not by the enumeration of a number of classes followed by the words " or other," but by the mention of a single class (in this case " theatre ") followed by those
D words. (*c*) The tendency of the more modern authorities is to attenuate the application of the *ejusdem generis* rule : see *Anderson* v. *Anderson* (1).

(iii) The third question is whether a funfair of the sort involved here is a " place of public entertainment " within sect. 33 of the 1872 Act, assuming the *ejusdem generis* rule does not apply. The respondents argue that on this point there is authority in their favour ; and that, apart from authority, such funfairs are not places of public entertainment or, perhaps, of entertainment at all.
E The authority relied on is *A.-G.* v. *Southport Corpn.* (2). This case was decided under a revenue statute (dealing with entertainments tax) which contained a special definition of " entertainment " for its own purposes. Such a definition affords little guidance to the meaning of the same term in a different statute passed *alio intuitu*. The facts were that at Southport persons could by payment obtain access to an enclosure by the sea, which along with other amenities such as suntraps, shelters and walks, contained a bathing pool. Those who
F paid to enter this enclosure might do so to bathe, or they might do so to sit in the sun or out of the wind, or to walk, or to watch the bathers in the pool. The performances of the bathers were quite unorganised ; no one arranged their activities for the purpose of diverting spectators or of giving a deliberate " performance " of any kind. In these circumstances it was held that the bathing was not an " entertainment " such as to attract tax. We do not
G think that a case decided on facts so different from those of the present case, and on the basis of a special statutory definition of the word " entertainment," helps us to decide the meaning of the term here.

Apart from authority, the respondents argued that " public entertainment " involves the existence of entertainers and persons entertained, and that, where persons resort to premises where there are no entertainers, and entertain themselves by means of the machines there provided, the place is not one of public
H entertainment. The case under this head was persuasively put by asking whether persons who hire a tennis court in a public park and possibly racquets and balls take part in a public entertainment. The answer to this is, we think, no. But hiring the accommodation and apparatus for engaging in a game or sport is essentially a different activity from that of working the machines provided in this case.

We think a satisfactory working definition of " public entertainment " was one suggested by counsel for the appellant in argument :

> . . . a place open to members of the public without discrimination who desire to

be entertained and where means of entertainment are provided.

Judged by this test, or indeed, by the ordinary use of language, these funfairs were, in our view, places of "public entertainment," and none the less so because no fee was charged for admission to the premises.

We are of opinion that the justices determined the question raised in the case wrongly. The case must be remitted to them with a direction to find the offences proved and to adjudicate thereon.

Appeal allowed with costs. Case remitted to the justices with a direction to find the offences proved and to adjudicate thereon.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *W. Lawrence Allen*, Town Clerk, Barrow-in-Furness (for the appellant); *Kenneth Brown, Baker, Baker*, agents for *W. H. Winder & Clift*, Lancaster (for the first respondents); *Oswald Hanson & Smith* (for the second respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

Re LIABILITIES (WAR-TIME ADJUSTMENT) ACT, 1941. *Re* AFFAIRS OF EVANS AND EVANS.

[Court of Appeal (Lord Greene, M.R., MacKinnon and Luxmoore, L.JJ.), **February 18, 1944.**]

Emergency Legislation—Liabilities adjustment order—Protection order—Practice—Preliminary hearing to be ex parte—Notice given to creditor by registrar of county court—Appearance of creditor's solicitor at hearing—Whether irregularity such as to vitiate proceedings—Liabilities (War-Time Adjustment) Act, 1941 (c. 24)—*Liabilities (War-Time Adjustment) Rules*, 1942 (*S.R. & O.*, 1942, *No.* 1302), *rr.* 12 (1), 14, 16, 20-22—*Liabilities (War-Time Adjustment) Rules*, 1943 (*S.R. & O.*, 1943, *No.* 1336).

The respondent was the landlord of the appellants and had issued a writ against them for arrears of rent and possession, but on the application of the appellants to the High Court an order had been made staying the proceedings. In the meanwhile the appellants applied to the county court for a liabilities adjustment order and a protection order. After the first session of the preliminary hearing of the application, the registrar of the county court sent a notice of the proceedings together with the date of the next hearing to the respondent, who thereupon appeared, by his solicitor, at this adjourned hearing of the preliminary hearing, and produced certain evidence and was heard by the judge. It was contended by the appellants that by the Liabilities (War-Time Adjustment) Rules, 1942, 1943, an application for an adjustment order is to be made *ex parte* and the whole proceedings at that stage should, therefore, be *ex parte*:—

Held: (i) upon the true construction of the Liabilities (War-Time Adjustment) Rules, 1942, as amended in 1943, the "preliminary hearing" and the adjourned hearings of a "preliminary hearing" of an application for a liabilities adjustment order are to be *ex parte*. Not until the "adjourned hearing," which takes place after the "preliminary hearing" has been completed, are creditors entitled to be present and to address the court.

(ii) the irregularity of the procedure was sufficient to vitiate the proceedings and the case must be remitted to the county court for the hearing to be completed.

[**EDITORIAL NOTE.** Under the rules provision is made for two hearings of the application. The first or preliminary hearing is an *ex parte* hearing, at which only the debtor is allowed to be present. The second or adjourned hearing is *inter partes* and the creditors will not normally attend until the preliminary hearing is concluded and the adjourned hearing comes on.

For the Liabilities (War-Time Adjustment) Act, 1941, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 34, p. 23.]

Appeal by the applicants from an order of His Honour Judge Hunter, K.C., given at Southend County Court, dated Dec. 9, 1943. The facts are fully set out in the judgment of Lord Greene, M.R.

Archibald Safford for the appellants.

Percy C. Lamb for the respondent.

LORD GREENE, M.R.: This appeal raises a point of general importance which transcends the actual importance of the case itself. The debtors were the tenants of a garage in which they carried on their business and on Aug. 9, 1943, a writ was issued against them for arrears of rent and for possession. This moved the debtors to approach the liabilities adjustment officer for advice. They also applied to the High Court on Aug. 25, 1943, for a stay of the landlord's proceedings. This was followed by a formal application by the debtors on A Oct. 23, 1943, for a liabilities adjustment order and a protection order. That application was properly made in the Southend County Court. The application, it will be observed, was a combined application for both the orders, and not merely an application, such as is sometimes found, for a protection order in the first instance. On Nov. 11, that application came before the county court judge, and he adjourned it until the High Court had heard the pending application for a stay of the landlord's proceedings in the High Court. The application B in the High Court was granted by the master on Nov. 16, and on Dec. 9, 1943, the adjourned hearing of the application came before the county court judge, and the application was dismissed.

The procedure which was followed is attacked by the appellants on the ground of irregularity, and, if the attack is justified—as I think it is—the irregularity was one which, in my opinion, made the proceedings at which the appellants' application was dismissed abortive. The question arises in this way: Under the C Liabilities (War-Time Adjustment) Rules, 1942, it is contemplated that there may be, in the course of proceedings under the Liabilities (War-Time Adjustment) Act, 1941, two hearings, each having its own distinct character. One is called "preliminary hearing," and the other—rather inconveniently—is called "adjourned hearing." The rules contain provisions as to what should be done at each of those two stages of the hearing of the application. It is said D on behalf of the appellants that the "preliminary hearing" must be a hearing *ex parte*, and that it is only at the stage of the "adjourned hearing" that other parties—creditors being, presumably, the principal ones—are entitled to come on the scene at all. That, putting it shortly, is the point.

In this case, when the county court judge had adjourned the application in order that the result of the High Court application might be ascertained, the registrar of the county court sent to the present respondent, who is the landlord E of the premises and the plaintiff in the King's Bench action, a notice which stated that, on Oct. 27, 1943, the debtors applied to the court for a liabilities adjustment order, and that on the hearing of that application the court adjourned the hearing of the application, and the notice proceeded to give notice that the adjourned hearing of the application would take place at the court on a stated day. Encouraged by the receipt of that document, the landlord by his solicitor appeared at the hearing, and the solicitor brought with him certain evidence F which he desired to put before the court. The judge's note says, on the face of it, that he heard the landlord's solicitor. If the contention of the appellants is right, it was not open to the registrar to send that notice at all, and it was not open to the judge to allow the creditor to appear, much less to tender evidence or be heard. The whole of those proceedings at that stage, on the appellants' argument, are necessarily *ex parte*, and counsel for the appellants says that, G where an applicant to the court is entitled to behave as on an *ex parte* application and to come unprepared with material and professional assistance to deal with other persons, it would be a serious irregularity to allow other persons to appear unexpectedly like that and take part in the proceedings.

The argument for the appellants requires an examination, as short as possible, of the relevant provisions of the rules. Rule 12 deals with the debtor's application. Para. 1 provides as follows:

> H An application by a debtor for an adjustment order shall be in form 5 and no person shall be named as respondent thereto.

The debtor, therefore, is told: "When you first come to the court, you need not bring anybody in the shape of a creditor or anybody else." The adjustment officer is to make a report; the application is to be filed in the court office, and supported by an affidavit and the report of the adjustment officer; the application is to be entered in the books of the court, and a plaint note is to be given to the applicant.

Then comes rule 14 (1):

> The first hearing of an application for an adjustment order (hereinafter called the preliminary hearing) [" preliminary hearing " is being used in a technical, special meaning in these rules] shall be in private.

The words " shall be in private " cannot, in my opinion, be interpreted as meaning by themselves that the hearing is to be *ex parte*. The fact that the hearing is to be *ex parte* appears from other provisions. I think all that it means is that it is to be a hearing at which nobody but a person interested is entitled to be present ; nobody but proper parties. In other words, it is the same as a hearing *in camera*.

Rule 14 continues, and I call attention to the opening words because there is an important distinction between the adjourned hearing of a " preliminary hearing " and the " adjourned hearing " itself which comes about only after the " preliminary hearing " has been disposed of, whether it takes one, two or three appointments to get rid of it :

> (2) At the preliminary hearing (which may be adjourned from time to time) the judge may make an order dismissing the application, or where the application is not dismissed (*a*) may, if satisfied that a *prima facie* case has been made out as to the matters specified in para. (*a*) or para. (*b*) of sect. 3 (1) of the Act, make a protection order, and (*b*) whether a protection order has been made or not, may refer the debtor's affairs to the registrar for investigation and report, or give such other directions as the judge may think fit as to the conduct of the proceedings. (3) The affidavit filed with the application shall be admissible in evidence, but the judge may require further evidence to be given orally or otherwise, as he thinks fit. (4) When the preliminary hearing has been completed, the application for an adjustment order, if not dismissed, shall stand adjourned.

There again is brought out the distinction between the " preliminary hearing," which is completed either at one, two or three sessions, and the " adjourned hearing " which takes place after the " preliminary hearing " has been completed.

> (5) Any order made at the preliminary hearing shall be drawn up by the registrar and shall be served on the debtor and, where a creditor is the applicant, on the applicant, and, if the affairs of the debtor are referred to the adjustment officer, on the adjustment officer, and on such other person as the court may direct . . .

It is only at that stage, when the order made at the preliminary hearing has been drawn up, that anybody other than the debtor and the adjustment officer comes on the scene. Para. (6) provides :

> Proceedings subsequent to the preliminary hearing shall, unless the court otherwise orders, be heard in private.

Rule 16 deals with interlocutory applications for a protection order, and it says :

> (1) An application for a protection order, if not included in an originating application for an adjustment order, may be made at any time in the course of the proceedings . . . (2) Where the applicant for the protection order is the debtor, the application shall be made *ex parte* unless the court otherwise orders.

There, on applications of that kind—but this was not such a case—the application is *ex parte*, but the judge can order that other persons should be served.

The next one which I need read is r. 20, which deals with the adjourned hearing :

> (1) When the adjustment officer or registrar has reported to the court, or, if there has been no reference for a report, when the registrar thinks fit, the registrar shall fix a day for the adjourned hearing of the application and shall give not less than 7 clear days' notice thereof to the adjustment officer . . . to the debtor and to every creditor in the list of creditors in the report and to any other person whose attendance at the hearing appears to the court to be desirable . . . [Then there is a power to dispense with the giving of notice to creditors]. (2) The procedure at the adjourned hearing (which may be adjourned from time to time) shall be such as the court may determine, but the adjustment officer and the debtor and every such creditor and other person shall be given an opportunity of addressing the court in person or by solicitor or counsel or by any other person allowed by the court to do so.

At this stage, therefore, the creditors, having been given notice of the " adjourned hearing," are expressly entitled to appear, and at that stage the proceedings are no longer *ex parte*. I do not think that I need read r. 20 (3), but it is in accordance with that view. Rule 21 (2) provides that a copy of the adjustment order, if made, is to be served on the debtor and the adjustment officer, and every person to whom notice of the adjourned hearing was given, and so on.

Rule 22 deals with intervention by a person not a party, and it says:

> (1) Where an application has been made for an adjustment order, any person who claims (*a*) that he is the owner of property claimed by or in the possession of the debtor, or (*b*) that he is a creditor who has not been required to submit a proof of debt . . . or (*c*) that for any other reason he is or may be prejudicially affected by the making of the adjustment order, may, in the course of the proceedings . . . make an application to the court . . . (5) Nothing in this rule shall authorise an application for revocation of a protection order between the preliminary hearing and the adjourned hearing of an application for an adjustment order.

That contemplates, as I understand it, that an application under that rule cannot be made, if the object of it is to revoke the protection order, until the "adjourned hearing," in the special sense in which it is used in these rules, has come on.

Looking at those rules, and bearing in mind the crucial distinction between the "preliminary hearing" and adjournments of the "preliminary hearing" on the one hand and the "adjourned hearing" and adjourned hearings of the "adjourned hearing" on the other hand, it seems to me quite clear that, just as the original application which the debtor makes in the first instance is an *ex parte* application, so it remains an *ex parte* matter until the "preliminary hearing" has been completed, and, if an order is made, that order then will be served on the creditors, and the creditors are then entitled to appear at the "adjourned hearing." There is no provision anywhere in the rules relating to the "preliminary hearing" which gives the court any power to summon creditors or anybody else to the "preliminary hearing." When the rules bring the creditors on the scene, it is to be observed that it is all the creditors who are brought on the scene, and that must be right, because it would be quite intolerable that the court should be able to summon one creditor out of many and deal with the matter on the argument and the evidence adduced by that one creditor without the attendance of the others. When one creditor is entitled to be there all creditors are entitled to be there, and that is in accordance with elementary and obvious justice in cases where orders which the court is going to make will affect the creditors as a whole. I must not, of course, be taken as saying that, on some particular hearing by the court of a matter in which only one creditor is interested (for instance, it may be a mortgagee) necessarily everybody must be summoned to that particular meeting, but at the proceedings in general every creditor has got a right to attend.

In the present case an error was made by the county court registrar in sending out that notice. He must have been under a misapprehension and must have thought that the adjourned hearing which is referred to in the notice was going to be the "adjourned hearing" which is dealt with by r. 20, but, even if he thought that, I do not understand why he did not summon the other creditors, and it does not appear that he did so. On the footing that the adjourned hearing to which he was referring was that referred to in r. 20, he was quite wrong because the adjourned hearing that was going to take place on the date mentioned in the notice was not the "adjourned hearing" under r. 20 at all, but an adjournment of the "preliminary hearing" within the meaning of r. 14 (2), and the notice was wrongly sent out and there was no right in the respondent to be present at that hearing at all. It was suggested that, under the power given in r. 14 (2) (*b*), by which the court is entitled to "give such other directions as the judge may think fit as to the conduct of the proceedings," it would be competent to the judge to summon a creditor. In my opinion, that is not the right view of the language because the proceedings at this stage are *ex parte* proceedings, and by summoning a creditor and picking out one creditor—perhaps among many—the judge would be altering the whole nature of the proceedings. It was tentatively suggested that under that rule the judge could have summoned a creditor, and that he in fact did so, and this notice sent out by the registrar is pointed to as showing that he made such an order. That argument could not stand for a moment. Even if the judge had jurisdiction to summon a creditor he would have had to make an order for that purpose, and the order must be made in the presence of, or, at any rate, communicated to the debtor. It would be intolerable that a judge exercising discretion to make an order should be in a position to do it behind the back of the party most vitally concerned. Therefore, in my opinion, there is nothing in that point.

If the view that I take as to the meaning of these rules is correct—and I take it without any hesitation—the irregularity, in my opinion, is one which vitiates the proceedings. It would obviously be impossible, where a person who is not entitled to be present has been allowed to address the court and to lead evidence, to enquire into the state of the judge's mind with a view to ascertaining whether, and to what extent, the presence of that party, what he said and the evidence that he led, affected the judge's mind in coming to his decision. In the present case the irregularity—what the solicitor said and the evidence that was led—might, for all I know, not have had the slightest influence on the mind of the judge, but it would be highly undesirable if the law were that an irregularity of this kind could be condoned if it could be shown that it had not affected the judge's mind. The fact that he does not mention it does not mean that he was not affected by it. It is not for us to enquire whether he was in fact affected, or whether he was affected to a small degree or to a large degree. A matter was placed before him which ought not to have been placed before him, and that is quite sufficient to vitiate his decision. Therefore, the only thing that can be done is to send the matter back. It was suggested that this court ought to consider the merits and dismiss the application on its merits. That would be a course which, in my opinion, this court ought not to take in these circumstances. The result of this appeal may or may not be of benefit to the appellants. I propose to say no word to express any view on my part of the merits of this case into which we have not sufficiently gone. All that we can do is to vindicate the strict observance of the rules and say that what has taken place is not in accordance with the rules and, accordingly, cannot stand.

This is not a mere technicality as I see it. It raises a question of important principle, because this Act is dealing primarily with people of small means and people who, in view of the very object of the Act, have not got money to spare in engaging the services of professional advisers sooner than they need, and it must happen over and over again that at preliminary hearings under this Act debtors turn up in person without any professional assistance. It would be wrong, if at that stage in the proceedings they suddenly found themselves confronted by somebody such as a creditor, who has got no right to be there—but the debtor would not know that—assisted, it may be, by counsel who is allowed to be heard and to submit arguments to the court. The result might very well be, in many cases, that the debtor's case would, to the satisfaction of the judge, be demolished at that stage, and the debtor would not have the advantage of having his case considered as it ought to be considered at that stage, merely as a preliminary hearing—the order being, of course, without prejudice to any change of view of the judge when the creditors ultimately come on the scene. The debtor is entitled to have his application at that stage dealt with in that spirit and in that way. If the creditors were allowed to come in without his knowing that they were going to be there the result might lead to injustice, more especially if not all the creditors came, but one or two creditors who happened to have heard of it. If the creditors are to be there they all ought to be there as they are entitled to be under r. 20.

The result, therefore, is that the appeal must be allowed and the matter must go back to the county court judge.

MacKinnon, L.J.: I agree. I do so with some regret and with a great deal of sympathy with the respondent. He having received the notice from the registrar which he did receive, it was certainly not his fault that his attendance and intervention at the hearing on Dec. 9 was in breach of the rules, as in fact it was. I agree that this appeal must be allowed.

Luxmoore, L.J.: I agree.

Appeal allowed. Application remitted to the county court for the preliminary hearing to be completed.

Solicitors: *Herbert Smith & Co.* (for the appellants); *W. R. Perkins*, agent for *Nelson Mitchell*, Southend (for the respondent.)

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

MARINE INSURANCE CO., LTD. *v.* GRIMMER

[KING'S BENCH DIVISION (Atkinson, J.), **February 8, 1944.**]

Insurance—Marine insurance—Re-insurance—Designation of ship—Named ship "and/or steamers held covered at premiums to be arranged"—Ship expected by insurers to carry cargo—Premium—Ship lost at date of re-insurance.

The plaintiffs were the insurers of a cargo of sugar sent from Jamaica to Canada. It was regarded as certain that the sugar would be loaded on a certain ship and the plaintiffs at first re-insured part of the risk with the defendant as shipped on that ship. Thinking this rather a rash presumption the slip was almost immediately amended by the addition of the words "and/or steamers held covered at premiums to be arranged." It was contended by the plaintiffs (i) that the cargo insured was that expected by the assured to be loaded in the named ship and not "that intended by the shippers" to be loaded, and (ii) that the premium is deemed to have been fixed at the date of sailing and not at the date the ship was underwritten. This contention was of importance because the cargo was not in fact loaded on the named ship but on another which at the date of the re-insurance was known to have been torpedoed and lost :—

HELD : (i) the cargo insured was that expected by the assured to be loaded in the named ship.

(ii) the premium was deemed to have been fixed at the date of sailing.

[**EDITORIAL NOTE.** This case concerns matters which it would have been thought would have been authoritatively decided long ago. The importance of the decision lies in the fact that it is practically impossible during war time to say that a cargo will be loaded on any particular ship and information as to the sailing of ships is often imperfect owing to the restrictions imposed for purposes of security.

AS TO DESIGNATION OF SHIP, see HALSBURY, Hailsham Edn., Vol. 18, pp. 211, 212, para. 280 ; and FOR CASES, see DIGEST, Vol. 29, pp. 94, 95, Nos. 520-523.]

Cases referred to :

*(1) *Allison* v. *Bristol Marine Insurance Co.* (1876), 1 App. Cas. 209 ; 29 Digest 96, *546* ; 34 L.T. 809.

(2) *Kynance Sailing Ship Co.* v. *Young* (1911), 104 L.T. 397 ; 29 Digest 139, *912* ; 16 Com. Cas. 123.

*(3) *Reliance Marine Insurance Co.* v. *Duder*, [1913] 1 K.B. 265 ; 29 Digest 119, *725* ; 81 L.J.K.B. 870 ; 106 L.T. 936 ; 17 Com. Cas. 227.

(4) *Sanday & Co.* v. *Keighley, Maxted & Co.* (1922), 91 L.J.K.B. 624 ; 41 Digest 328, *1845* ; 127 L.T. 327 ; 27 Com. Cas. 296.

*(5) *Greenock S.S. Co.* v. *Maritime Insurance Co.*, [1903] 1 K.B. 367 ; *affd.* [1903] 2 K.B. 65; 29 Digest 192, *1518* ; 72 L.J.K.B. 868 ; 89 L.T. 200.

ACTION by the Marine Insurance Co., Ltd., on a marine policy of re-insurance dated July 13, 1942, subscribed by the defendant and a number of other underwriters at Lloyds, whereby the plaintiffs claimed that they were re-insured in respect of a risk that they had underwritten on a shipment of sugar from Jamaica to Canada. All the underwriters of the policy agreed to be bound by the result.

The plaintiffs had an agency at Kingstown in Jamaica for the purpose of obtaining business on shipments from there. They also, but not through the agency, had an arrangement with a large firm in Jamaica known as Gray's Inn Jamaica Central Factory, Ltd., whereby they cover all their shipments of sugar at certain agreed rates. The London agents for this company are a firm called Henckell du Buisson. By the terms of their open policy, Gray's Inn Factory were requested to give the earliest notice of intended shipments, advising in each case the name of the vessel and the approximate value of the shipment. The plaintiffs had a number of protective covers with their marine underwriters. Some of them, called participating covers, operate automatically, re-insuring the plaintiffs for a certain proportion of any risk they underwrite. Some of the protective covers did not operate automatically, but the plaintiffs were free, if they so desired, to give notice to the covering underwriters that some fixed proportion was allocated to their cover.

In the spring of 1942, the plaintiffs received by cables intimations from their Jamaica agency of certain intended sailings in which they would be interested. On May 24, they received from their agency a cable to the effect that they would be interested to the extent of £11,500, sailing May 26; and later that day they received a cable saying that the name of the steamer was "Western Head." At that time the regulations did not permit all the information to be put in one cable; it had to be spread over several cables for reasons of security. On May 28 they received a cable to the effect that they would be interested to the extent of £26,000, sailing about May 29. By cables received on May 29 and 31, they received notice that they would be interested to the extent of £21,500 in the Cavelier, sailing about Aug. 30; and either on May 31 or the day following they were told that the amount was increased to £23,000. On June 2 they received a letter from Henckell du Buisson dated June 1, informing them that their principals, Gray's Inn, Ltd., had 30,000 bags of sugar sailing from Jamaica to Montreal, and they were advised that the value of the shipment would be about £50,000, but that the steamer was not named.

The plaintiff's general manager is Darby and the assistant manager McCay. When this letter was received they had a discussion about this parcel. £20,000 of the £50,000 was automatically appropriated to three of their participating re-insurers. They decided to allocate £10,000 to the optional re-insurance and to obtain a special re-insurance for £20,000.

McCay, as the result of inquiry of Henckell du Buisson, had very little doubt at that time that it was safe to mention the Cavelier without qualification as the ship upon which this cargo would be sent and he so instructed the company's brokers. The slip was, therefore, headed with the words "Cavelier and conveyances as original," followed by "Jamaica and/or as original," "Canada, Atlantic and/or as original"; then the next line "sugar and/or interest as original." Then "Value original policy and/or interest as original. V.O.P.", which means "Value original policy." Then the next line "Against War Risks only"; and then "original net rate and deductions as per Marine Insurance Co's cover."

Some two or three groups at Lloyds underwrote this slip for various sums. McCay began to worry about the fact that the instructions had been to cover this parcel by S.S. Cavelier alone, without the very usual addition "and/or steamers held covered." He said that he realised that there had been no cable communication naming the ship and that it was merely an opinion, albeit a strong one. In consequence of this, on June 6 he instructed the brokers to re-insure the £20,000 as coming on the Cavelier and/or steamers. The words "and/or steamers H.C.", were added to the slip, and the underwriters who had already initialled the slip were asked to add their initials to the alteration. The evidence was that no explanation was given to the underwriters when they were asked to initial this alteration. The re-insurance was completed under this second slip, except that a rather higher premium had to be provided for in respect of some part of the sum.

The named defendant was one of the underwriters of the second slip. In fact, the 3,000 tons of sugar had been shipped on the Western Head and that ship had already been torpedoed and sunk, and the fact that it was lost was known at Lloyds on June 1. The policy contemplated was "on steamers lost or not lost." The policy was issued on the 17th day of July. There was a slip attached to the policy, containing these words: "being a re-insurance attaching to policy or policies of the [plaintiffs], subject to the same terms, clauses and conditions as the original policy or policies and to pay as may be paid thereon. Held covered in case of deviation or change of voyage at a premium to be arranged."

A. J. Hodgson and *H. M. Pratt* for the plaintiffs.

P. Devlin and *V. Wolff* for the defendant.

Atkinson, J.: The defence is that the 30,000 bags of sugar were not covered by the policy. The parcel is not specifically mentioned. It can, therefore, only come within the policy if it is linked up with the steamship Cavelier. The nature of the link required depends on the true meaning of the words "Cavelier and/or steamers held covered." The defendants plead and say that the words have a customary meaning among persons dealing in marine insurance, namely, "intended to be shipped on the Cavelier." That is, intended by the exporting shipper in this case Gray's Inn, Ltd., at Jamaica. They agree that once that intention is established, the goods are covered whatever steamer they may come by; and they say and say truly that it is plain on the evidence in this case that the shippers never intended this sugar to come on the Cavelier and, therefore, that the sugar was not within the terms of the policy.

The view of the plaintiffs is that re-insurance in practice is effected somewhat loosely and that the re-insurer relies very much on the honour of the underwriter desiring to spread his risk. It is said that well-known underwriters are constantly re-insuring one another and that it is in the interests of all of them to be able easily and quickly to spread their risks, and normally all that the re-insured underwriter requires to know is that the other man has some risk as, for example, on sugar from Jamaica to Canada which he wishes to spread, and, if he agrees to come in, he knows that he is sharing that risk whatever it may be.

Doubtless the intention of the assured is of importance. In *Allison* v. *Bristol Marine Insurance Co.* (1), LORD HATHERLEY said this at p. 235:

> My Lords, I concur entirely in the view which has been taken of the case before us by my noble and learned friend who has preceded me in expressing his opinion upon it. The two points to be considered are, first, what is the insurance that has been effected by the policy and the subject-matter thereby insured; and we are led, in the consideration of that point, to the farther question as to what was the contract between the insurer and the person with whom he bargained, as the charterer of the ship, in order to ascertain what were the perils of the sea against which the assured desired so to protect himself.
>
> Now, my Lords, we must bear in mind in this inquiry, in the first instance, that if there be any question or doubt (I think in truth we shall find there is none) as to what the subject-matter of insurance is, then on principle it is to be held in all cases that that in respect of which the insurance is made is that which is capable of being a subject-matter of insurance, namely, that which is at risk; and that in regarding the contract of insurance, we must not assume, and we cannot in any way consistently with law assume, that the assured is endeavouring to effect a policy upon that which is at no risk whatever.

In *Kynance Sailing Ship Co.* v. *Young* (2), SCRUTTON, L.J., said:

> It is undoubtedly the law that general words in certain parts of a policy must be limited by the intention of the parties.

The Marine Insurance Act, 1906, s. 26 (3), provides that:

> Where the policy designates the subject-matter insured in general terms, it shall be construed to apply to the interest intended by the assured to be covered.

It has not yet been decided what the word "interest" in that subsection means. Strictly, the word refers not to subject-matter, but to the assured's interest in the subject-matter; but the word is often used as equivalent to "subject-matter," as, for example, in the slip in this case, where everyone agrees that: "sugar and/or interest" means "sugar and/or any other goods"; and it may be that the word is used in that sense in this section, bearing in mind the context.

Be that as it may, it is well settled that it is not open to prove an intention which is contrary to the meaning of the words used. For example, it is not open to the plaintiffs to prove that they did not intend to re-insure the agency parcel of sugar on the Cavelier, because that is covered by the plain words of the slip and of the policy. Nor would it be open to them to prove that they intended to cover the sugar of Gray's Inn, Ltd., if, in fact, it does not come within the wording of the policy truly construed.

I think that has been settled in *Reliance Marine Insurance Co.* v. *Duder* (3), in the judgment of KENNEDY, L.J., at p. 334. He was dealing with the question of whether words in a policy could be limited by proving the intention of one of the parties, and he said:

> It is, I conceive, a fundamental principle of our law, that, where you have a contract which has a plain natural meaning, and which is not impeached upon the ground of common mistake or upon the ground of fraud or of misrepresentation, it is not permissible to alter its effect according to the intention of one of the two contracting parties, or to adduce evidence in order to show such an intention. If A and B enter into a written contract, it is immaterial to consider what either of them intended to effect. The only question is, what have they said by their contract?

There is, in fact, no doubt whatever as to the plaintiffs' intention. They gave perfectly clear instructions to their brokers to insure this particular lot of sugar and only this particular lot of sugar. For some reason the brokers failed to carry out those instructions. It may be that they will have to answer for any loss suffered through their failure to carry out the instructions they received. They had already covered the agency parcel of £23,000 worth on the Cavelier, and, if they had done what they had been told to do there would have been no trouble in this case.

The first contest is whether the words to be written into the contract are: " intended by the shippers " as contended by the defendants, or " expected by the assured," as contended by the plaintiffs. For purposes of identification expectation of the assured is, of course, just as effective and as capable of proof as intention of the shippers.

The defendants called three witnesses only to establish the customary meaning pleaded. All of them were signatories to this insurance. They attributed different meanings to the words to be construed. One of them accepted the interpretation for which the plaintiffs contended. The only independent witness said:

> It can hardly ever be guaranteed that goods will go by a certain ship, even in peacetime. Much more is this the case in war time; indeed quite frequently, merchants do not know the name of the vessel shipowners may use for the cargo. Sometimes they are not allowed to know, and frequently circumstances make it impossible for them to know. In cases where shipowners name a steamer, the best the cargo owner can do is to hope or expect that they may go by that steamer. When a cover is effected by, say, " Cavelier and/or steamers held covered," as a matter of underwriting practice, this means (*a*) there is some expectation that they may go by Cavelier; it cannot possibly be stated higher than this in war time; (*b*) if they do not go on Cavelier, they are held covered by whatever steamer they are loaded into, at an additional premium if circumstances justify one.

It is, therefore, quite plain that the customary meaning pleaded by the defendants is not established, and I find on the evidence that the words mean " expected by the assured." Everybody agrees that the expectation must be a *bona fide* expectation and based on grounds which are reasonable, bearing in mind the conditions prevailing. I also find that the plaintiffs did honestly expect that the sugar in question would go in the Cavelier. Indeed, their *bona fides* is not challenged.

Counsel for the defendant contends that, if the expectation of the assured is the test and not the intention of the shipowners, at least the expectation must be based on reasonable grounds, and the expectation in this case was not based on reasonable grounds. On the pleadings I doubt whether he is entitled to rely on this contention. I was ready to admit certain amendments, but counsel did not elect to avail himself of that permission, and I must reserve to the plaintiffs their right to object if the case goes further. But, as it has been pressed, I will express my view about it.

The contention is directed not only to identification of subject-matter, but also to the risk which the underwriter is asked to re-insure. The evidence establishes that it would be more difficult to obtain cover re-insurance for goods to come on " steamer or steamers " than if there were a named steamer in front of those two words. When a ship is named an underwriter assumes that, at any rate, that ship is the most likely one to carry the goods. He looks it up to get the latest information about her and makes sure that there is no reason for supposing she is already lost. Clearly an assured must not put in the name of a ship dishonestly to secure a lower rate of premium, and, if there were no grounds for an alleged expectation, it probably could not be established. I was referred to *Sanday & Co.* v. *Keighley, Maxted & Co.* (4), where it was held that the words in a charterparty " ready to load September " meant (1) that, in view of the facts known to the sellers at the time of making the contract, they honestly expected that the steamer would be ready to load as stated and that their expectation was based on reasonable grounds; and (2) that whether such expectation was or was not based on reasonable grounds was a question of degree.

It has not been suggested that the implied words here must be treated as a warranty but I gather that it is put in this way, that the only sugar covered was sugar that the plaintiffs reasonably expected to be on the steamship Cavelier. There must be borne in mind that the very words " Cavelier and/or steamers " implied doubt, and the inevitable uncertainties of everything affecting shipping during the war.

Bearing all that in mind, I have come to the conclusion that under all the circumstances of this case the plaintiffs had reasonable grounds for their expectation. The agent for the shippers as soon as he knew that the Cavelier was due to sail about May 30 told the plaintiffs that it was nearly certain that the sugar would be on the Cavelier ; and he had his reasons : that the ship was a well-known steamer on the run from Jamaica to Canada ; that it was usual for the Cavelier to take sugar from their port and that she was in the habit of trading between the two countries and picking up their sugar, whereas the Western Head had never carried their cargoes before. Certainly, if the evidence of the independent witness is right, there was undoubtedly sufficient expectation to justify the naming of the ship, and, as the one independent witness, a witness in a position of great importance, I think I ought to accept his evidence and I do.

The only other point for decision is the date on which the premium for the Western Head is to be deemed to have been fixed. The words are " steamer and/or steamers held covered at premiums to be arranged." The plaintiffs say that the date of sailing is the true date. The defendants say it is the date on which the slip was underwritten ; and, as it was then known that the Western Head had sunk, the premium would have been 100 per cent. of the cover ; in other words, the insurance would be worth nothing. I am satisfied that the date must be the date of the commencement of the risk—certainly not later than the date of the sailing of the Western Head. If that view is right, no extra premium is payable, as it is common ground that the two ships were of the same class. If the defendants were right, the effect would be that, even if it had been beyond question that the Western Head was covered by the words " and/or steamer," yet the plaintiffs could recover nothing, because the ship had gone down at the date of the underwriting. This would be inconsistent with the words " lost or not lost " and, indeed, would give them no effect whatever as applied to the words " steamer and/or steamers." I think that point is covered by *Greenock S.S. Co.* v. *Maritime Insurance Co.* (5). The clause under consideration there was this : " Held covered in case of any breach of warranty, deviation and/or any unprovided incidental risk or change of voyage, at a premium to be hereafter arranged." There had been a breach of the warranty of seaworthiness and consequent loss. BIGHAM, J., said, at p. 374 :

> Now, undoubtedly the warranty of seaworthiness is far and away the most important of the few implied warranties which a shipowner enters into when he insures his ship, and I am satisfied that if proper effect is to be given to this clause it must be held to apply to that particular warranty. What, then, is the operation of the clause ? In my opinion, it entitles the shipowner, as soon as he discovers that the warranty has been broken, to require the underwriter to hold him covered. It also entitles the underwriter to exact a new premium commensurate with the added risk. But what is to happen if the breach is not discovered until a loss has occurred ? I think even in that case the clause still holds good, and the only open question would be, what is a reasonable premium for the added risk ? To answer this the parties must assume that the breach was known to them at the time it happened, and must ascertain what premium it would then have been reasonable to charge.

Applying that principle to this case, it means that they must be deemed to have been considering the matter as at the time the goods were shipped on the Western Head—on the named ship ; and that the premium must be arranged as at that time. I think it means that the last date would be the date of sailing—possibly the date on which the loading commenced ; but there is no difference between the two ; and, therefore, I think no extra premium can be demanded in this case.

Judgment for the plaintiffs with costs.

Solicitors : *Ince, Roscoe, Wilson & Glover* (for the plaintiffs) ; *William A. Crump & Son* (for the defendant).

[*Reported by* R. BOSWELL, ESQ., *Barrister-at-Law.*]

GIBBY *v.* EAST GRINSTEAD GAS AND WATER CO.

[Court of Appeal (Scott, Goddard and du Parcq, L.JJ.), **February 16, 1944.**]

Factories—Dangerous machinery—Absolute duty to fence—Contributory negligence—Evidence not showing precise cause of death—Inference of negligence of workman.

The deceased workman was a stoker in a gas works. Part of his duty was to quench the coke after it had left the retort and as part of this operation he had to ride out on to a gantry on an engine and return along the gantry on foot. The gantry was unfenced and unlighted during the hours of darkness. The deceased met his death in the course of this part of the operation, but the evidence did not prove how he met his death. The company had provided a hurricane lamp but did not require the men to use it and some men used their own torches and the deceased had brought with him on the night of the accident his own bicycle lamp. In fact the deceased took neither the hurricane lamp nor his own bicycle lamp out with him on the gantry. It was contended that the facts disclosed such contributory negligence as was an answer to a claim under the Factories Act, 1937, for breach of statutory duty:—

Held: the facts disclosed negligence on the part of the deceased contributing to the accident and was a sufficient answer to a claim under the Factories Act, 1937, or at common law.

[**EDITORIAL NOTE.** In this case the precise manner in which the deceased met his death cannot be ascertained and the court is left to inference or circumstantial evidence. This is a case where, in the words of Lord Wright in *Caswell* v. *Powell Duffryn Associated Collieries, Ltd.* (2), at p. 733, " the inference does not go beyond reasonable probability." The cause of accident, however, if effect is given to the reasonable probabilities of the case, is not left as a mere speculation or conjecture. The reasonable probability is that the man fell because, having failed to carry a light, he could not see where he was going. The necessary facts to establish contributory negligence are, therefore, in this case proved by inference from the probabilities of the case and the court is entitled to reject what are mere possibilities.

As to Contributory Negligence as a Defence to Breach of Statutory Duty, see HALSBURY, Hailsham Edn., Vol. 23, p. 686, para. 969; and for Cases, see DIGEST, Vol. 24, pp. 908-911, Nos. 62-81.]

Cases referred to:

*(1) *Flower* v. *Ebbw Vale Steel, Iron & Coal Co., Ltd.*, [1934] 2 K.B. 132; Digest Supp.; 103 L.J.K.B. 465; 151 L.T. 87.

*(2) *Caswell* v. *Powell Duffryn Associated Collieries, Ltd.*, [1940] A.C. 152; [1939] 3 All E.R. 722; Digest Supp.; 108 L.J.K.B. 779; 161 L.T. 374.

Appeal by the widow of the workman from a order of Lewis, J., dated Oct. 8 1943. The widow made her claim under the Fatal Accidents Acts for damages for breach of statutory duty imposed by the Factories Act, 1937. The breach of statutory duty, she alleged, was the cause of the death of her husband who was employed at the defendant company's works as a stoker. The facts are fully stated in the judgment of Scott, L.J.

A. S. Comyns Carr, K.C., and *N. R. Fox-Andrews* for the appellant.

F. A. Sellers, K.C., and *Douglas Bartley* for the respondents.

Scott, L.J.: For the purpose of preparing hot coke coming from the defendant company's retorts for storage in their paved yard it is necessary to perform the operation of " quenching " the coke, which leaves the retort in a white-hot condition. This operation is carried out by spraying water upon it from a mechanical sprinkler.

The accident which caused the death of the deceased occurred at some time not very long before 11 p.m. on Oct. 8, 1942. The operation of " quenching " was, at that period of the war, being carried out in two stages—the first part in the retort house and the second at a sprinkler erected on a platform between 10 and 11 ft. above the yard level and situate about 10 yds. away from the door of the retort house, which was on the same level. The access to it was by a semi-circular gantry, also on the same level, supported on pillars, on which a narrow railway, about 2 ft. wide altogether, was laid, with 3 in. boards between the rails on which a man could walk. This semi-circular railway extended beyond the platform for another 7 yds. or so. The hot coke was carried out from the retort house by a small steel wagon or "bus," drawn by an electric engine. It was the duty of the deceased to take the coke out, "quench" it, and then deposit it in the yard by opening the side doors of the bus, which were hinged along the top and opened outwards, allowing the quenched coke to fall at any point along the length of the railway where there was room in the yard below for it to lie.

The work of gas and coke manufacture was continuous through the 24 hours, A the men working in three eight-hour shifts. During each shift the bus was taken out to have the second stage of quenching performed, some twelve to fifteen times. On each occasion it was usual for the stoker, having turned on the quencher tap, to leave it to run and then to walk back to the retort house, because, having come out into the cold air from the retort house, where it was very hot, he wished to avoid the risk of catching cold by staying outside, and partly also in order to prepare for the next operation in the retort house. Then, B in a few minutes, he would go back again, turn off the sprinkler and drop the coke out of the bus at a convenient place along the railway. There were only two stokers on duty on each shift, and the stoker working on the gantry side of the retort house was not visible to the man on the other side. The result is that there is no direct evidence as to the movements of the deceased.

The breaches of statutory duty alleged were chiefly that the gantry was C (*a*) not fenced by any railing, and (*b*) not lighted, the plaintiff relying for (*a*) on sects. 25 (1) and 26 (1) and (2), of the Factories Act, 1937, and for (*b*) on sect. 5 of the Act.

Sects. 25 and 26 provide as follows:

> 25 (1) All floors, steps, stairs, passages and gangways shall be of sound construction and properly maintained; 26 (1) There shall, so far as is reasonably practicable, be provided and maintained safe means of access to every place at which any person has D at any time to work; (2) Where any person is to work at a place from which he will be liable to fall a distance more than ten feet, then, unless the place is one which affords secure foothold and, where necessary, secure hand-hold, means shall be provided, so far as is reasonably practicable, by fencing or otherwise for ensuring his safety.

The case on sect. 25 (1) depended upon the reading of the words "sound construction" as including design. In the sense in which the argument was addressed to us, I do not think that interpretation possible. But, having E regard to the absence of any kind of protection from falling off this narrow railway, in my view sect. 26 (1) and (2) apply, if it was reasonably practicable to supply those means of protection.

The reasonably certain inferences of fact are that the deceased, standing on the engine as usual, took out the bus charged with hot coke to the platform and turned on the quencher. The next thing that is known is that, just before 11 p.m. he was found lying on the yard floor at a spot about 10 ft. from the F platform, almost unconscious, the bus and engine being still on the platform. He died on the following day. The quencher tap was turned off at the time it was seen after the accident, by whom there is no evidence. The inference obviously is that he fell off the gantry, presumably on his way back in the usual routine to the retort house for the few minutes while the process of quenching on the platform was working itself out. There was no fencing of any sort or kind along the sides of this high level railway, and unless it was proved to be G not "reasonably practicable" to fence it, there was a clear breach of both subsections of sect. 26. The judge held that it was not "reasonably practicable," but I do not accept that conclusion, although for reasons which will appear it is not necessary to decide it.

There was no external system of lighting at the time of the accident. Sect. 5 (1) of the Act says:

> H Effective provision shall be made for securing and maintaining sufficient and suitable lighting, whether natural or artificial, in every part of a factory in which persons are working or passing.

That section is in Pt. I, dealing with "Health (General Provisions)," and I doubt whether it was there intended to deal with safety; but, whether it was or was not, the absence of lighting in my opinion was a fact which would certainly affect the safety of the access under sect. 26. But, for war-time reasons, fixed lighting, which had originally been put up, had been in fact removed, and in its stead the company had instituted a system of working with hand-lamps, supplying an ordinary hurricane lamp which was kept available in the retort house for use by any workman wanting a light, as, for instance, for walking on the gantry at night; and there was evidence that this lamp was in good working order at the time in question. Indeed, on a previous night, as was proved in evidence, the deceased had used it; but on the night in question he did not. Nor did he use a bicycle lamp which he had brought with him from his home when he came on duty that night.

On this state of facts the company pleaded contributory negligence, and the A judge found in favour of the defendants on that issue, albeit without going into it at all deeply. In truth, I think he regarded it as almost self-evident that the substantial cause of the accident was the absence of fencing coupled with the failure of the deceased to take a light. I agree with that conclusion.

Counsel for the appellant contended that, in the circumstances of the case, there was sufficient ground for reversing that decision; and natural sympathy with the poor widow made the court glad to give the closest attention to every B circumstance which lent itself to his argument. His case was, in the first place, that what Gibby did may have been an error of judgment or inadvertence but was not such a want of reasonable care as to constitute negligence of the kind requisite to the defence of contributory negligence; and at his instance we considered at length all the different expressions on that point of view in the opinions of the noble Lords in *Flower* v. *Ebbw Vale Steel, Iron & Coal Co., Ltd.* (1), and *Caswell* v. *Powell Duffryn Associated Collieries, Ltd.* (2). In both those C cases the doctrine of contributory negligence was discussed in its relation to a breach by the defendant of statutory duty towards the plaintiff. But, in my opinion, the facts in the present case are very different, and leave no room for such a distinction. The gantry without any protecting fence was, in the dark, very dangerous. With no hand-hold of any sort, the least stumble might cause a man to overbalance beyond all chance of recovery; and in addition the D uneven holes, where the planks did not come close up to the guard rails but left gaps up to 3½ ins. in width, were very likely to cause a stumble in the dark. The appellant's own case was that it was so dangerous that lighting was essential, and she relied on the defendants' failure to perform their statutory duty of lighting under sect. 5 of the Act, as well as on their failure to make the gantry safe under sect. 25, or at common law on the ground that, without lighting, it was a dangerous system of working which the defendants were practising. E The omission to take a light, whether the hurricane lamp supplied by the defendants for the purpose, or his own bicycle lamp, was an act of folly which I believe any jury would say was negligence.

A further contention was that the hurricane lamp did not comply with the requirements of the Lighting Order, 1940, r. 50 (1) and (2). But, in the first place, there was no evidence before the court that that was a fact; and, in the second place, there was no evidence that Gibby knew it; or that that considera- F tion had anything to do with his not taking it. Had that been the reason, it would seem to follow that he would have taken his own bicycle lamp. Besides, he had used the hurricane lamp previously, at least once. A suggestion was made that he may have thought that the fact that a practice display of searchlights was going on that night sufficed to illuminate the railway. But, even if it was still going on when he went out of the retort house, which was not proved, G that was in its nature so precarious a source of illumination, being one that might stop at any moment, as to make a hand lamp almost more necessary than if there had been no searchlight display. On the facts, I am clearly of opinion that there was negligence.

Even so, counsel for the appellant contended that such negligence did not cause, or contribute to, the accident. Frankly, I do not understand his theory of causation. There was a means of access which was contrary to the statute: H in the dark it was highly dangerous. The plaintiff unnecessarily goes on to the gantry in the engine without a light, knowing that he is going to walk back over it in the dark. In the absence of fencing and hand-hold, for which the defendants are to blame, and in the absence of light for which he as well as they is to blame, he falls. The obvious conclusion to my mind is that the two causes contributed to the fall. I reach this conclusion with that tinge of regret which sympathy for the poorer party naturally evokes. But the rule of law which we call contributory negligence is not unsympathetic or unjust; and it is very much in the interest of the community as a whole that everyone should know that he loses his title to damages if he has, by his own negligence, contributed to causing his own injury.

I do not think any review of the cases is necessary for the purpose of dealing with the argument of contributory negligence in this case, as I am satisfied that the two causes were both substantial causes of the result. The consequence is that the appeal must be dismissed with costs.

GODDARD, L.J.: In this case the judge found two things. He first found that there was no breach of statutory duty on the part of the defendants. Inferentially, I think he also held that there was no negligence on the part of the defendants apart from statutory duty. Secondly, he held that the deceased was guilty of negligence; not, of course, in his view, of contributory negligence, because contributory negligence would only arise where the defendants were guilty of negligence.

We have not heard counsel for the respondents on the question of breach of statutory duty by the defendants, or negligence, and I will say no more, therefore, about it than that a perusal of the judge's judgment certainly does not convince me that there was no negligence or breach of statutory duty on their part. I think there is a great deal to be said both for the fact that there had been a breach of statutory duty and also that there was an unsafe system of working. This gantry is obviously a dangerous place. Whether it was practicable or not to fence it is a question which we have not heard argued, and, therefore, I say no more about it.

I approach the case on the footing, as I think the appellant is entitled to have it approached, that there was negligence in the defendants, because, as I say, although we have not heard it argued, considerations have been put forward by counsel for the appellant on that ground. Therefore, we have to consider whether the negligence found by the judge is in truth negligence contributing to the accident. He has found negligence here, and although this is not a case in which the demeanour or credibility of the witnesses formed any element in the case, because there was no real conflict of evidence, nevertheless it is no function of an appellate court to reverse a finding of this description merely because they think that might be the right course to take. The duty of an appellate court is to reverse a decision which they are convinced is wrong. I am certainly not convinced that the finding of negligence was wrong, and in fact, in my opinion, it was clearly right.

This was a case of a man whose work caused him to be in an electrically lit retort house, but to go out from time to time into the dark, where he would have to wait to get his eyes accustomed to the darkness. He comes out, and he has to proceed along on an electrically propelled locomotive to a certain place for the purpose of quenching the coke, and then get off and walk back to the retort house. But as he walks back along a very narrow track, with a fall on either side of him—and, moreover, it is a curved track—it is just one of those places, as is clear from the plan and the photographs which we have seen, where one false step will cause a serious accident. In those circumstances, I should have thought that a man, going out at night, having to go into the dark from his previous place of employment, which I have no doubt was well lit being lit by electric light, if he had any real care for his own safety, would not venture upon it without a lamp, there being a lamp provided for him to use if he chose. I say "if he chose" because it seems that some of the men preferred to use their own torches, and this man had with him a bicycle lamp. But, whether he used a bicycle lamp or the hurricane lamp which was provided, I can conceive of nothing more likely to cause an accident than for a man to go at night in the dark, without a light of any sort, on to this place.

Various suggestions have been put forward as to why the man did not take a light. It has been said that there was an air raid practice in progress and there were searchlights. All I can say is that that seems to me to be a matter of the merest surmise. We know nothing as to whether the searchlights were on at the time when he met with the accident. Indeed, the information given was that the searchlights were in operation up to about 10.16, and the accident must have occurred not very long before 11 o'clock at night. I do not know what degree of illumination would be given by the searchlights, or whether the man thought anything about the searchlights at all, and for myself I think it would be pure surmise and speculation to take that into account at all.

It was said that the lamp did not conform with certain provisions of the Lighting Order. It was an ordinary hurricane lamp, and hurricane lamps are permitted so long as they do not throw the light up and do not give more light than is necessary. There was no evidence before the court as to whether the lamp would have complied with the Lighting Order or not; but, whether it did or not, there was nothing to show that this man either knew or thought that it did not. He had used it before; it was there for him to use; and there is not the smallest evidence that he or any other workman had ever protested at not being supplied with a proper lamp. If it was an improper lamp to use, or if he thought it was, he could have used his own.

It seems to me that the judge was well justified in this case in finding that, in going on to this gantry at night without any light to guide him as he was walking back along it to the retort house, the deceased was disregarding his own safety and therefore was negligent. The only other point in the case, and the only appreciable point, seems to me to be whether or not there was a sufficient train of causation between that negligence and the accident to make it truly contributory negligence. In my opinion, there clearly was. If you find that a person has been walking a path on a dark night when there is no moon, and the only thing known about him after that is that he has fallen off the track, whether it is over a cliff-side or down into a yard below a gantry, I think most people would say: "Well, it is what comes of going along a place like that without a light at night."

LORD WRIGHT said, in *Caswell's* case (2), at p. 169 ([1939] 3 All E.R. at p. 733):

> There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability.

Then he distinguishes inference from mere surmise.

In no case, whether it be civil or whether it be criminal, where the court has to come to a decision upon the evidence of circumstances, can you ever eliminate every conceivable possibility, and no court has ever been obliged to do it. In this case it is conceivable that somebody came up behind this man on the gantry and pushed him over. No one suggests he did, but it is a conceivable possibility. It is also conceivable that, although the evidence was that he was a strong, healthy man engaged in work, he was seized with a sudden illness. That again is a possibility. But it is more than a possibility, a probability—and the court is entitled to come to a conclusion upon probabilities—that, owing to lack of light he fell from this dangerous place when he took a false step in the dark. That seems to me to be the reasonable probability. I think the facts show enough for the court to be satisfied, if I may use the common expression in criminal cases, beyond reasonable doubt—and the emphasis in those cases is always on the word "reasonable"—that the accident was due not only to the absence of fencing, without which it would not have had fatal results, but was also due to his going on to this gantry without any light.

The doubt which I had at some period of the case was caused by what LORD MACMILLAN had said in *Caswell's* case (2), and which was put, if I may say so, forcibly by DU PARCQ, L.J., as summarising at one period what he understood to be the argument for the appellant. LORD MACMILLAN said, at p. 169 ([1939] 3 All E.R. at p. 733):

> The respondents' breach of duty was clearly a cause of the accident. Having thus causally connected the accident with the respondents' breach of duty, I do not think that it was incumbent on the appellant to eliminate and disprove all conjectural possibilities that the deceased may himself have been in some way careless of his own safety.

This case goes very far beyond a conjectural possibility that the deceased was careless of his own safety. We have here the fact that he was careless of his own safety in not taking a lamp where any careful, prudent workman would have taken a light. In those circumstances it seems to me to be a case of true contributory negligence; that is to say, the accident was the result of two causes operating at the same time, a breach of duty by the defendants and the omission on the part of the plaintiff to use the ordinary care for the protection of himself or his property that is used by the ordinary reasonable man in those circumstances—to take Lord Atkin's words in *Caswell's* case (2), at p. 164 ([1939] 3 All E.R., at p. 722).

For these reasons, I agree with my Lord that this appeal should be dismissed.

du Parcq, L.J.: I wish to express no opinion upon any of those matters upon which we have not heard full argument from counsel for the respondents. I think it right, however, to say that I am strongly inclined to disagree with the judge upon one point on which we did hear full argument, and that is the question whether the deceased was guilty of a breach of statutory duty under sect. 119. I feel that there are great difficulties in the way of so holding. I doubt very much whether the deceased, if he had lived, could have been convicted, on the known facts, of an offence under that section. It is not at all clear that the hurricane lamp of which we have heard so much was, within the meaning of that section, provided for the use of this workman, among others, under the Factories Act; and the further difficulty arises that he was not ordered to use it, or ordered to use it at any particular time. It was left to his discretion whether to use it or not. In those circumstances, I think that, to say the least of it, it would have been very difficult to satisfy any court that he had committed an offence under that section, and I am not at all sure that any court would have had power to convict him of such an offence on a right interpretation of the section. However, the judge went further. He did not merely hold that there had been a breach of statutory duty on the part of the deceased; he held also that, if it were necessary to decide it, as in his view it was not, the deceased was shown to have been guilty of contributory negligence.

In happier days this case would have been tried by a jury. I will assume that, after a full and proper direction the jury might properly have found, and would have found, that there had been a breach of statutory duty on the part of the defendants, or that they had been guilty of negligence, and that, but for that breach of duty or negligence, the deceased would not have been killed. They would then have had to consider the question of contributory negligence. On that point it may be believed with some confidence that the jury would have been spared any subtle or complicated direction. Unless the trial had taken place in a university city and it had happened that the jury was composed mainly of philosophers and logicians, I doubt if a discussion of theories of causation would have either assisted or interested them. It would have been enough to say to them, in the words of Lord Macmillan in *Caswell's* case (2), at p. 169 ([1939] 3 All E.R. at p. 733):

> It is then for respondent to show that the deceased himself was by his own negligence wholly or partly responsible for the accident.

Thus, the questions for the jury and the direction to them would have been: "Would the deceased, if he had been as careful as a workman of ordinary prudence may be expected to be, have taken a lamp with him? If so, did his failure to use a lamp substantially contribute to cause the accident? If it did so contribute, then the defendants have made out their defence."

If the jury had found the defence of contributory negligence made out after such a direction, in my opinion no court could have set aside that verdict or said that there was not evidence to support their finding. In my view, nobody could have said that the finding was not a justifiable inference from the known facts. It is in substance the inference which the judge drew. The full argument which we have heard has not satisfied me that it was a wrong inference; indeed, it has convinced me that it was the right inference. I agree that the appeal should be dismissed.

Scott, L.J.: I should like to add that I agree with what du Parcq, L.J., has said with regard to sect. 119.

Goddard, L.J.: So do I.

Appeal dismissed.

Solicitors: *J. R. Cort Bathurst* (for the appellant); *Ince, Roscoe, Wilson & Glover* (for the respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

Re SIR ERNEST DEBENHAM, BART., AND W. H. A. MERCER'S CONTRACT.

[Chancery Division (Simonds, J.), **January 14, 1944.**]

Sale of Land—Conditions of sale—Incorporation of General Conditions—Interest on purchase money—Special condition stating rate of interest—Whether Law Society's General Condition excluded as inconsistent—Law Society's General Conditions of Sale (1934 *Edn.*), *cl.* 7.

The applicant entered into an agreement dated Oct. 9, 1941, whereby he agreed to sell certain property to the respondent for £18,500 subject to a lease and an agreement for the sale of the property to a previous purchaser. £3,750 was to be paid as a deposit on the signing of the agreement and the balance of the purchase price, £14,750, on the date for completion. It was provided that, if the £14,750 was not paid on that date, it was to carry interest at 5 per cent. until payment. The agreement further provided that the property was sold subject to the Law Society's General Conditions of Sale (1934 Edn.), so far as they were not varied by or inconsistent with the agreement. The £14,750 was not paid on the agreed date and the vendor took out a summons claiming a declaration that, upon the true construction of the agreement, the respondent was liable to pay him interest at 5 per cent. per annum on the £14,750 as from the agreed date for completion until payment, whether or not delay in completion of the agreement was attributable to the default of himself, the vendor. It was contended for the respondent that the Law Society's General Conditions of Sale (1934 Edn.), cl. 7, was incorporated into the agreement and, therefore, he was not liable to pay the interest where completion was delayed by the vendor's default. The applicant contended that the provision for payment of interest in the agreement of Oct. 9, 1941, was a variation of or inconsistent with the Law Society's General Conditions of Sale (1934 Edn.), cl. 7:—

Held: upon the true construction of the agreement of Oct. 9, 1941, the clause was not a variation of nor inconsistent with the Law Society's General Conditions of Sale (1934 Edn.), cl. 7.

[**EDITORIAL NOTE.** The question here is whether the special provision in the agreement is a variation of or inconsistent with the well-known clause relating to payment of interest on the balance of the purchase money where completion is delayed. It is held that it is not inconsistent with those terms. In fact it provides for payment of interest at the same rate as the clause in question which, however, goes on to deal with many other matters.

As to Completion, see HALSBURY, Hailsham Edn., Vol. 29, pp. 296-298, paras. 390, 391; and for Cases, see DIGEST, Vol. 40, pp. 118-126, Nos. 935-1000.]

Vendor and Purchaser Summons taken out by the vendor to determine a question of construction arising under an agreement for the sale of land. The facts are fully set out in the judgment.

M. J. Albery for the vendor.

E. M. Winterbotham for the purchaser.

Simonds, J.: This is a vendor and purchaser summons, the applicant being the vendor, Sir Ernest Ridley Debenham, and the respondent the purchaser, William Herbert Allan Mercer. The applicant claims a declaration that, upon the true construction of an agreement dated Oct. 9, 1941, and made between the applicant of the one part and the respondent of the other part for the sale of certain property in the parish of Milborne in the county of Dorset, the respondent is liable to pay to the applicant interest at 5 per cent. per annum upon the balance of the purchase money thereunder for the time being remaining unpaid as from Jan. 9, 1942, until payment, whether or not delay in completion of the said agreement is attributable to the default of the applicant.

That raises a short but, as I think, difficult question of construction of the agreement, which incorporates the Law Society's General Conditions of Sale (1934 Edn.), so far as they are not varied by or inconsistent with the conditions of the contract. The contract recites that the vendor is the owner in fee simple free from encumbrances of the property thereinafter described and states that the property sold is subject to an agreement dated June 18, 1936, for the sale of the property to Bladen Dairies, Ltd., and a certain lease; and it recites the amount outstanding and becoming due from Bladen Dairies, Ltd., the purchaser under the earlier agreement, in the sum of £23,750. The agreement then provides:

> The vendor will sell and the purchaser will purchase all the vendor's right title and interest in the said property subject to the said lease and agreement for the sum of £18,500 to be paid as follows: as to £3,750 as a deposit on the signing hereof; as to the balance of £14,750 on Jan. 9, which is to be the date for completion, or on earlier completion if possible, and, if such amount be not so paid on Jan. 9, 1942 aforesaid, it shall carry interest at 5 per cent. until payment.

There are certain other provisions to which I need not refer, and, finally, cl. 7, which is in the terms I have already stated:

> The property is sold subject to the Law Society's Conditions of Sale (1934 Edn.) . . . so far as they are not varied by or inconsistent with these conditions.

This case has been argued before me on the footing that the vendor was in default, and the single question is whether, notwithstanding his default, he is nevertheless entitled, under the terms of this agreement incorporating the Law Society's General Conditions of Sale, to be paid interest as from the date fixed for completion until the actual date of completion. That in its turn depends upon the answer to the question: Is the provision that I have read, that, if such amount (that is, the balance of £14,750), be not so paid on Jan. 9, 1942, it shall carry interest at 5 per cent. until payment, a provision which varies or is inconsistent with the general conditions to which I have referred and which are incorporated in the agreement. I turn, then, to the relevant condition in the Law Society's General Conditions of Sale. That is cl. 7, which is a comprehensive condition dealing with interest on purchase money. It contains four paragraphs:

> (1) If from any cause whatever (save as hereinafter mentioned) the completion of the purchase is delayed beyond the date fixed for completion, the purchase money, or where a deposit is paid, the balance thereof, shall bear interest at the rate of £5 per cent. per annum from the date fixed for completion to the day of actual payment thereof.

It will be observed that that is in terms substantially the same as the terms of the agreement, except for the words which appear in parenthesis, "save as hereinafter mentioned." That carries one forward to para. (3), to which I will presently come. Para. (2) is as follows:

> Provided that, if delay in completion arises from any other cause than the purchaser's own act or default, the purchaser may . . . (*a*) at his own risk, deposit the purchase money, or where a deposit is paid, the balance thereof, at any bank in England or Wales, and (*b*) give notice, in writing, forthwith of such deposit, to the vendor or his solicitors, and in that case the vendor shall (unless and until further delay in completion shall arise from the purchaser's own act or default) be bound to accept the interest, if any, allowed thereon, as from the date of such deposit, in lieu of the interest accruing after the date of the deposit, which would otherwise be payable to him under this condition.

Then para. (3):

> No interest shall become payable by a purchaser if and so long as delay in completion is attributable to: (*a*) default by the vendor in deducing title in accordance with the contract, or in giving an authority to inspect the register kept under the Land Registration Act, 1925, or in conveying; or (*b*) any other act or default of the vendor or his Settled Land Act trustees.

Then para. (4):

> The vendor shall, as from the date when interest becomes payable under para. (1) of this condition, have the option (to be exercised in writing at any time before actual completion and before a deposit of the purchase money or the balance thereof under para. (2) shall have been made) of taking the rents and profits or an apportioned part thereof (as the case requires) less the outgoings or an apportioned part thereof, up to the date of actual completion, in lieu of the interest otherwise payable under the said para. (1); and, if the said option is exercised, the same payments, allowances and apportionments shall be made as if the date fixed for completion had been the date of actual completion.

Counsel for the applicant admitted, as I think he was bound to admit, that, if the short provision in regard to interest which is contained in the agreement operated, by reason of its inconsistency, to exclude paras. (1) and (3) of cl. 7, it must operate to exclude also paras. (2) and (4); that is to say, he was bound to admit that the short words in the contract which I have read and repeat—"if such amount be not so paid on Jan. 9, 1942, aforesaid it" (that is, the balance of the purchase money) "shall carry interest at 5 per cent. until payment"—was a condition which the parties intended to operate to exclude the whole of cl. 7 of the special conditions, containing, as that clause does, a number of provisions, some of which operate for the benefit of the vendor, others for the benefit of the purchaser. He puts his case in this way. He says: Here upon the face of the contract there is an unqualified provision for payment of interest from the date fixed for completion until the date of completion, and that, he says, is a variation of or is inconsistent with the qualified term contained in cl. 7 of the Law Society's General Conditions of Sale, which by para. (1) provides that interest shall be paid from the date fixed for completion until the date of completion unless a certain condition obtains.

That is an attractive argument, but on the whole I have come to the conclusion that there is no real variation or inconsistency. In my view, it is possible to read that provision in the contract as no more than a statement that the rate of interest which is to run from the date fixed for completion until the date of completion is the rate of 5 per cent. I cannot but think that, if the parties, having in mind the Law Society's General Conditions of Sale (as I must assume they had since they incorporated them) had intended to exclude from their bargain the special provisions of cl. 7, they would have dealt with that in a manner much more clear than simply by the statement that the interest was to be paid at a certain rate from the date fixed for completion until completion. It appears to me that it is quite possible and reasonable to refer those words to nothing more than a statement of the bargain that the rate of interest to be paid should be 5 per cent. and that that rate should run from the date fixed for completion until completion, and that it was not intended to exclude the several provisions of the Law Society's General Conditions of Sale, cl. 7, some of which operate for the benefit of the vendor and others for the benefit of the purchaser.

I appreciate what was put to me in argument, that this was a somewhat special bargain, having regard to the fact that the property purported to be sold had already been sold and that what the vendor would get, assuming that the earlier purchaser concluded his part of the bargain, would be nothing more than the balance of the purchase money payable thereunder; but I do not think that that peculiar feature of this bargain ought to drive me from what I otherwise conceive to be the proper construction of the clauses under review.

I come to the conclusion that there is in the special condition no variation or inconsistency with the general conditions which entitles the vendor to be paid interest from the date fixed for completion until actual completion whether or not the delay in completion was attributable to his default. I declare accordingly; and the applicant must pay the respondent's costs of the application.

Declaration accordingly.

Solicitors: *Field, Roscoe & Co.* (for the applicant); *Arthur Blackman, Hailey & Co.* (for the respondent).

[*Reported by* R. L. ZIAR, ESQ., *Barrister-at-Law.*]

STRAY *v.* DOCKER

[KING'S BENCH DIVISION (Humphreys, Asquith and Cassels, JJ.), **January 25, 1944.**]

Landlord and Tenant—Rent restriction—Extortionate rent—Limitation of time—Date from which time begins to run.

Where an information is laid under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 10, that a landlord has let a dwelling-house to which the Act applies, at a rent which, having regard to all the circumstances of the case, yields to the landlord an extortionate profit, the limitation of time begins to run from any date on which the rent is payable.

[**EDITORIAL NOTE.** This case deals with the criminal proceedings relating to excessive rent and the question is whether the criminal act is the original letting at an excessive rent or whether an offence is committed every time an excessive rent is received on the rent day, which is usually once a week, once a month or once a quarter. The decision on this point will necessarily determine the starting point of any limitation of time applicable to the proceedings and it is decided that the relevant time is any date on which the rent is payable.

AS TO RENT INCLUDING PAYMENT FOR FURNITURE, see HALSBURY, Hailsham Edn., Vol. 20, pp. 314, 315, para. 370; and FOR CASES, see DIGEST, Vol. 31, pp. 560, 561, Nos. 7078-7084.]

APPEAL by way of case stated from a decision of the justices for the borough of Sutton Coldfield. The facts are fully set out in the judgment of HUMPHREYS, J

W. E. P. Done for the appellant.

A. Safford for the respondent.

HUMPHREYS, J.: On May 24, 1941, the respondent let to Jones a dwelling-house to which the Rent Acts applied at a rent which included payment in respect of the use of furniture. It was a quarterly letting; and the tenancy was still subsisting on the date of the hearing of the information. The information was laid on May 8, 1943, was heard on June 1, 1943, when the justices dismissed it.

The information was laid under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 10, which, as amended in 1923 and 1939, runs as follows:

> Where any person after the commencement of the Rent and Mortgage Interest (Restrictions) Act, 1939, lets any dwellinghouse to which this Act applies . . . at a rent which includes payment in respect of the use of furniture, and the rent charged yields to the landlord a profit which, having regard to all the circumstances of the case . . . is extortionate . . .

the landlord shall be liable to certain penalties upon summary conviction; and the court may make certain other orders, including an order that the rent, so far as it exceeds the amount permitted, is irrecoverable from the tenant; and any excess shall be repaid to the tenant.

The justices gave effect to an objection that the information was out of time, in that the matter of which complaint was made arose on May 24, 1941, and, according to the Summary Jurisdiction Act, 1848, s. 11, the information in such cases must be laid within six months of the date when the matter arises; that is to say, within six months of May 24, 1941, in this case. In point of fact the information was not laid until May 8, 1943.

The point which is raised by this case is whether, in a prosecution under sect. 10 of the 1920 Act as amended, the original letting of the house is the important date from which the six months run or whether it is right to say, as is contended here on behalf of the prosecution, that the six months run from any time when it can be said that the rent charged in the letting yields to the landlord a profit which, having regard to all the circumstances, is extortionate. That is the point raised by the case.

I think that the first matter to be mentioned, and always to be kept in mind, is that sect. 10 is quite plainly a provision intended to prevent the exploitation of poor people at the hands of landlords. That is the object of the section. In spite of this being, as it is, a penal section, I think regard must be had to that fact in giving a benevolent interpretation to it. The section is very like the preceding one, sect. 9, which is also amended by the 1939 Act, and provides (as amended) in the first part in language exactly similar to that found in sect. 10, that:

> Where any person lets, or has let since the date of the passing of the [Act of 1939] a dwellinghouse to which this Act applies . . . at a rent which includes payment in respect of the use of furniture, and it is proved to the satisfaction of the county court on the application of the tenant that the rent charged is yielding or will yield to the landlord a profit in excess of the normal profit . . .

the court may order that the excess rent shall be irrecoverable and may make further consequential orders. Sect. 10 is the corresponding section, creating a penalty on the person who does that thing which is prohibited; and it in effect A
also gives power to the justices to declare that the rent improperly charged shall be irrecoverable from the tenant.

The question is what is the real offence charged, so that, by answering that question, one can decide when the matter of complaint arose here. My view is that there are two separate elements to be taken into consideration. First of all the section prescribes that there must be a letting and a letting after a particular date; for the section begins by saying—and it has no application to B
any other case—that the letting must be a letting after a date which in this case is Sept. 3, 1939, when the Rent and Mortgage Interest (Restrictions) Act, 1939, commenced to operate. That is the first thing. Then the section goes on to say—and it is necessary to prove—that the rent charged in respect of that letting yields to the landlord a profit which is, having regard to all the circumstances of the case, extortionate. My view is that the real offence which is created in that section is not the letting at all, although that C
must be an incident in the commission of the offence, but the charging to the tenant of a rent which, in all the circumstances, yields to the landlord an extortionate profit. If that is the correct view, it would be obvious that, for the time that the rent is in fact charged—I suppose that would be at least every quarter-day when the rent becomes payable, as this was a quarterly letting—there is a charge which would come within the meaning of the language of this section. D
My view, therefore, is that the landlord—and it is only a landlord who may be convicted under this section—commits the offence whenever he charges a rent which yields to him a profit which, having regard to all the circumstances of the case, is extortionate, if there is a letting of these premises which has taken place after the commencement of the 1939 Act.

I think that argument is very considerably strengthened by a consideration of this fact. In the 1920 Act, as that Act was originally drawn and passed, E
sects. 9 and 10 did not use the expressions "landlord" and "tenant" at all, but used the expressions "lessor" and "lessee." Therefore, it may have been under that Act, as it was in 1920 when it came into operation, extremely difficult to say that any person who was not the original lessor—there can only be one lessor—was liable to be convicted under sect. 10 as it then stood. But Parliament had brought to its notice in subsequent years that the person who was receiving an extortionate rent was not necessarily a person who was the F
lessor at all—he might be an assignee of the lessor—and it was desirable to make such a person, although he was not the person who originally let, liable for the penalties under sect. 10 in an appropriate case. Accordingly sect. 10 (2) of the 1923 Act amended the original sects. 9 and 10 of the principal Act. Subsect. (2) provides:

> In sects. 9 and 10 of the principal Act . . . the expressions "landlord" and "tenant" shall respectively be substituted for the expressions "lessor" and "lessee." G

That fact seems to me to lend force to the argument that circumstances might very well change which might alter a letting which, in the circumstances as they were originally, was a letting at a reasonable rent, into a rent which became an extortionate rent. For example, the landlord might himself be a *mesne* landlord, and he might be paying a rent for the premises which might make it impossible to say that the rent he was charging the tenant in the original letting was extortionate, because it was not very much more than he was paying himself. But H
supposing that the landlord, for some reason or in some way, had his own rent lowered materially, then it might in point of fact be found by a court that the rent which he was now charging to the tenant was an extortionate rent, having regard to the very different proportion which it bore to the rent which he himself was paying, a fact which, it cannot be disputed, would be a very material matter to be taken into consideration. Another illustration given by counsel for the appellant was that the cost of materials and labour necessary to effect repairs

might have very materially altered in the course of the period of letting. That might be a matter in which the circumstances might change.

Apart from that, there seems to me to be another section of this Act which makes clear almost beyond argument that the landlord who commits, or may commit, an offence under sect. 10 may not be the original lessor at all, but may be quite a different person. That is the definition of the expression "landlord" to be found in sect. 12 (1) of the Act. In that subsection the definition of A "landlord" is this:

> (*f*) The expression "landlord" . . . includes any person from time to time deriving title under the original landlord . . . (*g*) The expression "landlord" also includes in relation to any dwellinghouse any person, other than the tenant, who is or would but for this Act be entitled to possession of the dwellinghouse . . .

For these reasons, I have come to the conclusion that the argument for the respondent ought not to be accepted by this court. The main argument pre- B sented may be stated in one sentence—that the offence created by sect. 10 is complete at the moment of letting. In my opinion, that is not so. I confess that I am glad to think that the view which I have arrived at of the law in regard to this matter is a view which will not prevent justice being done in cases where, although the original letting may have been on perfectly reasonable terms, the incidence of that letting, in the sense of the rent which is charged by the landlord, may at some subsequent time become a charging of rent which is C extortionate having regard to all the circumstances.

For these reasons, I think that the appeal should be allowed and the case remitted to the justices to deal with, they not having heard, as I understand it, the facts of the case at all.

ASQUITH, J.: I agree; but at the risk of repetition, I wish to emphasise one point already made by my Lord, because that point standing alone seems to me D quite conclusive against the argument presented for the respondent. The argument presented for the respondent is that the offence consists in the letting and is complete with the letting. Yet it is clear that, under this section, though there must have been a letting by someone, proceedings can be taken against someone altogether different, who had never let at all. The section begins: "Where any person after [a certain date] lets"—and it used to go on "and the rent charged yields to the lessor an exorbitant profit." While it retained that E wording, of course that must mean the same person as originally let. But it seems to have occurred to the legislature that, where there has been an assignment and the person by whom the exorbitant rent is charged is an assignee, it is unjust that he should escape. Therefore, the 1923 Act deliberately substituted for the word "lessor" the word "landlord," which is defined in the 1920 Act as including persons claiming title under the original lessor, *e.g.* assignees. The "landlord" is the person who can be prosecuted under the section; F and, where there has been an assignment, the assignee is the landlord within the meaning of the definition. It follows that that person can, in such case, be prosecuted, although he was not the original lessor, and has, in fact, never let anything to anybody. This fact seems to me to be in itself fatal to the argument presented by the respondent.

CASSELS, J.: I agree. I cannot think that the intention of the legislature G was merely to deal with letting. Sect. 10 of the Act of 1920 is headed "Penalty for excessive charges for furnished letting." It is the extortionate profit which is aimed at. I cannot agree that the offence is complete at the moment of the letting. A profit which is reasonable at the time of the letting may become extortionate at a later date by change of circumstances. If the contention of counsel for the respondent is correct, a landlord who took an extortionate profit for six months after the actual letting without being prosecuted, would not be H liable to be prosecuted by the local authority, or by anybody else, under sect. 10; and would only be liable to proceedings in the county court by the tenant to recover payment of the rent in excess of the normal profit under sect. 5. In my opinion, the appeal should be allowed and the case remitted to the justices.

Appeal allowed with costs.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *R. Walsh*, town clerk, Sutton Coldfield (for the appellant); *Stafford Clark & Co.*, agents for *Jeffery Wild & Lovatt*, Birmingham (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

DICKINSON *v.* ST. AUBYN AND ANOTHER

[COURT OF APPEAL (Goddard and du Parcq, L.JJ., and Vaisey, J.), **March 2, 1944.**]

Landlord and Tenant—Repairs—Power to determine lease for 7 years at end of 5 years—Covenant to paint in "the last quarter of the said term"—Whether covenant applies when lease determined at end of 5 years.

A landlord had granted the lease of a flat for 7 years to a tenant, with option to the tenant that, on giving notice, he might determine the lease at the end of the fifth year. The lease included a covenant to keep the premises in good repair, etc., and "in the like condition to deliver up the same at the end or sooner determination of the tenancy," and a separate covenant "to paint in the last quarter of the said term." It was contended on behalf of the landlord that, since the tenant was enabled to determine the lease at the end of 5 years, the obligation to paint in "the last quarter of the said term" applied to whatever term had existed, whether it were 5 or 7 years :-

HELD : since two different sets of words had been used in the covenants, the words "the last quarter of the said term" referred to the term of 7 years for which the lease had been granted, as distinguished from the words "determination of the tenancy," used in the first mentioned covenant.

[**EDITORIAL NOTE.** This is a short but important point in connection with the repair covenants in leases. Such covenants often provide for not only general repairs but specific matters, such as painting in the last year of the term. If the tenant is given power to "break" the lease at the end, as is not unusual, of the third and fifth year in a seven-year term or at the end of the seventh and fourteenth year in a 21-year term, then the draftsman must be careful to show whether he means the special work to be done in the last year of the actual tenancy or in the last year of the full term.

AS TO COVENANTS TO REPAIR, see HALSBURY, Hailsham Edn., Vol. 20, pp. 208-219, paras. 228-238 ; and FOR CASES, see DIGEST, Vol. 31, pp. 329, 330, Nos. 4715-4723.]

APPEAL by the tenant from a judgment of HILBERY, J., dated Oct. 27, 1943, in an action by the landlord for breach of covenant. The facts are fully set out in the judgment of GODDARD, L.J.

G. Granville Sharp for the appellant.

A. S. Diamond for the respondent.

GODDARD, L.J. : A lease of a flat was granted on Sept. 29, 1937, for the term of 7 years. There are certain covenants by the lessee, and among them is a covenant to keep the premises in repair, and

> . . . at the determination of the tenancy to leave all locks, keys, bolts, windows and sash-lines in good working condition and to keep all floors properly cleaned and all chimneys properly swept (damage by fire excepted) and in the like condition to deliver up the same at the end or sooner determination of the tenancy.

A proviso was inserted at the end of the lease giving the tenant the right to determine the lease at the end of the fifth year, and, accordingly, so far as his or her liability under the third covenant which I have just read is concerned, there is no question whatever that the flat had to be given up at the determination of the tenancy in good repair.

There is, however, another covenant, and it is upon this covenant that the controversy arises. The fourth covenant is :

> To paint in the last quarter of the said term with two coats at least of good oil paint and one coat of enamel . . .

The whole question is whether "the said term" which is referred to in that covenant means the term of seven years, or whether it means the term which can be put an end to at the end of the 5 years. In other words, the question is whether the obligation attaches not only at the end of 7 years if the lease runs its full term, but also at the end of the fifth year if the tenant gives notice to determine at the end of five years.

The first rule of construction which I bear in mind in construing this lease is that it is necessary to give effect to every word which is in the document. I have to construe the document and find the intention of the parties, or the contractual rights of the parties, from the words which they have used, and I must give effect to every word. The second rule that I bear in mind is that, if there is an ambiguity in the lease or a doubt in the lease as to what is meant, the lease has to be construed according to what is generally called the rule of *contra proferentes*, that is to say, against the persons putting it forward.

The first thing that occurs to one is that different words are used in the third covenant from those which are used in the fourth covenant. The third covenant provides for the yielding up in repair of the premises "at the determination of the tenancy," and, therefore, there can be no doubt, and it is not argued to the contrary, that the tenant's obligation under that covenant attaches when the tenancy is determined, whether it is at the end of the seventh year or whether it is at the end of the fifth year. But when you get to the fourth covenant, which deals with painting, one finds different words. One knows that it is a very common thing in leases to provide for painting at the end of particular periods, and very often at the end of 7 years, and in the fourth covenant the words are, "to paint in the last quarter of the said term." There is no question that "the said term" there refers to the term of 7 years which has been previously granted under the lease. Counsel for the respondent argues that, as the proviso enables the tenant to give notice at the end of five years, we must read "the last quarter of the said term" as meaning the last quarter of the term which in fact has existed, whether it be 5 years or whether it be 7 years. That would be reading these words, "to paint in the last quarter of the said term," as if they read, "to paint in the last quarter of the tenancy, be it 5 years or be it 7 years."

That was the construction which Hilbery, J., put upon it, but, in my opinion, that is not the right construction. If parties use in one covenant one expression which shows that they had in mind obligations to arise at the end of the tenancy, which may be one period or may be another period according to whether the tenant exercises an option, and then in the next covenant they use an expression which *prima facie* applies to the full term which is created, then I think the proper rule of construction to apply is that they mean something different. In my opinion, therefore, the covenant to paint "in the last quarter of the said term" ought to be construed strictly against the landlord, and must mean that the tenant's obligation, if he holds for the full term of 7 years, is to paint in the last quarter of the 7 years, but not to paint in the last quarter if he exercises the option and gives up the premises at the end of the five years.

There is one other covenant in the lease to which I must call attention, and that is that it is provided that he is :

> . . . during the last month of the tenancy to permit any intending tenant properly authorised to inspect the said premises at reasonable hours in the day time.

That is not "in the last month of the term," but it is "in the last month of the tenancy," and that again shows that the parties are drawing a distinction between the two periods, or at any rate are having in mind that the lease may come to an end before the full term which is granted has expired. There are other provisions in the lease, no doubt, in which "the term" can be seen to mean the duration of the tenancy. For instance, in the landlord's covenants, he covenants :

> . . . to keep the outside walls and roofs with the outside water pipes and shoots and outside drains and sewers properly cleaned and repaired . . . at all times during the said term.

That is a continuing obligation, and the landlord would be liable under it if at any time during the period he did not keep them in repair.

I think, however, that we are bound in this case to construe the covenant with which we are concerned, containing the words "the said term," as applying to the term of 7 years, and consequently, for those reasons, I take a different view upon this short point of construction from that of Hilbery, J., and I think upon this point the appellant is right.

du Parcq, L.J. : I agree. It seems to me that the reasonable construction of this fourth covenant is that which my Lord has stated. "The said term" there must mean, as it seems to me, a period of time. It is not possible to construe it as meaning "the estate hereby demised," but it means the period of time previously referred to, namely, "the said term." Now, the period of time which has been referred to is 7 years, and "the last quarter of the said term" therefore means the last quarter of the 7 years, and the tenant, if he has read this lease, knows that when he gets to that quarter he must paint, and having read that, he sees that, if he gives notice to terminate after five years he will never get to that quarter at all, and the obligation to paint will no more arise than the obligation to go on cleaning windows every two months after he has determined the lease.

Counsel for the respondent rather suggested that this construction was based on a narrow view, and rather complained that it all turned on one word. It very often happens that very important decisions turn on one word, and it is as well that draftsmen should remember that. But I do not think that the interpretation that we are putting upon this lease is giving at all a strained meaning or an improbable meaning to it. One has to have regard to the nature of the duty which is imposed upon the tenant. Many landlords think it very desirable that their houses or flats should be painted every 7 years, and it is perfectly reasonable for the landlord to say to the tenant: "If you are there for 7 years, then at the end of the 7 years you must paint." If the lease is determined earlier, it may not be very difficult for the landlord to make arrangements by which the liability to paint will be transferred to others, but that is not a matter which concerns us.

I agree with my Lord that the tenant, reading the lease, might quite reasonably come to the conclusion, and it would be, indeed, the only conclusion to which one could come, that, if he determined the lease after 5 years, he would be under no obligation to paint. I agree, therefore, that the appeal must be allowed, so far as the obligation which it has been sought to put upon the tenant under the fourth covenant is concerned, but the appellant remains liable, of course, under the third covenant.

VAISEY, J.: Whether our decision corresponds with the opinion or the actual intention of the parties, I do not pretend to know, but what we have to decide is what is the true construction of the lease to which the parties have put their hands and seals. It seems to me that the wording of cl. 4 of the lessee's covenants, when it is contrasted with the wording at the end of cl. 3, is too strong and too clear to admit of any speculation as to any possible or even probable contrary intention of the parties. In my judgment, "the last quarter of the said term," means the quarter which will begin at midsummer, 1944, and end at Michaelmas, 1944, and on that ground it seems to me that this appeal must succeed.

Appeal allowed.

Solicitors: *Markby, Stewart & Wadesons* (for the appellant); *Barnes & Butler* (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

PAPRIKA, LTD., AND ANOTHER *v.* BOARD OF TRADE.

[KING'S BENCH DIVISION (Lawrence, Lewis and Wrottesley, JJ.), **January 21, 1944.**]

Magistrates—Appeal to quarter sessions—Appeal against sentence—Hearing solely on evidence given below—No objection by counsel—Whether confirmation of sentence valid—Amendment of notice of appeal to include appeal against conviction—Jurisdiction.

Emergency Legislation—Rationed goods purchased without coupons—Fine based on purchase price—Whether purchase tax properly included in purchase price.

The appellants pleaded guilty to charges under the Consumer Rationing Order (No. 8), 1941, and the Defence (General) Regulations, reg. 55, of obtaining certain rationed goods without surrendering the appropriate coupons and they were fined £2,000 each. The appellants gave notice of appeal against sentence to quarter sessions and at the hearing before the appeal committee they applied for leave to amend for the purpose of appealing against conviction. The committee held that they had no power to grant leave to appeal against conviction where a plea of guilty had been entered. The appeals against sentence were then heard solely on the evidence which had been given before the magistrate and counsel for the appellants raised no objection. On the appeal by way of case stated by the appeal committee, the appellants contended (i) that at the hearing before the committee no evidence was called; (ii) that the committee were wrong in holding that they had no jurisdiction to give leave to appeal against conviction; and (iii) that the fines imposed upon the appellants were in excess of the maximum fines permitted under the Defence (General) Regulations, reg. 55, in that in assessing the price that the appellants had paid for the goods the purchase tax had been included :—

A HELD: (i) on an appeal to quarter sessions against sentence, where counsel for the appellant has accepted the evidence given in the court below as the basis upon which the appeal is to be heard, the appellant cannot object to the sentence imposed.

(ii) the committee had no jurisdiction to give leave to appeal against conviction since the appellants had not fulfilled the conditions as to recognisances, etc., set out in the Summary Jurisdiction Act, 1879, s. 31 (2) and (3), and the Metropolitan Police Courts Act, 1839, s. 50.

B (iii) the committee were correct in including the purchase tax in the purchase price paid by the appellants for the goods.

[**EDITORIAL NOTE.** The main point of importance in this case concerns the practice of quarter sessions on appeals against sentence. Generally speaking, an appeal to quarter sessions is a rehearing of the case and all the evidence is heard afresh. It has been the practice, however, on appeals against sentence only, where the guilt is by the nature of the appeal admitted, only to go into those matters which affect sentence C and not to rehear the case generally. This practice is held to be good by the decision herein.

AS TO PROCEDURE ON APPEAL TO QUARTER SESSIONS, see HALSBURY, Hailsham Edn., Vol. 21, pp. 706-709, paras. 1229-1231; and FOR CASES, see DIGEST, Vol. 33, pp. 392-399, Nos. 1026-1087.]

Cases referred to:

*(1) *Ex parte Ashton* (1912), 76 J.P. 383; 33 Digest 397, *1074*; *sub nom. Ex p. Grafton Club*, 28 T.L.R. 473.

D *(2) *R.* v. *Glamorganshire JJ.* (1890), 24 Q.B.D. 675; 33 Digest 404, *1143*; 59 L.J.M.C. 150; 62 L.T. 730.

(3) *R.* v. *Newbury* (*Inhabitants*) (1791), 4 Term Rep. 475; 38 Digest 610, *1359*.

(4) *R.* v. *Standing* (1909), 2 Cr. App. Rep. 5; 14 Digest 507, *5609*.

(5) *R.* v. *Mason* (1919), 14 Cr. App. Rep. 126; 14 Digest 508, *5622*.

APPEAL by the accused by way of case stated from a decision of the appeal committee of the City of London Quarter Sessions.

E The defendant company was charged with unlawfully acquiring certain rationed goods otherwise than against the surrender of the appropriate coupons contrary to the Consumer Rationing (No. 8) Order, 1941, and the defendant Black was charged with aiding and abetting in the commission of the offence. The goods in question had been purchased by the defendant company for £562 10*s*. on which the purchase tax was £187 10*s*. The defendants pleaded guilty before the stipendiary magistrate and were fined £2,000 each under the F Defence (General) Regulations, reg. 55. The defendants appealed to quarter sessions and then, by way of case stated by the appeal committee, to the King's Bench Divisional Court.

G. O. Slade, K.C., and *Christmas Humphreys* for the appellants.

Valentine Holmes for the respondent.

LAWRENCE, J.: Three main points are raised by the appellants. First, G that no evidence was called or admission made before the committee as is stated in para. 8 of the case and that the case ought to be remitted for this reason; second, that the committee were wrong in holding that they had no jurisdiction to give leave to appeal against conviction in the present case; and, third, that the fine imposed by the magistrate was in excess of that authorised by the Defence (General) Regulations, reg. 55, because the price of the goods which the appellant company purchased without coupons was held to include the amount H of the purchase tax.

The appellants pleaded guilty before the magistrate and were fined £2,000 each. They then gave notice of appeal against sentence but not against conviction, but at the hearing before the appeal committee they applied for leave to amend their notice of appeal so as to appeal also against their conviction. The appeal committee held that they had no power to give leave to appeal against conviction, and the questions of law and fact as to the amount of the fine were then gone into on the basis of the evidence before the magistrate and without hearing any evidence. No objection to this course was taken by the appellant's counsel, and we have been informed that it is the general practice in London not to call evidence where the appeal is only against sentence.

On the second question, I am of opinion that the committee were right in holding that they had no power to give leave to appeal against conviction in the circumstances. By the Summary Jurisdiction Act, 1879, s. 31 (2), as amended by the Act of 1933, notice of appeal must be given within 14 days of the conviction, and by subsect. (3) recognisances must be entered into within 21 days; and by the Metropolitan Police Courts Act, 1839, s. 50, even more stringent conditions are imposed. None of these conditions was complied with, and *Ex parte Ashton* (1) and *R.* v. *Glamorganshire Justices* (2), show how strict the compliance with these conditions must be; and the Quarter Sessions Act, 1849, ss. 3 and 9, also support the view that, in the absence of any express power to give leave to waive the conditions, quarter sessions have no power to do so. I express no opinion upon the further question which was dealt with in argument as to whether there is any right to appeal against conviction where the appellant has pleaded guilty.

The first point is one of difficulty. No authority has been cited that, on an appeal to quarter sessions against sentence where the facts are gone into without strict proof and no objection is taken by counsel for the appellant, the appellant can thereafter contend that he is not bound by the proceedings. It is said to be the general practice at quarter sessions in the City of London, and it is certainly the practice in the High Court, that the same strictness of proof is not demanded in matters relevant to sentence as in matters relevant to conviction. It is true that an appeal to quarter sessions has always been treated as a rehearing, although there appears to be no statutory provision to that effect, see *R.* v. *Newbury* (3). This practice must, I think, have its origin in criminal cases in the presumption of innocence which in appeals to quarter sessions is continued even to a convicted man, but this presumption and the onus upon the prosecution which results from it does not, in my opinion, apply to matters of sentence. On the charge itself innocence is then impossible, and guilt on previous occasions becomes for the first time relevant. There is, accordingly, no onus upon the prosecution to prove anything, though it is convenient, as was done in this case, that the prosecution should inform the court of matters which may be relevant on sentence, which matters by their plea of guilty the appellants must be taken to have admitted. But sentence is the concern of the court and not of the prosecution, and it is the universal practice in the High Court, so far as my experience goes, for the court to accept admissions by counsel for the convicted persons on matters relating to sentence, though no admission by counsel should be accepted before conviction: see *R.* v. *Standing* (4) and *R.* v. *Mason* (5). In my opinion, therefore, an appeal against sentence stands on a different footing from an appeal against conviction, and if, as here, an appeal against sentence is allowed by counsel for the appellant to proceed upon the basis of the evidence in the court below, the appellant cannot thereafter be heard to say that the sentence imposed cannot stand.

On the third question, I am of opinion that the appeal committee are right and that, assuming the facts stated in the case to be in evidence, the committee were entitled to confirm a fine of three times the sum which the appellants paid for the goods in question. The fact that the appellants paid the sum of £750 for the goods is *prima facie* evidence that they might be expected to fetch that sum if they had been lawfully sold. Wherever a sale attracts purchase tax, that tax presumably affects the price which the seller who is liable to pay the tax demands, but it does not cease to be the price which the buyer has to pay even if the price is expressed as *x* plus purchase tax.

For these reasons, in my opinion, the appeal ought to be dismissed with costs.

Lewis, J.: I agree.

Wrottesley, J.: I have had an opportunity of seeing the judgment which has just been delivered, and I agree with it.

Appeal dismissed with costs.

Solicitors: *W. G. R. Saunders & Son* (for the appellants); *Solicitor to the Board of Trade* (for the respondent).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

Re HILLAS-DRAKE, NATIONAL PROVINCIAL BANK, LTD. *v.* LIDDELL

[CHANCERY DIVISION (Simonds, J.), **February 3, 17, 1944.**]

Executors and Administrators—Residuary Estate—Advances—Hotchpot—Valuation—Date for valuing estate for purpose of distribution—Charge of interest on advances.

The testator, by his will devised and bequeathed all his estate to trustees upon trust for sale and conversion and directed that the whole of his trust fund, after the payment of certain annuities and subject to his wife's life interest, should be held in trust for his 3 children in equal shares. He further directed that certain money settled on his children should be brought into hotchpot. The court was asked to decide (i) the date at which the distributable assets of the estate ought to be valued for the purpose of the hotchpot clause, and (ii) the manner in which the rights of beneficiaries in the income of the estate up to the date of distribution ought to be adjusted:

HELD: (i) the rights of advanced and unadvanced benefiicaries should be adjusted by reference to the value of the estate at the date of distribution.

(ii) the share of residuary income distributable to advanced beneficiaries must be debited with interest at 4 per cent. per annum less tax on the amount of the advances brought into hotchpot by them.

Re Gunther's Will Trusts, Alexander v. *Gunther* ([1939] 3 All E.R. 291) and *Re Oram, Oram* v. *Oram* ([1940] 4 All E.R. 161) *not followed.*

[**EDITORIAL NOTE.** A judge of first instance is more or less bound to follow a decision by a judge of co-ordinate jurisdiction. Here, however, it is shown that the decisions in *Re Gunther* (1) and *Re Oram* (2) are so out of line with authority and the proved practice of the court, that to refuse to follow them is not to run counter to authority but to ignore decisions which themselves are quite contrary to authority and practice.

AS TO HOTCHPOT, see HALSBURY, Hailsham Edn., Vol. 34, pp. 424-426, para. 470: and FOR CASES, see DIGEST, Vol. 44, pp. 1247-1250, Nos. 10761-10776.]

Cases referred to:

*(1) *Re Gunther's Will Trusts, Alexander* v. *Gunther*, [1939] Ch. 985; [1939] 3 All E.R. 291; Digest Supp.; 108 L.J.Ch. 395; 161 L.T. 156.

*(2) *Re Oram, Oram* v. *Oram*, [1940] Ch. 1001; [1940] 4 All E.R. 161; Digest Supp.: 109 L.J.Ch. 427.

(3) *Re Tod, Bradshaw* v. *Turner*, [1916] 1 Ch. 567; 44 Digest 1247, *10766*; 85 L.J.Ch. 668; 114 L.T. 839.

(4) *Re Hargreaves, Hargreaves* v. *Hargreaves* (1903), 88 L.T. 100; 44 Digest 1248, *10767*; varying 86 L.T. 43.

*(5) *Re Wills, Dulverton* v. *McLeod*, [1939] Ch. 705; [1939] 2 All E.R. 775; Digest Supp.; 108 L.J.Ch. 286; 160 L.T. 635.

ADJOURNED SUMMONS to determine at what date the residuary estate of the testator should be valued for the purpose of adjusting the rights of the parties *inter se* in the final distribution. The facts are fully set out in the judgment.

H. O. Danckwerts for the plaintiffs, trustees of the will.

Geoffrey Cross for the first two defendants.

Wilfrid M. Hunt for the son of the testator.

SIMONDS, J.: By his will dated Apr. 2, 1930, the testator, Thomas Standish Hillas-Drake devised and bequeathed all his estate to his trustees upon trust for sale and for investment of the proceeds of such sale (subject to the payments therein mentioned) in the investments therein mentioned, and directed his trustees to hold such proceeds and investments (therein called his trust fund) upon trust to pay certain annuities out of the income thereof and to pay the residue of such income to his wife during her life, and subject thereto to hold the whole of his trust fund in trust as to one equal third part for his son Robert, as to one other equal third part for his daughter Beatrice and the remaining third part for his daughter Ella. He then made provision, which is not here material, for the settlement of his children's shares, and by cl. 15 directed that any securities settled by him on the marriage of any of his children should be brought into hotchpot by such child in ascertaining his or her share of his trust fund, and the value of such respective securities should be the cost to him of the same as shown by his "investments book," and he further directed that certain other moneys should be similarly brought into hotchpot by his son.

The testator made certain codicils, to which I need not refer, and died on Feb. 26, 1941. His widow survived, but died shortly after him on Mar. 15, 1941. The amounts to be brought into hotchpot are agreed to be £7,368 by the son, £3,846 by the daughter Beatrice and £4,257 by the daughter Ella.

There is nothing in these, the material facts, to distinguish this estate from many others which are administered by the court or out of court, and it is strange that it should have been necessary, as undoubtedly it was necessary, for the executors to seek the guidance of the court upon the questions that have been raised. These questions relate (*a*) to the date at which the distributable assets of the estate ought to be valued for the purpose of the hotchpot clause, and (*b*) as to the manner in which the rights of the beneficiaries in the income of the estate up to the date of distribution ought to be ascertained. These two questions are logically interconnected. For, if the assets of the estate ought to be valued at the death of the testator for the purpose of hotchpot, so that the fractional share of each beneficiary in the ultimately distributable estate is once and for all determined on that basis, it would surely be logical that each beneficiary should have the same fractional share of the income since the death, and it would be unnecessary to have recourse to the method of adjustment which has been commonly adopted, namely, that the advanced beneficiary should bring into hotchpot on income account 4 per cent. per annum on the amount of his advances and be debited therewith against his share of such income. In my judgment, the fact that such a method has been for so long the common practice of administration in and out of court is of great importance in considering what is the proper date for valuation.

I should have entertained no doubt what is the proper date for such valuation but for the case of *Re Gunther* (1), in which Farwell, J., delivered a considered judgment, and *Re Oram* (2), in which Bennett, J., followed his decision. In the first place, since the object of a hotchpot provision is to ensure equality between beneficiaries, it is relevant to ask what date for valuation will serve that end. If I take the date of distribution as the proper date, then I have no difficulty in securing equality. If there are 3 beneficiaries, of whom one has been advanced £10,000, and there is available for distribution money or securities of the value of £50,000, I add the £10,000 to the £50,000 and give each beneficiary £20,000, debiting £10,000 against the advanced beneficiary. If, on the other hand, I take the date of the testator's death as the proper date, and value as at that date the assets which are available for distribution, I do not necessarily secure equality. It is, indeed, almost certain that I will obtain inequality in greater or less degree.

Let me take a simple example. Again I have 3 beneficiaries, of whom one has been advanced £10,000, and assets available for distribution of the value of £50,000; but these assets at the date of the testator's death were worth not £50,000, but £40,000, and upon this assumption it is by reference to this value that the shares of the beneficiaries are to be finally ascertained. Accordingly, the advanced beneficiary will take 6,666/40,000ths and each of the other beneficiaries 16,666/40,000ths of the distributable estate. The value of the estate being increased from £40,000 to £50,000, the share of the advanced beneficiary will be approximately £8,333, and that of each unadvanced beneficiary £20,833. So far from equality being produced by this method of hotchpot, the advanced beneficiary loses in the distribution substantially more than he has gained by his advancement. Conversely, if the assets have depreciated between the death and the date of distribution, this method of applying the hotchpot provision will allow the advanced beneficiary to retain a substantial advantage. Upon principle, there seems no reason for adopting such a method. Why should the court, aiming at equality, deliberately miss the mark?

Secondly, in a matter of this kind, it is very relevant to consider what has been the practice of the court. I assume for this purpose that there has been no special direction in the will or other instrument under which advances are brought into hotchpot. If there is such a direction the practice of the court, however fair and convenient, may be abrogated, for it is the privilege of a testator to say *stet pro ratione voluntas*. In its absence there is, I believe, an overwhelming case for saying that the practice of the court has been to take the value of the estate at the date of distribution as that by reference to which the rights of the beneficiaries must be adjusted. It is not so long ago that administration by the court, with consequent orders on further consideration, was far more common than it is today, and no unusual feature of those orders was a provision which worked out the rights of the beneficiaries upon a hotchpot. Counsel representing the testator's son, than whom no counsel at the Bar has had a wider experience, was clear that the practice had been in accord with what appeared to be the principle, and that the relevant date has always, in the absence of a special provision, been the date of distribution. In this view the chief registrar and the chief master, whom I consulted, concurred. Finally, it may perhaps be regarded as conclusive of practice that in SETON'S JUDGMENTS AND ORDERS numerous examples are to be found of orders in which, upon distribution, the rights of advanced and unadvanced beneficiaries are adjusted by reference to value at that date (see, e.g., Vol. I, p. 217, Vol. II, p. 1436), but no order, so far as my researches have gone, can be found in which the court has directed the valuation as at the death of a fractional distribution based on that valuation.

Thirdly, it has been said that there is no direct authority upon that matter, apart from the cases to which I referred earlier in my judgment. From this I dissent. There can be no more cogent authority upon a question of this kind than the long practice of the court. The law is implicit in the orders that the court has made. Moreover, though in *Re Tod* (3), SARGANT, J., was primarily concerned with the scope of the decision in *Re Hargreaves* (4) in regard to income, he dealt there also with capital, and expressly declined to adjust rights in capital upon the basis of a valuation at the death and of fractional shares thus ascertained.

Finally, I emphasise the point to which I made earlier reference. It is, perhaps, a practical possibility to combine a distribution of capital upon the basis of a valuation of assets at the death with a distribution of income upon the footing that the advanced beneficiary is charged with interest upon his advances; but the combination is utterly illogical and unscientific, and it is a fair conclusion that such a method of dealing with income was devised just because capital was distributable not upon the basis of a valuation made at the death, but upon the basis of actual value at the date of distribution. I do not need to repeat what I discussed at length in *Re Wills* (5), where I showed that for at least 100 years this had been the common method of dealing with income in the absence of any contrary direction.

It is with these considerations in mind that I come to *Re Gunther* (1). The will there under discussion had no peculiar features; it was, indeed, expressly pointed out that there was nothing to indicate that the testator had in mind any date at which the estate should be valued for the purpose of adjusting the rights of the beneficiaries *inter se*. There, as here, it was against the share of a residuary trust fund similarly defined that advances had to be brought into hotchpot, and the learned judge held that the valuation should be made at the date of the death of the testator, and the rights of the beneficiaries adjusted accordingly. He treated the question as one wholly at large upon which he had no authority to guide him; he rejected the cases in which distribution of income had been discussed as affording him no assistance. He made no reference to the practice of the court, and finally fixed the date of death as that upon which the valuation should be made and the rights adjusted upon the ground that, if any other date were taken, the rights of the beneficiaries would vary according to the speed and energy with which the executors administered the estate and were in a position to distribute it. With all deference, I think that this reason has little cogency. It ignores the fact that it is only by taking the value at the date of distribution that the postulated equality is reached and that the rules and practice of the court assume and require due diligence in administration. Ought I, in the circumstances, to follow this decision? I think not. Uniformity, consistency, certainty in the law, these are highly important attributes of our legal system, and I would not advance my own opinion against the considered judgment of FARWELL, J., if I thought that by doing so I made a breach in the principle which judges of co-ordinate jurisdiction are bound to observe. But, in my opinion, it is the judgment in *Re Gunther* (1), followed by BENNETT, J., in *Re Oram* (2), which is out of line with authority, and is inconsistent with long-established principle and practice. I do not doubt that, deciding as I do, that the rights of beneficiaries advanced and unadvanced must be adjusted upon the basis of the value of the distributable assets as at the date of distribution, I do but reaffirm the old practice of this court and stand again in the ancient way.

Upon the second question, namely, the adjustment of rights in respect of income, I need not repeat what I said at length in *Re Wills* (5) and have already indicated in this judgment. There being no provision to the contrary in the will, the advanced beneficiaries will be debited against their share of residuary income with interest at 4 per cent. per annum less tax on the amount of capital brought into hotchpot by them.

Solicitors: *Shelton, Cobb & Co.*, agents for *Coles & James*, Eastbourne (for all parties).

[*Reported by* Gwynedd Lewis, *Barrister-at-Law.*]

GARVIN *v.* THE POLICE AUTHORITY FOR THE CITY OF LONDON.

[King's Bench Division (Humphreys, Asquith and Cassels, JJ.), **February 2, 1944.**]

Police—Pension—Tuberculosis contracted during period of service—Whether an "injury"—Police Pensions Act, 1921 (*c.* 31), *s.* 2 (1) (*c*).

The respondent entered the City of London Police Force in 1939 being passed as medically fit. In 1942 he was discharged on the ground of his incapacity for the performance of his duty due to pulmonary tuberculosis. He applied to the police authority for a special pension for life under the Police Pensions Act, 1921, s. 2 (1) (*c*), on the ground that the tuberculosis was an injury which he had received in the execution of his duty in the Police Force. The respondent gave evidence that in Sept., 1940, he was on duty for 12 hours per day for a period of 14 days instead of the usual 8 hours and a doctor in evidence stated that the onset of the disease probably occurred about that time. On behalf of the appellants, the police authority, it was contended (i) that tuberculosis was not an injury within the meaning of sect. 2 (1) (*c*) of the Act; and (ii) that there was no evidence to support a finding that the tuberculosis contracted by the respondent was received in the execution of his duty:—

Held: (i) upon the true construction of sect. 2 (1) (*c*) of the Act, tuberculosis is an injury within the meaning of the section.

(ii) at the probable period of the infection the respondent was subjected to debilitating conditions of service owing to the war and there was sufficient evidence to support the finding of the court below that the respondent's tuberculosis was contracted as a direct result of and, therefore, suffered in the execution of his duty.

[**EDITORIAL NOTE.** The question here is whether a disease can be an injury within the meaning of the Police Pensions Act, 1921, s. 2 (1) (*c*). It is well-known that in workmen's compensation cases diseases even of gradual onset have been held to be accidents causing injury and the principle of these decisions has here been extended to the above Act.

As to Special Pensions see HALSBURY, Hailsham Edn., Vol. 25, pp. 348, 349, paras. 577, 578; and for Cases, see DIGEST, Vol. 37, pp. 192-195, Nos. 125-142.]

Cases referred to:

(1) *Brintons, Ltd.* v. *Turvey*, [1905] A.C. 230; 34 Digest 464, *3799*; 74 L.J.K.B. 474; 92 L.T. 578.

(2) *Fife Coal Co., Ltd.* v. *Young*, [1940] A.C. 479; [1940] 2 All E.R. 85; Digest Supp.; 109 L.J.P.C. 49; 162 L.T. 344; *sub nom. Young* v. *Fife Coal Co.*, 33 B.W.C.C. 107.

(3) *Walker* v. *Bairds & Dalmellington, Ltd.* (1935), 153 L.T. 322; Digest Supp.; 28 B.W.C.C. 213.

(4) *Walker* v. *Hockney Brothers* (1909), 2 B.W.C.C. 20; 34 Digest 273, *2311*.

Appeal by the police authority of the City of London from an order of the City of London Quarter Sessions awarding a special life pension under the Police Pensions Act, 1921, s. 2 (1) (*c*). The facts are fully set out in the judgment of Humphreys, J.

H. G. Robertson for the police authority.

F. A. Sellers, K.C., and *L. Ivan Horniman* for the respondent.

HUMPHREYS, J.: On Oct. 31, 1942, Denis Edward Garvin was discharged from the City of London Police Force, in which he was a constable, on the ground of his incapacity for the performance of his duty due to pulmonary tuberculosis. He applied to the police authority for a special pension for life under the Police Pensions Act, 1921, s. 2 (1) (*c*). His application was refused, whereupon he appealed to the City of London Quarter Sessions, as he was entitled to under the provisions of sect. 17 of that Act. Quarter Sessions allowed his appeal and awarded him a special pension.

Sect. 17 (2) provides as follows:

> An appeal shall lie on a point of law from any decision of quarter sessions under this section to the High Court in accordance with rules of court, and the decision of the High Court shall be final, but in all other respects the decision of quarter sessions shall be final.

The Common Council, being the police authority for the City of London, appeal under that subsection to this court.

The points of law for our decision stated in the grounds of appeal may be summarised as follows: (i) The Court of Quarter Sessions was wrong in law in holding that tuberculosis was an injury within the meaning of sect. 2 (1) (*c*) of the Act. (ii) The Court of Quarter Sessions was wrong in law in holding that the tuberculosis of the said Garvin was an injury received in the execution of his duty there being no evidence to support such a finding.

Sect. 2 (1) of the Act is as follows:

> Every member of a police force . . . (*c*) if at any time he is incapacitated for the performance of his duty by infirmity of mind or body occasioned by an injury received in the execution of his duty without his own default, shall be entitled on a medical certificate to retire and receive a special pension for life.

Subsect. (*d*) provides that such a person being so incapacitated by infirmity not occasioned by such injury as aforesaid shall be entitled to retire and receive a gratuity. The police authority under that subsection awarded to Garvin a gratuity of £45 10*s*.

The notes of evidence taken by the Recorder at the hearing of the appeal at Quarter Sessions are not very full, but counsel for the Common Council stated that the facts had never been in dispute and supplemented the notes of the Recorder in one or two respects from his own note. The material facts may be thus stated. Garvin is 26 years of age. He was a strong, healthy boy with no family history of tuberculosis, and in 1933 joined the Royal Horse Guards, being graded medically A.1. He was discharged at his own request in August, 1934, intending to take up music as a means of livelihood and obtained engagements as a trombone player. He joined the City Police in April, 1939, being medically examined and found fit and being selected in preference to other candidates who were rejected. He continued to enjoy good health until Feb. 8, 1941, when he was absent from duty for 9 days suffering from gastric influenza. In November, 1941, he again suffered from gastric influenza, being absent for 8 days. On Mar. 2, 1942, he was again ill, and again his disease was diagnosed as gastric influenza, but his sputum being examined he was sent to Brompton Hospital, where he was found to be suffering from tuberculosis in the right lung. In the opinion of Dr. Southwell, the consulting physician at that hospital, the onset of the disease was certainly subsequent to 1939 and probably within 18 months of the time of his examination, which takes one back, if I have rightly understood the evidence, to about September, 1940, as the earliest probable date of infection.

The respondent was detained for a time at the hospital, then sent to Frimley Sanatorium and, as already stated, discharged from the police force in October, 1942.

Dr. Southwell stated that tuberculosis has spread generally during the war, and expressed the view that an ordinarily healthy person if called upon to serve unusually long hours of duty with irregular meals and frequent wettings would be more liable to the disease in consequence of such conditions. Dr. Crabb, surgeon to the City Police, gave figures showing that tuberculosis in the City Police Force had not increased since the war. The respondent himself gave no particulars of any unusual conditions of service which did not apply equally to other members of the City Police Force. He proved that in September, 1940, he was on duty for 12 hours a day for a period of 14 days instead of the usual 8 hours a day. He was, however, though he gave no special evidence about it, subjected to the appalling conditions of life in the City of London between September, 1940, and the middle of 1941. No evidence would be needed to inform the aldermen of the City of London who composed the Court of Quarter Sessions of what those conditions were.

I turn to the grounds of appeal. In my opinion, ground (i) is quite misconceived. I am not aware of any legal principle or canon of construction which should prevent tuberculosis from being described as an injury occasioning infirmity of body. Pulmonary tuberculosis is induced by an infection of the lung with a bacillus. Medical men speak and write of the lesion of tuberculosis, and a lesion is defined as a wound or injury.

We are told that this is the first occasion upon which this point has come up under this Act for decision by the High Court. But for many years the courts have been occupied in construing the expression to be found in the various Workmen's Compensation Acts "injury by accident." I find that as far back as 1905 it was held in the House of Lords in *Brintons* v. *Turvey* (1) that a workman employed in sorting wool who was infected with the bacillus of anthrax, from which disease he died, had thereby suffered an "accident causing injury." LORD HALSBURY, L.C., in the course of his opinion observed, at p. 233:

> . . . when some affection of our physical frame is in any way induced by an accident, we must be on our guard that we are not misled by medical phrases to alter the proper application of the phrase "accident causing injury," because the injury inflicted by accident sets up a condition of things which medical men describe as disease.

Later he says, at pp. 233, 234:

> It does not appear to me that by calling the consequences of an accidental injury a disease one alters the nature or the consequential results of the injury that has been inflicted.

In *Fife Coal Co., Ltd.* v. *Young* (2), VISCOUNT CALDECOTE, L.C., took occasion in giving his opinion in the House of Lords to review the authorities upon this branch of the law, and in referring to the dissenting judgment of LORD ROBERTSON in *Brintons* v. *Turvey* (1) spoke as follows, at p. 484:

> In view of a later decision, to which I shall refer, it is of some interest to observe LORD ROBERTSON's opinion that nobody could think of saying that a man who had caught cold had met with an accident.

The later decision there referred to was *Walker* v. *Bairds & Dalmellington, Ltd.* (3). In that case the workman had died from broncho-pneumonia caused by a chill contracted through exposure to cold and water. His widow was held entitled to an award on the ground that the workman had suffered "personal injury by accident" within the meaning of the Workmen's Compensation Act, 1925, s. 1. Indeed, the *ratio decidendi* of the cases under the Workmen's Compensation Acts in which the courts have been compelled to disallow the claim of the workman or his dependants, of which an example is *Walker* v. *Hockney Brothers* (4) (the case of the man who gradually over a period of years acquired paralysis by riding a carrier bicycle) has been not the absence of proved injury but the failure, as VISCOUNT CALDECOTE, L.C., puts it, "to identify any event which could however loosely be called an accident."

In the present case there is no necessity to prove an accident, indeed, there is an express provision that the injury occasioning the incapacity may be accidental or not. Sect. 12 (2) of this Act requires the police authority to determine upon an application for a special pension whether the injury was accidental or not. In either case the applicant is entitled to a pension which is, however, slightly smaller in the case of an accidental injury than in the case of a non-accidental one: see Table of Scales of Pensions in Sched. I of the Act.

In my opinion, the first ground of appeal fails. Ground (ii) raises, I think, a more difficult question. The words to be construed are "injury received in the execution of his duty without his own default." No default by the respondent is here suggested. That the words "in the execution of his duty" are to receive a benevolent interpretation is clear when reference is made to sect. 33, the interpretation section. Injury suffered by a member of a police force is deemed to have been suffered in the execution of his duty if so suffered whilst on a journey to or from duty or in consequence of some act performed in the execution of his duty. A pensionable injury, therefore, if I may use that term, may be suffered at a time when the man is not actually on duty. There must undoubtedly be some degree of causal relation between the injury and the duty. It would not be sufficient for the claimant to say "I was a serving policeman when I contracted tuberculosis." It would probably be impossible in any case of pulmonary tuberculosis to establish by evidence the day or week or perhaps even the month during which the infection of the lung occurred, but where it is shown that the conditions of service during the critical period were such as to cause unusual mental and bodily strain which, acting upon a frame ordinarily healthy but at the time enfeebled by long hours of duty, frequent wettings and such matters, rendered it more liable than usual to such infection, I think the injury might be described as being the direct result of and therefore suffered in the execution of duty.

The evidence in the present case was slight. I might have hesitated myself before coming to the same conclusion as the Quarter Sessions, but it is to be remembered that we are not called upon in this appeal to come to any conclusion upon the facts. The decision of Quarter Sessions in that respect is final, the tribunal consisted of persons peculiarly fitted to decide the relevant questions of fact, and I am not prepared to say that there was no evidence upon which they could award a special pension to the respondent. I think the appeal fails and should be dismissed.

ASQUITH, J.: I agree, and desire to add nothing.

CASSELS, J.: I agree.

Appeal dismissed with costs.

Solicitors: *City Solicitor* (for the appellants); *Marris & Shepherd* (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

NOTE.

WILLIAMS *v.* INLAND REVENUE COMMISSIONERS

[HOUSE OF LORDS (Viscount Simon, L.C., Lord Atkin, Lord Thankerton, Lord Russell of Killowen and Lord Porter), **February 29, 1944.**]

An appeal from the decision of the Court of Appeal (LORD GREENE, M.R., SCOTT and MACKINNON, L.JJ.), reported [1943] 1 All E.R., at p. 318, was dismissed without calling on the respondents. VISCOUNT SIMON, L.C., said that he was content to rest his view upon the convincing judgment of LORD GREENE, M.R. The question whether a particular item is to be regarded for income tax and sur-tax purposes as capital or income may involve questions of both fact and law, but, in this case, the Commissioners' determination did not appear to disclose any conclusion of fact which would justify the view in law that the policy moneys were received by the company otherwise than as a receipt of income. The other noble and learned Lords concurred.

Raymond Needham, K.C., and *J. S. Scrimgeour* for the appellants.

The Attorney-General (*Rt. Hon. Sir Donald B. Somervell, K.C.*), and *Reginald P. Hills* for the respondents.

Solicitors: *Evill & Coleman* (for the appellants); *Solicitor of Inland Revenue* (for the respondents).

NOTE.

BONTEX KNITTING WORKS, LTD. *v.* ST. JOHNS GARAGE

[COURT OF APPEAL (Scott, Goddard and du Parcq, L.JJ.), **February 23, 1944.**]

An appeal from the decision of LEWIS, J., reported [1943] 2 All E.R. 690, was dismissed. The court held that on the facts there was a departure from the terms of the contract and this necessarily nullified any special provision limiting the liability for loss of goods. It was implied in a contract for a delivery which was to take only a short time that the delivery would be proceeded with without interruption or delay.

Re BORNE, BAILEY *v.* BAILEY AND OTHERS

[Chancery Division (Vaisey, J.), **January 20, 21, 1944.**]

Wills—Ademption—Legacy of stock—Compulsory acquisition by Treasury at stated price—Value of stock at end of executor's year—Securities (Restrictions and Returns) No. 3 Order, 1941 (*S.R. & O.,* 1941, *No.* 1574), *paras.* 1, 2—*Acquisition of Securities (No. 5) Order,* 1941 (*S.R. & O.,* 1941, *No.* 1575), *para.* 1.

A testatrix by her will made on Mar. 26, 1935, bequeathed £300 Union of South Africa Stock, 1945-75, to her sister. Before the death of the testatrix the Government of the United Kingdom for the purpose of aiding the war in which that Government was engaged required that all such stock should be transferred to the Treasury at a stated price. The testatrix died on Dec. 6, 1941, holding £300 of the said stock, which was subsequently transferred by the executors who received £321 15*s.* 6*d.* in respect of the stock. It was contended that the bequest was adeemed by such Government action :—

Held : (i) the gift was not a specific gift.

(ii) the legatee was entitled to the sum received by the executors from the Treasury in respect of the stock.

[**EDITORIAL NOTE.** To aid the war effort the Government compulsorily acquired many kinds of securities. The question thus arises as to the position of a legatee where such securities form the subject-matter of a bequest. Here the bequest is held not to be a specific bequest of the stock and the legatee is entitled to the sum paid by the Treasury on the acquisition.

As to Ademption, see HALSBURY, Hailsham Edn., Vol. 34, pp. 126-131, paras. 161-169 ; and for Cases, see DIGEST, Vol. 44, pp. 403-416, Nos. 2355-2473.]

Cases referred to :

*(1) *Re Gray, Dresser* v. *Gray* (1887), 36 Ch.D. 205 ; 44 Digest 411, *2421* ; 16 L.J.Ch. 975 ; 57 L.T. 132.

(2) *Robinson* v. *Addison* (1840), 2 Beav. 515 ; 44 Digest 298, *1299* ; 9 L.J.Ch. 369.

Adjourned Summons by the executors asking, *inter alia*, for the determination of a question which together with the facts is fully set out in the judgment.

H. Hillaby for the executors.

M. J. Albery for the legatee.

C. V. Rawlence for other legatees.

A. de W. Mulligan for the next of kin.

Vaisey, J. : The testatrix made her will on Mar. 26, 1935, and died on Dec. 6, 1941. The first question raised by this summons is whether the bequest in the will of the testatrix to the defendant Elizabeth Bailey of £300 Union of South Africa Stock 1945-75 was adeemed by that stock being acquired by the Treasury before the death of the testatrix or whether Elizabeth Bailey is entitled to (i) the sum of £321 15*s.* 6*d.* received by the executors as the purchase price of that stock (ii) the value of that stock ascertained at the end of one year from the death of the testatrix or at some other date and how that value ought to be ascertained.

The bequest in the will is in the following terms :

> I give and bequeath unto my sister Elizabeth Bailey all my personal effects and £300 Union of South Africa Stocks 1945-1975.

It is clear that from these words and from other passages of the will that the gift must not be treated as a specific gift but as a general gift. Starting with the proposition that the gift is a general legacy it is necessary now to see what happened to the stock before the death of the testatrix.

By para. 1 of the Securities (Restrictions and Returns) (No. 3) Order, 1941, it was ordered :

> (1) Except with permission granted by or on behalf of the Treasury no person shall sell, transfer, or do anything which involves the creation of a charge on or affects his rights or powers in relation to, any securities of the classes specified in this Order. (2) Every person resident in the United Kingdom, being an owner of any securities of the said classes, shall, not later than the first day of December, 1941, make a return to the Bank of England in respect of those securities.

The Acquisition of Securities (No. 5) Order, 1941, provided as follows :

> (1) All sterling securities of the description mentioned in the first column of the Schedule to this Order, being securities in respect of which an owner is required to make a return

to the Bank of England under para. 2 of the Securities (Restrictions and Returns) (No. 3) Order, 1941, are hereby transferred to the Treasury at the price specified in the second column of that Schedule in relation to those securities respectively.

From October 10, 1941, this Union of South Africa Stock was bound to be transferred to the Treasury under the Securities (Restrictions and Returns) (No. 3) Order, 1941, para. 2, at the price of £107 5*s.* 2*d.* per cent. Some weeks before the death of the testatrix a circular was issued by the Treasury directing that in the case of such stock a transfer should be executed by the holder into the joint names of high officials of the Bank of England, before Dec. 1, 1941. There can be no doubt that on Oct. 10, 1941, the ownership by the testatrix of this stock which had to be transferred by Dec. 1, 1941, had been determined and that she was from that time entitled only to receive the prescribed percentage sum in respect of that stock. As this is a general legacy it does not matter whether or not the testatrix possessed such stock at the date of her death.

No doubt as in *Re Gray* (1) a general legacy of this nature normally amounts in effect to a direction to the testator's executors to buy the shares or other property designated, and as KAY, J., said, at p. 211 :

> Of course the court will do its utmost to maintain the legacy, and if for any reason the shares could not be bought, or if the legatee had a choice in the matter and said that he would rather not have shares, he would then take the amount of money which would have had to be expended in buying them.

The matter is dealt with in JARMAN ON WILLS, 17th Edn., p. 1043, as follows :

> The case where a testator makes a bequest of shares in a company and the company is in existence at the testator's death, but has ceased to exist within a year of his death, does not seem to have arisen. If the executor need not purchase the shares and transfer them to the legatee until the expiration of the year, it looks as though the legacy would fail on the principle of *Re Gray* (1); but on the other hand it might be argued that the legatee was entitled to the value of the shares, as at the testator's death, though the legacy was not payable until the expiration of the executor's year. It seems probable that the court would hesitate to adopt a construction which would make a general legacy of shares fail because after the testator's death the company had been wound up and reconstructed, but the point is not without difficulty.

I have stated the position on Dec. 1, 1941, and I think that the position a year after the testatrix's death would be the same. It may well be that at that date the Treasury might not have been willing to pay so much for the stock but as there is no other evidence of their value at that date, it must, I think, be taken that the percentage sum paid by the Treasury was the value of the stock at that date.

This case is not covered by any authority. The legacy was not adeemed by the acquisition of the stock by the Treasury and the legatee is entitled to £321 15*s.* 6*d.* in respect of the stock.

Declaration accordingly. Costs of all parties out of estate.

Solicitors : *Godfrey & Robertson*, agents for *Robertson & Thomas*, Amersham (for the plaintiffs) ; *Haslewood, Hare & Co.*, agents for *Francis & Howe*, Chesham (for the first defendant) ; *Ramsden & Co.* (for the second, third and fourth defendants) ; *F. Duke & Sons* (for the fifth defendant).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

Re J. A. A. WITTKE (*deceased*). REYNOLDS AND ANOTHER *v.* KING EDWARD'S HOSPITAL FUND FOR LONDON AND ANOTHER.

[CHANCERY DIVISION (Vaisey, J.), **January 13, 1943.**]

Wills—Discretionary trust—Forfeiture—All beneficiaries resident in enemy territory—Whether residuary gift accelerated.

The testatrix left the income of her estate upon protective trusts for the benefit of her sister, with a discretionary power to pay her any part of the capital of the estate and subject thereto to pay the capital and income to the King Edward's Hospital Fund for London. The sister was resident in enemy-occupied territory and her husband who was the only other possible beneficiary under the protective trusts was also resident there. It was contended that, upon the failure of the protective trusts, the words "subject thereto" in the will caused the property to vest in the King Edward's

Hospital Fund and that the income was not payable to the Custodian of Enemy Property :—

HELD : (i) although the trust was not in terms upon protective trusts during the life of the sister, yet, upon the proper construction of the will and having regard to the gift of capital to the sister, the gift was only one during her lifetime.

(ii) the income was payable to the Custodian of Enemy Property during the lifetime of the sister. A

[**EDITORIAL NOTE.** The judgment herein contains a very necessary caution to those incorporating statutory trusts, the difficulty here being that the protective trusts were not limited to the lifetime of the principal beneficiary. On the second point it was sought to be argued that the protective trusts had failed and that the residuary gift, therefore, took effect, but, although the effect of a forfeiture is to make the income payable to persons resident in enemy-occupied territory, that is not a total failure of the protective trusts which accelerates the residuary gift. B

AS TO ACCELERATION OF SUBSEQUENT INTERESTS, see HALSBURY, Hailsham Edn., Vol. 34, pp. 132, 133, para. 171 ; and FOR CASES, see DIGEST, Vol. 44, pp. 428-432, Nos. 2575-2596.]

SUMMONS by the trustees of the will of the testatrix to determine a question of construction arising thereunder. The facts are fully set out in the judgment.

T. D. D. Divine for the trustees.

C. V. Rawlence for King Edward's Hospital Fund for London. C

H. O. Danckwerts for the Custodian of Enemy Property.

VAISEY, J. : The testatrix made her will on June 22, 1940, and appointed the plaintiffs to be executors and trustees thereof. She gave the whole of her real and personal property to them upon usual trusts for sale and conversion and for the payment of her debts and subject thereto for investment. Then by cl. 3 of her will she directed that the residue should be held by the trustees : D

> . . . as to the income thereof upon protective trusts for the benefit of my sister Louise Berrier Provided always that my trustees shall have power from time to time to pay to my said sister the whole or any part of the capital of my residuary estate in their absolute discretion and subject thereto upon trust to pay the capital and income of my residuary estate to King Edward's Hospital Fund for London.

Apart from the war-time legislation, there is a matter arising upon the words which I have read with which I must deal first. What does the will as it stands E mean ? The reference to "protective trusts" is obviously a reference to the Trustee Act, 1925, s. 33, because that expression, "protective trusts," was invented, for the first time, I think, by that section. The section says :

> Where any income, including an annuity or other periodical income payment, is directed to be held on protective trusts for the benefit of any person (in this section called "the principal beneficiary") for the period of his life or for any less period, then, during that period (in this section called the "trust period") the said income shall, F without prejudice to any prior interest, be held on the following trusts, namely . . .

then, putting it shortly, those trusts are, firstly, for the payment of the income to the principal beneficiary during the trust period or until a forfeiture has arisen by reason of the vesting of the interest in some person other than the principal beneficiary ; and upon that event happening (using the words of the section) : G

> . . . If the trust aforesaid fails or determines during the subsistence of the trust period, then, during the residue of that period, the said income shall be held upon trust for the application thereof for the maintenance or support, or otherwise for the benefit, of all or any one or more exclusively of . . .

certain specified persons, who in the events which have happened in this case may be said to be the principal beneficiary and her husband, "as the trustees in their absolute discretion . . . think fit." H

The sister of the testatrix, Louise Berrier, has a husband living but, as it is believed and understood, no issue. She and her husband are both resident in France and are, therefore, at present, and have at all material times been, affected with enemy status ; and it is admitted that a forfeiture has arisen, within the meaning of this section if it applies ; so that the subsequent trust for the application of the income for maintenance and so forth has arisen.

People who refer to these statutory provisions which are designed to be incorporated in wills ought to do so with care. My attention has been called to the fact that the will of the testatrix does not comply strictly with sect. 33 because it does not direct the income to be held upon protective trusts for the benefit of Louise Berrier for a particular period, that is to say, her life or some less period ; and it is submitted that, that being so, the section is not effectively incorporated in this will. Reading the will as a whole, and disregarding up to this point the provisions of the war-time legislation, except, of course, in regard to the fact that a forfeiture has arisen, it seems to me that, upon the true construction of the will, there is here an effective life interest given for the lady. It might have been that the failure to define the interest would have resulted in there being here an indefinite gift of income but for the fact that the trustees are given a discretionary power to pay the capital to Madame Berrier, which I think is quite inconsistent with any suggestion that the trust could be properly read as a trust for the payment of the income indefinitely because in that view of the will the lady would have been entitled to call for a transfer of the capital. So, in my judgment, upon the true construction of this will, the section is duly incorporated because I think the period of the lady's life must be regarded, as a matter of construction, as necessarily the period during which the protective trusts are to operate. If that is right then it follows that there is, and I suppose always has been, or, at any rate, as from the date of the forfeiture there always has been, an effectively incorporated direction that the income is to be held upon trust to apply it for the benefit of the lady and her husband or one of them.

The question arises whether the interest which they have acquired in that form is or is not caught by the Trading with the Enemy Act, 1939, and the Trading with the Enemy (Custodian) Order, 1939, so as to entitle the Custodian of Enemy Property to call for the payment of that income. Counsel for the Custodian of Enemy Property has called my attention to the relevant sections of the Trading with the Enemy Act and of the Order. The relevant section of the Act is sect. 7, which, so far as material, is in these words :

> (1) With a view to preventing the payment of money to enemies and of preserving enemy property in contemplation of arrangements to be made at the conclusion of peace, the Board of Trade may appoint custodians of enemy property for England, Scotland and Northern Ireland respectively, and may by order (*a*) require the payment to the prescribed custodian of money which would, but for the existence of a state of war, be payable to or for the benefit of a person who is an enemy . . .

Under the powers given by that section the Trading with the Enemy (Custodian) Order, 1939, was made, and that Order directs that any money which would, but for the existence of a state of war, be payable to or for the benefit of a person who is an enemy and any money which is to be deemed for the purposes of the Act—that is the Trading with the Enemy Act—to be money which would but for the existence of a state of war be so payable is to be payable to the Custodian.

It seems to me that no distinction can be drawn between money which is payable for the benefit of an enemy and money which is applicable for the benefit of an enemy ; and, therefore, having regard to the construction of the will, the proper interpretation of the Trustee Act, 1925, and the true scope and intention of the Trading with the Enemy Act, 1939, and the Trading with the Enemy (Custodian) Order, 1939, it seems to me to follow that, as from the admitted forfeiture of the determinable interest given to Madame Berrier, and until further order the income must be paid to the Custodian of Enemy Property. That is all I should feel disposed to do at the moment. I cannot accept the argument that, because it is impossible for there to be an application for the personal benefit of either of these persons, therefore King Edward's Hospital Fund for London comes in by virtue of the words "subject thereto."

It seems to me that the proper answer to the questions raised by para. 1 of the summons is this, that I should declare that, on the true construction of the will and the Trustee Act, 1925, s. 33, and in the events which have happened the income of the residuary estate is during the life of Madame Berrier until further order payable to the Custodian of Enemy Property.

Order accordingly. Costs of all parties to be paid out of arrears of income, any deficiency to be raised out of capital.

Solicitors : *Reynolds, Sons & Gorst* (for the trustees) ; *E. F. Turner & Sons* (for the hospital) ; *Solicitor to the Board of Trade* (for the Custodian of Enemy Property). [*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

GEORGE MONRO, LTD. *v.* THE AMERICAN CUANAMID AND CHEMICAL CORPN.

[Court of Appeal (Scott, Goddard and du Parcq, L.JJ.), **February 17, 1944.**]

Practice—Writ of summons—Service out of jurisdiction—Claim for negligence—Alleged tort committed in America—Damage suffered within jurisdiction—"Tort committed within the jurisdiction"—R.S.C., Ord. XI, r. 1 (ee).

The defendants were an American corporation carrying on business in America who manufactured a product known as Cyanogas used for the destruction of vermin. By an agreement with the plaintiff company the latter were appointed the sole distributors of Cyanogas in the British Isles, the plaintiffs buying the Cyanogas from the defendants and the property in the goods passing in America. The agreement further provided that the contract should be construed and respective rights of the parties be determined according to the laws of the State of New York. The plaintiffs subsequently sold a quantity of Cyanogas to Boots Cash Chemists, Ltd., and the Shropshire County Council who entered into an agreement to rid a certain farmer's premises of rats, purchased the Cyanogas. Subsequently the farmer brought an action against the Shropshire County Council for negligence in the execution of its contract with him. The county council served a third party notice on the plaintiffs and at the trial judgment was given against the county council and the plaintiffs were ordered to contribute towards the damages and costs as to one half. The plaintiffs then sought to recover these sums from the American corporation on the ground of negligence. The alleged wrongful act was that the American corporation sold a dangerous article in America without giving a due warning of its nature. The question to be determined was whether the plaintiffs were entitled under R.S.C., Ord. XI, r. 1 (*ee*) to an order granting leave to serve the writ on the American corporation out of the jurisdiction:—

Held: leave to serve a writ out of the jurisdiction can be granted under R.S.C., Ord. XI, r. 1 (*ee*) only where a tort has been committed within the jurisdiction and it is not sufficient that damage from a tort committed out of the jurisdiction has occurred within the jurisdiction.

[**EDITORIAL NOTE.** The substance of the argument here is that where both the commission of a tortious act and the occurrence of damage are essential to an action, then, for the purposes of r. 1 (*ee*), it is sufficient if the occurrence of damage is within the jurisdiction although the tortious act is performed outside the jurisdiction. This contention is rejected and it is held to be necessary that the tort itself must be committed within the jurisdiction.

As to Service out of the Jurisdiction, see HALSBURY, Hailsham Edn., Vol. 26, pp. 31-33, para. 44; and for Cases, see DIGEST, Practice, pp. 351, 352, Nos. 667, 668.]

Cases referred to:

(1) *Draper* v. *Trist*, [1939] 3 All E.R. 513; Digest Supp.
(2) *The Hagen* (1908), P. 189; Digest Practice, 340, *579*; 77 L.J.P. 124; 98 L.T. 891.
(3) *Societe Generale de Paris* v. *Dreyfus Brothers* (1885), 29 Ch.D. 239.
(4) *Johnson* v. *Taylor Brothers & Co., Ltd.*, [1920] A.C. 144; Digest Practice, 340, *581*; 89 L.J.K.B. 227; 122 L.T. 130.

Appeal by the defendants from an order of Birkett, J., confirming an order of the Master allowing service of the writ out of the jurisdiction. The facts are fully stated in the judgment of Scott, L.J.

St. John Field, K.C., and *Harold Brown* for the appellants.

Ryder Richardson for the respondents.

Scott, L.J.: The plaintiffs, who are a company carrying on business in this country, had entered into an agreement with the defendant corporation (I use the word "defendant" in the provisional sense) on Feb. 1, 1938. The defendant company are manufacturers of a product known as Cyanogas used for the destruction of vermin such as rats, mice and insects. The agreement appointed the plaintiffs sole distributors for the sale and distribution of Cyanogas in the British Isles, the plaintiffs buying the goods from the defendants.

The affidavit in support of the application for leave to serve out of the jurisdiction says: "At some date prior to December, 1940, the plaintiffs as distributors sold to Boots Cash Chemists, Ltd., a quantity of Cyanogas." It then says that at some date in the autumn of 1940 a farmer called Wynn had entered into an agreement with the Shropshire County Council for the deratting of his farm and that on various dates the Shropshire County Council had purchased Cyanogas from Boots Cash Chemists; that on Sept. 29, 1941, Wynn commenced proceedings in the High Court alleging that he had suffered damage by reason of the negligence of the Shropshire County Council in the execution of his agreement with them; that in December, 1941, the Shropshire County Council served a third party notice on the present plaintiffs claiming an indemnity against the claim of Wynn or a contribution; that LAWRENCE, J., tried that case a year later, in December, 1942, and gave judgment in the action for the farmer against the county council and ordered that Monro, Ltd., the present plaintiffs, should contribute towards such damages and costs to the extent of one half.

The plaintiffs by their writ are now seeking, according to the affidavit, to recover from the American corporation sums of money in respect of that judgment. Leave to serve was obtained on that affidavit alone, and the only additional statements in the affidavit relevant to the case are that the solicitors in London, whom the plaintiffs thought might accept service on behalf of the proposed defendants, were instructed not to accept service; that the deponent had the conduct of the proceedings and believed that Monro, Ltd., had a good cause of action; that the defendant company carry on business at 30, Rockefeller Plaza, New York, United States of America, and was not a British corporation, and that he applied for leave. On that, under the present procedure under R.S.C., Ord. XI, by which leave to serve out of the jurisdiction can be obtained from a master, the master gave leave.

In my view, that affidavit is gravely defective in the amount of information that ought to be given in an affidavit supporting an application for leave to serve notice of a writ out of the jurisdiction; and the defect is not lessened by anything contained in the agreement which has now been produced in a subsequent affidavit.

An essential feature of the agreement made on Feb. 1, 1938, was an express provision "that the contract should be construed and the respective rights of the parties hereto determined according to the laws of the State of New York." That in itself would naturally make the courts in this country incline to be specially careful about giving leave to serve out of the jurisdiction. Under that contract there was no term which called for performance in the United Kingdom, therefore the provision which is contained in R.S.C., Ord. XI, r. 1 (*e*) about a breach of contract within the jurisdiction has no application. Similarly, there is no evidence that the contract was made anywhere except in the United States; therefore no ground whatever within R.S.C., Ord. XI, r. 1 for giving leave for service out of the jurisdiction can be based upon the contract.

The argument before us has accordingly been limited to a claim of tort vaguely indorsed upon the writ without any further particulars. In the particulars given in the affidavit about the proceedings in this country resulting from sales through the plaintiffs to Boots Cash Chemists, there is nothing to indicate, in my view, that anything took place in this country which could be clearly attributed to the defendant company as a tort committed within the jurisdiction.

In my view, even if it were possible to argue that any such cause of action based solely on tort could be said to have arisen within this jurisdiction, it is not enough to satisfy the requirements of R.S.C., Ord. XI. I express no opinion as to whether, if an act were committed out of the jurisdiction which did not give rise to a cause of action in tort until something further had happened within the jurisdiction such as resultant damage that could properly be regarded as a tort taking place within the jurisdiction, because it is not, in my opinion, necessary to decide that question in the present case.

The wording of R.S.C., Ord. XI, r. 1 (*ee*) is: "Where the action is founded on a tort committed within the jurisdiction." Great care is necessary in applying that sub-rule. In the present case there is not even now clear evidence before the court that the damages claimed in the proceedings between the farmer and the Shropshire County Council and the present respondents were due to a tort committed by the American company within the jurisdiction. *Prima facie*, the defendants did nothing except manufacture their material. How it was used, what had happened to it, whether it had been interfered with in any way within this jurisdiction, nobody knows.

Even assuming that the material was not in any way misused or tampered with, still I think it would be right to refuse leave to serve, in the discretion of the court here, if the cause of action in tort in respect of what was done in the manufacture of the goods in America could only be said to arise in this country because the damage arose here. I say that for this reason. Service out of the jurisdiction at the instance of our courts is necessarily *prima facie* an interference with the exclusive jurisdiction of the sovereignty of any foreign country where A
service is effected. I have known many continental lawyers of different nations in the past criticise very strongly our law about service out of the jurisdiction. As a matter of international comity it seems to me important to make sure that no such service shall be allowed unless it is clearly within both the letter and the spirit of R.S.C., Ord. XI. This is not the kind of case where service ought to be permitted outside the jurisdiction unless quite exceptional circumstances are shown, and certainly not upon such an affidavit as was filed in the present B
case, which I think was seriously defective. It is most important that the realities of the case should be considered; and, in the present case, as far as I can judge, the agreement made between the plaintiffs and the American company was one by which the American company were seeking carefully, with the consent of the plaintiffs, to keep all claims against them within the exclusive jurisdiction of the United States.

For these reasons I think the appeal must be allowed with costs here and C
below.

GODDARD, L.J.: I agree. I wish that it had been possible for us to have had some information as to the ground upon which the master and BIRKETT, J., refused to set aside the service of the writ on the summons which was taken out after a conditional appearance had been entered. I still more wonder how it ever came that an order for substituted service was made on this affidavit. D

The rule is perfectly clear upon the subject, that no leave should be granted unless it should be made to appear to the court or judge that the case is a proper one for service out of the jurisdiction under R.S.C., Ord. XI. There is nothing at all in this affidavit which shows that the case comes within a mile of the Order. All we know is this, looking at the affidavit which was filed on the application, that the plaintiffs seek to recover certain sums of money which they have been ordered to pay to certain other people in this country as damages E
sustained by them by reason of the negligence and breach of contract by the defendants, the American corporation.

A contract was referred to in the affidavit (it was not then exhibited, but it was exhibited in the proceedings to set aside the writ) in which it appeared that, so far as the breach of contract was concerned, the breach of contract, if any, occurred in America and nowhere else, and counsel for the plaintiffs has not F
attempted to support the order on the ground that there was any breach of contract. If the master had seen the contract I am sure he would have come to that conclusion, because it is as clear as daylight; and not only that, it is also clear that the parties provided that the contract should be construed and the respective rights of the parties thereto determined according to the law of the State of New York. That would not have prevented service within the jurisdiction, if the breach had been committed within the jurisdiction, but, G
inasmuch as the contract provided for the passing of the property in New York, it is impossible to see how any breach of contract occurred within the jurisdiction.

Therefore we are left with a claim against the defendants for negligence. We are not told in what respect it is alleged that they have been negligent. All that the affidavit has recited is that a Shropshire farmer brought an action against the Shropshire County Council for negligence in de-ratting his farm. The county council joined George Monro, Ltd., who were the proposed plaintiffs H
in this action and who were the people with whom the American company had a contract, claiming an indemnity against them. We do not know why. We are asked to infer, I suppose, that it was because something which George Monro, Ltd., supplied to the Shropshire County Council was dangerous or defective; but it does not say so. We do not know upon what grounds the farmer sued the Shropshire County Council, still less do we know the ground upon which the county council joined George Monro, Ltd., or upon what ground the trial judge gave judgment against them.

It would be quite sufficient for the purpose of disposing of this appeal to say that the affidavit which was before the master who gave leave to serve out of the jurisdiction does not begin to show that there is a claim to be brought against the American company which comes within R.S.C., Ord. XI. I do not want to decide the case merely upon that, because we know enough of the facts now, from what counsel has told us, to know that the negligence that is alleged is that the American corporation sold in America, as I have pointed out, and the property passed in America, a substance which was dangerous and in respect of which it is said a warning ought to have been given.

The only words of R.S.C., Ord. XI, r. 1, which could have relevance in this case seem to me to be in para. (*ee*). One of the grounds upon which a writ can be ordered to be served out of the jurisdiction is: "the action is founded on a tort committed within the jurisdiction." I am quite satisfied that those words ought to be read as a tortious act committed within the jurisdiction; where the act relied upon as a tort is committed within the jurisdiction.

In this respect I would like, if I may, to refer to something that I said in *Draper* v. *Trist* (1), at p. 525. I venture to cite it because I said it without any dissent from either SIR WILFRID GREENE, M.R., or CLAUSON, L.J., who were the other members of the court:

> I find it of some assistance in coming to a conclusion in this case to analyse in my own mind what exactly are the cause of action and the right of action, which are two different things. The action is one of that class which is known as an action on the case, akin to an action of deceit. In an action on the case, the cause of action is the wrongful act or default of the defendant. The right to bring the action depends on the happening of damage . . .

Here, the alleged tort which was committed in my view was a wrongful act or default; it was the alleged sale of an alleged dangerous article without giving a warning of its nature. That was committed in America, not in this country.

I think, as DU PARCQ, L.J., said in the course of the argument, all that this rule is aiming at is where a foreigner comes to this country and commits a tort in this country such, for instance, as driving a motor car and running somebody down by negligent driving. That is not exhaustive. It may be a libel uttered by him here; many things may be done here; but it does not seem to me that in this case the facts, as far as we know them, show that any tort was committed within the jurisdiction.

One reason for construing the words of R.S.C., Ord. XI, "committed within the jurisdiction" as being limited to a wrongful act committed within the jurisdiction is this. Although the American law is founded on our common law, it does not at all follow that, in the development of the common law, the same view has been taken of the law of tort in all respects by American courts as has been taken in these courts. In fact, if anyone peruses DR. GOODHART'S most excellent work, ESSAYS IN JURISPRUDENCE AND THE COMMON LAW, they will find instances set out where, as regards America, the Court of Appeal in New York have taken different views on some matters in relation to the law of tort from what have been taken in England. I do not know what the American law may be on the subject, but it might be that in some cases an act which would be regarded as tortious in England would not be regarded as tortious in America, and *vice versa*. Therefore, it would be a very strong thing for an English court to exercise jurisdiction over a foreigner in respect of an act committed by him in America, although some damage might be alleged to be suffered in England, when the act in America might not be considered by the courts of that country to be tortious at all.

Accordingly, I think that this leave ought never to have been given and that this appeal should be allowed and the writ set aside.

DU PARCQ, L.J.: I agree.

There is now no suggestion that the claim indorsed on this writ can be brought within R.S.C., Ord. XI, r. 1 (*e*), but reliance is placed, and placed solely, on sub-head (*ee*), that is to say, it is said that the action is founded upon a tort committed within the jurisdiction, the alleged tort being negligence.

I agree with what has been said by SCOTT and GODDARD, L.JJ., that the affidavit does not show at all what the alleged negligence is. It may be dangerous to draw any inference from it, but, having been instructed by counsel for the plaintiffs on the subject, I am willing to infer that the negligence alleged is the circulation, or the putting on the market, of a dangerous substance, with written instructions to use it in a dangerous way. That was an act of commission, done in the United States of America, and it is highly artificial to say that the tort was committed within the jurisdiction of the English courts.

The principle of the rule is plain. Looking at the substance of the matter without regard to any technical consideration, the question is: Where was the wrongful act, from which the damage flows, in fact done? The question is not where was the damage suffered, even though damage may be of the gist of the action. A

I wish to add this, in order to show that I most heartily agree with what has been said by Scott and Goddard, L.JJ., as to the importance of this appeal. Jurisdiction in respect of service abroad is now exercised by the masters. From 1852 until, I think, 1937, it had always previously been exercised by a judge of the High Court. I say nothing as to the desirability of the change in the rule, except that it must not, I am sure, be regarded as indicating that the rule-making authority intended to minimise the gravity of the jurisdiction. B Whoever exercises that jurisdiction, it should always be remembered that an application under the rule should never be granted without full knowledge and careful consideration of all the relevant circumstances. Goddard, L.J., has already referred to R.S.C., Ord. XI, r. 4, which itself makes the matter plain enough, but it is, I think, as well to remind those who now exercise the jurisdiction of the very important observations made in this court in 1908 by Farwell, L.J., C in *The Hagen* (2), at p. 201, who said that, during what were then the present sittings, Vaughan Williams, L.J., and he had on more than one occasion to consider R.S.C., Ord. XI, and had come to the conclusion which he then put under three heads. In the first of the three heads the court adopted the statement of Pearson, J., in *Societe Generale de Paris* v. *Dreyfus Brothers* (3), at p. 242. I will not read it. I need only say that there Pearson, J., called attention D to the high importance of the matter and said that the court ought to be exceedingly careful before it allowed a writ to be served out of the jurisdiction.

The second point was that, if on the construction of any of the sub-heads of R.S.C., Ord. XI there was any doubt, it ought to be resolved in favour of the foreigner.

The third point was that full and fair disclosure was necessary (that is, full and fair disclosure in the affidavit in support of the application) and that a E failure to make such full and fair disclosure would justify the court in discharging the order even although the party might afterwards be in a position to make another application.

I would only add to that a reference to what was said by Lord Haldane in the House of Lords in *Johnson* v. *Taylor Brothers* (4) at p. 153:

> Ord. XI, r. 1, does not lay down in imperative terms a new principle of law as to be F applicable in all cases. What it does is, while leaving intact the old principle that by the law of England jurisdiction depends, broadly speaking, on presence within the jurisdiction, to enable the court to give special leave for service out of the jurisdiction in certain circumstances. The court may do so, that is to say that the court has a new power which it is enabled to exercise in particular cases which seem to it to fall within the spirit as well as the letter of the various classes of case provided for. This appears to me to entitle the court to refuse to give such leave in an instance in which the proceeding, though for a breach within the jurisdiction and in the letter within the G terms of the rule, is in substance not so.

I need not, perhaps, have read that last sentence, because in the present case it is plain, to my mind, that this application falls neither within the spirit nor within the letter of the rule, but it is as well that it should always be before the mind of the master who is dealing with an application of this character.

I agree that this appeal should be allowed with costs.

H

Appeal allowed with costs.

Solicitors: *R. C. Bartlett & Co.* (for the appellants); *Watson, Sons & Room* (for the respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

B.A. COLLIERIES, LTD. *v.* LONDON AND NORTH EASTERN RAILWAY CO.

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and Luxmoore, L.JJ.), **March 15, 1944.**]

Mines—Coal mine—Seam passing under railway—Notice of intention to work—Counter-notice—Assessment of compensation—Allowance for damage to railway if worked—Mines (Working Facilities and Support) Act, 1923 (*c.* 20), *s.* 15.

The plaintiff company was the owner of a coal mine and part of the coal lay under certain works of the defendant railway company. The plaintiffs gave notice of their intention to work this coal, but the defendant company by a counter-notice given under the Mines (Working Facilities and Support) Act, 1923, s. 15, sterilised the coal, that is, for the protection of the railway, the coal was not to be worked but compensation was to be paid. It was contended on behalf of the railway company that, since, if the coal had been worked, the mineowner would have to pay a contribution for injury to the railway, the coal was for that reason of less value to the mineowner and this fact ought to be taken into account in assessing the compensation :—

HELD : the provisions of the 1923 Act as to compensation for sterilisation and as to contribution in the case of damage to the railway due to the working of the coal are separate and distinct. The liability to make contribution comes into existence only when damage occurs. The assessment of the compensation for sterilisation, therefore, should take no account of the damage which might occur if the minerals were worked.

Decision of MORTON, J. ([1943] 2 All E.R. 637) *reversed.*

[**EDITORIAL NOTE.** The Mines (Working Facilities and Support) Act, 1923, s. 15, substituted new provisions for the Railways Clauses Consolidated Act, 1845, ss. 78-85. These provide for the sterilising of coal under railway undertakings and the question here discussed is the assessment of compensation to the coal owner where the railway insists on the coal being left unworked for the protection of its works.

AS TO COMPENSATION IN CASE OF RAILWAYS, see HALSBURY, Hailsham Edn., Vol. 22, pp. 649, 650, para. 1399 ; and FOR CASES, see DIGEST, Vol. 11, pp. 156-158, Nos. 371-381.]

Cases referred to :

(1) *Eden v. North Eastern Ry.*, (1907) A. C. 400; 11 Digest 167, *374;* 76 L.J.K.B. 940 ; 97 L.T. 254.

(2) *Howley Park Coal and Cannel Co. v. London and North Western Ry. Co.*, (1913) A.C. 11; 11 Digest 153, *353;* 82 L.J.Ch. 76; 107 L.T. 625.

APPEAL by the mine owners from a decision of MORTON, J., reported ([1943] 2 All E.R. 637) where the facts are fully stated.

N. L. C. Macaskie, K.C., and *L. M. Jopling* for the appellants.

Sir Walter Monckton, K.C., S. Pascoe Hayward, and *J. B. Herbert* for the respondents.

LORD GREENE, M.R. : The judgment which I am about to read is the judgment of LUXMOORE, L.J., and myself.

The question raised by this appeal is one of considerable difficulty, the more so as the careful judgment of MORTON, J., presents what at first sight appear to be convincing reasons for a decision in favour of the respondents. The question turns upon the true interpretation of certain provisions of the Mines (Working Facilities and Support) Act, 1923, which introduced radical changes in the law governing the mutual rights and obligations of railway companies and mineowners in respect of minerals lying under or adjacent to railway lines and railway works. Previously to the passing of that Act these rights and obligations were governed in part by the mineral code contained in the Railways Clauses Consolidation Act, 1845, ss. 77-85, and in part by the common law.

The effect of the code may be summarised as follows. By sect. 77 a railway company on a purchase of land did not acquire the minerals thereunder (save such as were necessary for the construction of its works) unless they were expressly purchased. It thus avoided the necessity of paying for the minerals when it purchased the land and was able to defer payment for the support required until such time as the minerals were about to be worked. When that time arrived, the code gave to the railway company the right to protect itself against damage to its railway or works which might be caused through working the minerals within a prescribed distance (normally 40 yds.) therefrom. By sect. 78 a mineowner proposing to work the minerals within this area of protection was put under the obligation to serve a notice of his intention on the company and, if the company considered that the proposed working would damage its works and was willing "to make compensation for such mines or any part thereof" to the mineowner, the latter was forbidden to work the mines. The compensation, if not agreed, was to be settled as in other cases of disputed compensation, *i.e.*, under the Lands Clauses Consolidation Act, 1845. A

The railway company did not under this procedure become the owner of the minerals. They were merely sterilised. The "compensation" payable was the full value of the minerals required to be left unworked, namely, what they would have sold for if worked, less the cost of working them: *Eden* v. *North Eastern Railway* (1). The code made no provision for compensation to the royalty owner. By sect. 79, if the company was not willing to treat, the mineowner was entitled to work the minerals and provided he did so in a proper and usual manner he was under no liability for any damage which might be caused to the railway works. B

Two points must be borne in mind. First, the code gave the railway company no opportunity of protecting itself against the results of mining outside the 40 yds. limit. This no doubt was due to the fact that the danger of deep mining in its effect on the surface of neighbouring land situate at some distance from the scene of the operations was not sufficiently appreciated in the year 1845. Secondly, not only did the code impose no liability on the mineowner to contribute to the cost of repairs to railway works necessitated by mining outside the 40 yds. limit, but, if the railway company did not exercise the right to sterilise the minerals within the 40 yds. limit, the mineowner incurred no liability to contribute to the cost of repairs necessitated by working them, provided they were worked in a proper and usual manner. C D

But the common law came to the assistance of the railway company in the first of these two matters. In *London & North Western Ry. Co.* v. *Howley Park Coal & Cannel Co.* (2), it was decided that a railway company enjoyed the common law right of lateral support for its railway from mines lying outside the 40 yds. limit and was, accordingly, entitled to restrain the mineowner from working them in such manner as to withdraw that support. The result of this decision was no doubt a serious matter for the mineowners since they found themselves prevented from working their adjacent minerals without having the right to receive compensation as was the case under the code in respect of minerals within the 40 yds. area of protection. It was said in that case that the mineowner could have required his obligations in respect of minerals outside the 40 yds. area to be taken into account in fixing his compensation under the original notice to treat when the railway company acquired its surface lands. But this, so far as we can see, would only have been the case if the surface acquired and the minerals belonged to the same person; and, in any event, it afforded poor consolation to the mineowner to whom in the majority of cases it could give nothing but a feeling of regret for a lost opportunity. E F

The situation thus created was one which merited and received the attention of the legislature. We are told that the new code for "Minerals under railways," which is contained in Pt. II of the Mines (Working Facilities and Support) Act, 1923, embodies a compromise effected by the parties interested. The draftsmanship certainly supports this view, but, if it be correct, it cannot affect the question of construction with which we are concerned. This much, however, it is permissible to say, that the legislature, for reasons which appeared to it to be sufficient, imposed a new code under which each party lost certain of the privileges which it had previously enjoyed and received privileges to which it was not previously entitled. G H

The new code so enacted begins by extending the old area of protection beyond the 40 yds. specified in the old code. The new area of protection is an area extending from the railway works to a point equal to one-half of the depth of the seam proposed to be worked, *i.e.*, the greater the depth of the seam the wider the area of protection. With regard to this area the old requirement as to notice of intention to work is applied and the railway company is empowered to serve a counter-notice specifying the minerals comprised in the notice which it requires to be left unworked. The company is to pay compensation in respect of the minerals so specified. But the rate of compensation is to be different according as the specified minerals are within or without a distance of 40 yds. from the works. The rate in the latter case is to be one-third of the rate in the former case. The exact language of these provisions for compensation we will deal with later. For the moment all that we wish to do is to point out that the mineowner is given a right which he did not have before, namely, the right to receive some compensation in respect of so much of the specified minerals as lie outside the old 40 yds. area of protection which he is prevented from working. Incidentally, the company obtained the benefit of having a notice of intention to work minerals lying outside the old 40 yds. area of protection. A new feature of the compensation provisions is that compensation is to be payable to the royalty owner in respect of specified minerals which are sterilised by the counter-notice. This right of the mineowner to receive and the obligation of the company to pay compensation in respect of specified minerals lying in the outer area of protection, *i.e.*, the area outside the 40 yds. is the principal benefit received by the former and the principal detriment suffered by the latter under the new code.

Under sect. 79 the mineowner is given the same right to work in a proper and usual manner (but not otherwise) the minerals comprised in his notice in respect of which no counter-notice has been served which he enjoyed under the old code in respect of similar minerals within the old area of protection.

Sect. 79A confers an entirely new right on the company and imposes an entirely new obligation on the mineowner. It may fairly be regarded as providing the company with a *quid pro quo* for the detriment which it has suffered in the matter of compensation as above explained. Under that section a mineowner who works minerals in the new extended area of protection which he is entitled to work as not being comprised in a counter-notice is liable, even if his working is conducted in a proper and usual manner, to contribute towards expenses incurred by the company in making good damage to any railway works other than "protected works," *i.e.*, works comprised in a counter-notice. The right to call for a contribution so conferred on the company is obviously an important one. It enables the company in a suitable case to limit the area of the minerals which it requires to sterilise and so to limit the compensation which it will be called upon to pay. This it can do in any case where it is prepared to take the risk of damage to a railway work rather than pay compensation; for it will know that, if damage does occur, part of the cost of repairing it will be thrown upon the mineowner. It will be necessary at a later stage to examine these provisions in greater detail. It is sufficient to note here (i) that there are scales laid down for ascertaining the percentage of the contribution to be made by the mineowner with an upward limit to be determined in each case in accordance with certain elaborate directions; (ii) that provision is made enabling the mineowner to make deductions from royalties not exceeding in amount one-third of his contribution.

It is convenient at this point to state briefly what are the contentions of the parties to this appeal. The railway company contends that, in arriving at the compensation to be paid by it in respect of the specified minerals in its counter-notice, account should be taken of the fact that, if the counter-notice had not been served, the mineowners would have been liable to contribute to the making good of any damage caused by working them. This potential liability, it was said, made the minerals less valuable in the hands of the mineowners and the arbitrator must accordingly form an estimate of the risk and make an appropriate deduction from the compensation, making, of course, an allowance in respect of that part of the liability which the mineowners would be able to pass on to the royalty owner. The mineowners, on the other hand, contend that the provisions for compensation to be paid by the railway company and the provisions for contribution to be made by the mineowners are separate and distinct: that the former apply only in regard to specified minerals and that the latter apply only in regard to minerals that are not specified: that the liability to make contribution only arises where damage has in fact occurred: and that the possibility of its occurring is not an element which can be taken into account in fixing the compensation to be paid in respect of specified minerals.

In order to arrive at a solution of the problem thus raised, it is necessary to examine in some detail the language of both sets of provisions. We will begin with those relating to compensation.

(i) The obligation to pay compensation is expressed in sect. 78 (4) in the following words :

> . . . the company shall pay compensation to the mineowner and the royalty owner (if any) for the loss caused by the specified minerals being left unworked.

Attention is drawn by counsel for the railway company to the words "compensation for the loss caused" as contrasted with the words in the old code A
"compensation for such mines." This change in language, it was said, was due to the introduction of a new element in the computation of compensation which was not present under the old code, namely, the potential liability of the mineowner to contribute under sect. 79A. We cannot give any such force to this change in language. The more probable explanation of the change appears to us to be that words had to be found which would cover not only the case of the mineowner, but also the new case of the royalty owner. The words "com- B
pensation for such minerals" would have been inappropriate to the case of the royalty owner and, accordingly, a phrase was selected which would cover both cases.

(ii) Sect. 78A (1) provides that the compensation shall be determined by arbitration and the proviso to that subsection lays down rules for ascertaining the compensation payable to the mineowner and the royalty owner "so far as C
such compensation is payable in respect of the value of specified minerals." Now the basis of compensation under the old code was that of the value of the minerals affected, namely, what they would have sold for if worked, less the cost of working them : *Eden's* case (1). The use of the word "value" in sect. 78A (1) of the new code does not suggest that any departure from the old basis of compensation is intended or that a new factor, unknown under the old code, is to be taken into account. The potential liability to contribute cannot D
affect the value of the minerals when brought to market, nor, as it seems to us, can it properly be described as part of the cost of working within the meaning of *Eden's* case (1). It is worth pointing out that, if (as is contemplated by the language of sect. 78 (5) of the new code) the area of protection in any given case does not extend beyond the old 40 yds. limit, the railway company would, if their contention is correct, pay a less sum in compensation under the new code than it would have paid in respect of the same minerals under the old code. E

(iii) Under para. (ii) of the proviso the compensation payable to the mineowner is to be expressed as a sum per ton, the rate in the case of minerals under the outer area of protection being one-third of that "awarded" in the case of minerals lying under the inner area of protection. The more natural meaning of this provision appears to us to be that the arbitrator is to ascertain the tonnage (see para. (iv)) within each of the two areas of protection : he is then to deter- F
mine the value of the minerals within the inner area expressed as a rate per ton ; lastly, he is to apply one-third of that rate to the tonnage within the outer area. On this basis no separate ascertainment of the value of the minerals in the outer area falls to be made. All that it is necessary to do is to ascertain their tonnage figure and apply to it one-third of the rate per ton which has been ascertained on a valuation of the minerals within the inner area.

If this view is correct it will be impossible to make the allowance claimed by G
the railway company in respect of the potential liability to contribute and at the same time carry out the directions contained in para. (ii). In order to ascertain what allowance ought to be made (assuming that it is to be made) it will be necessary for the arbitrator to form an estimate of the damage likely to be caused by working both sets of minerals. If the value of the minerals within the inner area is to be affected by the potential liability in respect of those minerals the rate per ton applicable to those minerals will be correspondingly H
reduced. If the interpretation which we favour is the correct one, it would follow, on the respondents' argument, that the compensation payable in respect of minerals within the outer area would be reduced by reason of the potential risk of damage caused by working those within the inner area. This result might well be unjust since the effect of working the former might be widely different from that of working the latter.

It was, however, argued that this interpretation is not the correct one. It is said that the proper procedure is to ascertain the total tonnage in the two areas, value the total so found, making a proper allowance for potential contributions to be occasioned by the workings in both areas, reduce the figure so arrived at to a rate per ton and award compensation at the full rate in the case of minerals within the inner area and one-third of the full rate in the case of minerals within the outer area. It does not appear to us that this method complies with the instructions contained in the paragraph. It has the effect of attributing to the minerals within the inner area a value the amount of which is necessarily affected by the contribution to be expected by reason of damage caused by workings in the outer area and *vice versa*. It does not arrive at the true value of the minerals in either area since that could be ascertained only by valuing the minerals in each area with reference to the damage to be expected from their working alone without regard to damage to be expected from working the minerals in the other area. The damage in respect of which contribution is to be made under sect. 79A is damage done to individual works. It may very well be that the works protected by a counter-notice will be of various kinds and scattered over a considerable area. The damage to be apprehended in the case of any one of these works may well be attributable wholly to workings in the outer area or wholly to workings in the inner area or partly to one and partly to the other. We do not see how with any pretence of logic the present claim of the railway company can be made to fit in with the scheme for fixing compensation which is contained in sect. 79A (2).

(iv) Proviso (iii) to sect. 78A (1) deals with the compensation in respect of the value of specified minerals which is to be paid to the royalty owner. It is to be based on "the amount which would have been received by way of royalty in respect of the specified minerals if they had been worked out in the ordinary course." The rate of royalty in the case of minerals within the inner area is to be the contractual rate while the rate in the case of minerals within the outer area is to be one-third of that rate plus one-third of a penny per ton. According to the argument for the railway company, the royalty owner will never receive compensation at the rates thus specified in any case where the working of the specified minerals would have led to damage to a railway work. The reason for this is that, under sect. 79A (3), if the specified minerals had been worked and the mineowner had become liable to pay contributions, the royalty owner would have had to suffer a deduction from "any royalties then or thereafter becoming due from him (the mineowner) to the royalty owner under the lease" with a complicated upper limit to the amount to be deducted in certain cases. This deduction, it is said, would have fallen to be made if the minerals had been worked out "in the ordinary course." But this, if we understand the sections rightly, would lead to a most remarkable result. The amount of the deduction from royalties which is permitted under sect. 79A (3) is the same, whether the damage done is caused by workings under the inner or the outer area. It is a deduction from the royalties "payable under the lease." But the compensation payable to the royalty owner varies according as the specified minerals lie within the inner area or within the outer area. An illustration will explain our difficulty. Let us assume that the arbitrator finds that the damage to be apprehended to a particular work would, if the minerals had been worked out "in the ordinary course"—reading those words as the company reads them—have involved a contribution by the mineowner of £150 and that, in the opinion of the arbitrator such damage would have been attributable in equal shares to the working of the minerals in both areas. Let us further assume that the contractual royalty is 6*d.* per ton. On the argument for the railway company the compensation payable to the royalty owner under sect. 78A (1), proviso (iii) would be, in the case of the minerals within the inner area: 6*d.* × tonnage less one-third of £75, and in the case of the minerals within the outer area 2⅓*d.* × tonnage less one-third of £75. In other words, the deduction from the royalty owner's compensation would be the same in each case although his gross compensation in the one case is only just over one-third of what it is in the other.

(v) Having regard to the remarkable results which would follow if the contention of the railway company were correct, we cannot bring ourselves to believe that, if the legislature had intended those results, it would not have said so in express terms. The only express words which the respondents can point to as importing such an intention are the words in sect. 78 (4) already discussed, namely, "compensation for the loss caused by the specified minerals being left unworked." These would, indeed, be pregnant words if they carried the consequences imputed to them by the respondents.

We will now turn to the provisions relating to contribution.

(i) An examination of sect. 79A confirms us in the view that the contention of the mineowners is the correct one. Under that section the mineowner is to contribute :

> . . . towards the expenses properly incurred, or to be incurred, by the company A
> from time to time thereafter [*i.e.*, after the working] in making good any damage caused by such working to the railway or works of the company (not being protected works comprised in any counter-notice relating to such area of protection).

According to this language the liability arises when and only when damage is actually caused. Moreover, the damage in respect of which contribution can be claimed is, as we have already said, damage to individual works. According to the argument for the railway company the arbitrator will have to form an B
estimate of the damage which would have been occasioned to each of the protected works comprised in the counter-notice if the specified minerals had been worked. This estimate he will have to form with regard to each individual work, be it a line of railway, a signal box, a plate-layer's hut, a tunnel or a goods siding. Moreover, he would have to decide with regard to each work whether the damage would have been caused by working the minerals within the inner area or by working those within the outer area. He would also have C
to form an estimate of the time which would have elapsed before the effect of the workings came to the surface and caused damage to the railway work. In the case of deep workings this might be a matter of years, but he would have to form an estimate of how long it would take since he would have to assess the present value of a hypothetical contribution to be made at some future date.

It appears to us to be in the highest degree unlikely that the legislature would have imposed such a task on the arbitrator without express language to that D
effect. The effects of mining operations on buildings on the surface of superjacent or adjacent land is notoriously capricious and impossible to forecast with any certainty. It may, no doubt, be possible to say that damage will be caused, but something more is needed since it is the extent of that damage to an individual work and the cost of making it good that have to be assessed. We may quote here two passages from the Second and Final Report of the Royal E
Commission on Mining Subsidence (Cmd. 2899, dated June 23, 1927), which counsel for the railway company agreed describe with accuracy the uncertainty of the incidence of subsidence. In para. 7, it is said :

> The amount of subsidence is therefore not quantifiable and can scarcely be predicted with any accuracy, even when all the conditions are tolerably well ascertained.

In para. 9 it is said :

> The precise amount of subsidence cannot be determined beforehand, and the surface F
> area over which it will extend, the evenness or unevenness of the depressions, the period within which the process will begin and end—all these things turn upon conditions and circumstances which in many instances are not capable of forecast.

These statements were made some four years after the passing of the Act, yet we are asked to assume that, in spite of this uncertainty, the arbitrator is to perform the task, not merely of forecasting generally that damage will occur and when it will occur, but that damage of an ascertainable amount will occur G
to specific works and buildings.

In the present case we are told that the parties have agreed upon a figure for the allowance to be made in respect of potential contribution, if such an allowance is to be made. But this affords no answer to the difficulty, it merely avoids it. It may very well be that, in some cases, the damage to be apprehended can be measured with sufficient precision to enable the parties to arrive at a reasonable compromise. But an arbitrator must decide in accordance H
with the strict provisions of the Act and the fact that in this particular case and perhaps in other cases the parties are able to come to an agreement is not a relevant matter to consider when the true construction of the Act is involved.

(ii) But the task of the arbitrator would not end here. There are elaborate provisions for fixing an upward limit to the contribution to be made. We will not occupy time in referring to them at length. Suffice it to say that the limit is fixed by reference to the tonnage of minerals, gotten or ungotten, in any seams lying under an ascertained area, whether they be the seams which are proposed to be worked at the date of the notice or not. In the Second Schedule, where rules are laid down for determining what that area is to be, it is provided (para. 2) that :

> . . . the area shall extend longitudinally for a distance co-extensive with the part of the railway or works upon which expenditure has been incurred in making good the damage, together with a length beyond that distance at either end thereof equal to one-half of the mean depth of the seam or seams in question.

This appears to us to mean that the area can only be ascertained by reference to damage which has actually occurred and cannot be ascertained until it does occur.

These considerations drive us to the conclusion that the liability to make a contribution comes into existence when and only when damage occurs and cannot be regarded as having a potential existence before it occurs. The provisions of the Act relating to compensation and those relating to contribution appear to us to be quite separate and distinct and the existence of the latter cannot be taken as governing the measure of the former.

The appeal is allowed with costs here and below.

MACKINNON, L.J. : If, at common law, A was the owner of the surface of land, with a right of support to the surface and of a building upon it, and B was the owner of minerals beneath that surface ; if they made an agreement by which B was to abstain from working the minerals beneath A's land, and A undertook to compensate B for the loss he sustained by losing the value of the minerals which he would, but for the agreement, have mined and sold, how would B's compensation be estimated ? If B formulated his claim he might say : " But for our agreement I should have won from under your land so much coal, which I should have sold for £x. The expenses I should have incurred in raising and marketing this coal would have been £y. Therefore I have lost £$(x - y)$. Please pay me that." A might reply : " There is another factor to be taken into account. At common law I have a right to support. If in the absence of our agreement you had worked the coal under my land you would have damaged my house by subsidence. I could get damages from you for that. Either you would have had to leave a pillar to support my house (in which case the coal in that would have no value to you) or you would have had to pay me £z as damages. Therefore £z is another factor to put on the debit side of the calculation, and in truth the value of the unworked coal to you is £$x-(y+z)$."

If in the earliest days of railways A was a railway company and B the owner of subjacent minerals, and they made the suggested agreement, no doubt the railway company would be justified in contending that this factor of £z was an item to be set on the debit side against the £x factor in B's calculation. But since 1845 the rights and liabilities of a railway company and the owner of subjacent minerals have depended to a large extent upon statute and not only on common law. Sect. 78 of the Act of 1845 created a statutory equivalent to an agreement between A and B by which B should abstain from working coal for 40 yds. on either side of A's railway line, and A should compensate B for the loss he thereby sustained. Could A contend that, under the provision for compensation under sect. 78 the proper formula was not £$(x-y)$, as B said, but was £$x-(y+z)$? Clearly not ; for by sect. 79 it was provided that, if A did not cause sect. 78 to operate, B might work the mines " in a proper and necessary manner " ; and, if damage was done to the railway by improper working, B should be liable for the cost of repair. On the rule of *expressio unius*, it is manifest that the £z factor would only arise if B worked improperly, and not from A's common law right. As A could not contend that improper working by B must be anticipated and its effects estimated, clearly what I have called the £z factor could not be taken into account in estimating the compensation payable by A to B under sect. 78.

The *Howley Park* case (2) decided that, in respect of land outside the 40 yds. region dealt with by sect. 78, A's right of support, and right to damages if that support were withdrawn, remained as at common law, unaffected by sects. 78 and 79. If A was minded to increase the area of sterilisation of underlying coal, and agreed with B that B should abstain from working not only for the 40 yds., but for a further 100 yds. beyond the 40, and that A would compensate him for the loss of all the coal in this enlarged area, could A, when he and B came to discuss the amount to be paid, say to B : " It is true that, under sects, 78 and 79 I cannot ask you to debit in the account the £z factor as regards the 40 yds. area, but I can do so as regards the coal in the 100 yds. area added by our agreement. For in that area my rights are not affected by sect. 79, but depend on the common law." One must assume that the £z factor as to coal in the 100 yds. area is presently estimable, though I confess I cannot imagine that it could be done except by an assessor who was omniscient as to past, present, and future. That is a difficult question. I do not think it is necessary to attempt to answer it, but it may afford a consideration to be borne in mind in confronting the still more difficult problem that confronts us under the Act of 1923. In that problem we have no concern with either the common law, or any agreement between the parties. The problem depends solely on the construction of what I believe must be the most obscure and complicated piece of legislation in the entire statute book.

The 1923 Act did four things: (i) the royalty owner, who was ignored in the 1845 Act, is brought in as a possible party to arbitrations; (ii) the 40 yds. area of sterilisation is continued as the "inner area" of protection, but there is added to it an outer area of protection, depending on the depth of the seams beneath; (iii) the mineowner is to be compensated for the loss of his minerals that are sterilised, but by a purely arbitrary provision he is to have full compensation in the inner area, but only one-third of that in the outer area; (iv) if the minerals are not sterilised by a counter-notice and may be worked, the liability of the mineral owner for damage through subsidence caused by improper working is (by the new sect. 79 (2)) continued, as in the 1845 Act; but there is a wholly new provision (by sect. 79 (*a*)) whereby the mineral owner is to a certain extent to be liable for the cost of repairing subsidence damage caused by his proper working; this "certain extent" is a percentage of the cost of repairing such damage calculated according to the amazingly complicated terms of sect. 79A and the First and Second Schedules. This quantification of his liability is again purely arbitrary.

A counter-notice having been given the mineral owner is, under sect. 78 (4), to be entitled to compensation. There seem to be two, if not three, factors to be taken into account on the credit side of his account: (i) impliedly, the price which he would realise by selling the coal, less the cost of winning it and bringing it to market; (ii) expressly, under sect. 78A (2), the increased cost to him of working other minerals not specified in the counter-notice; and (iii) under sect. 81 and Sched. III the additional expenses for severance—which is to be estimated on yet another purely arbitrary basis of calculation. It is no doubt because of the existence of (ii) (and perhaps of (iii)) that sect. 78A (1) uses the words "so far as such compensation is payable in respect of the *value* of the specified minerals."

The question now raised is as to the proper factors to be taken into account in estimating the "value of the specified minerals" to the mineowner. On the credit side, without doubt, must be set down what he would realise for the coal when won. On the debit side, beyond doubt, must be set the expenses of working it, and getting it to market. This means £$(x-y)$ in the formula I used at the beginning. The respondents allege that there is a further item to be set on the debit side, the equivalent of what I specified as £z. This item they allege is the prospective liability of the mineowner under sect. 79A and the First and Second Schedules if, in the absence of a counter-notice, he had worked the specified minerals.

It seems to be assumed that this hypothetical liability can be ascertained, and reduced to a figure per ton of coal in the inner area, and to a third of that figure per ton of coal in the outer area. It is even asserted that that figure has been agreed in this case between the parties. I am not impressed by this. The alleged agreed figure, presumably so much per ton of the coal in the inner area, and so much per ton in the outer area, must have been arrived at by a purely arbitrary compromise based on conflicting guess-work.

As I said earlier, the rights and liabilities of these parties depend solely upon the provisions of this 1923 Act: there is no question of the common law or contract. The respondents must establish that solely, by reason of the provisions of the Act, they are entitled to have this disputed factor taken into account in estimating the compensation payable by them in respect of the specified minerals. There has not been, and cannot be, any suggestion that any words in the Act expressly so provide. It must, therefore, be a matter of implication; and so far as I can see that implication must be derived solely from the word "value" in the phrase "so far as such compensation is payable in respect of the value of specified minerals."

The basis of the argument for the respondents is the proposition, in general terms: "Admittedly 'value' means the price to be realised by the tons of coal less the cost of working them: sect. 79A creates a new and special item in the cost of working: therefore that item must be taken into account." If sect. 78A had defined the "value of specified minerals" as being "the value they would have if, being minerals not affected by a counter-notice, they were worked pursuant to sect. 79 and sect. 79A," this might be the result, despite the practical impossibility of estimating the hypothetical liability under sect. 79A. But sect. 78A makes no such provision, nor any reference, unless by implication, to sects. 79 and 79A as bearing on "the value of specified minerals." Hence the counter argument of the appellants that sects. 78 and 78A are complete in themselves as dealing with minerals specified in a counter-notice, while sects. 79, 79A and 79B are also complete in themselves as dealing with minerals not affected by a counter-notice: so that the meaning of "value" in sect. 78A is not to be modified by reference to sects. 79 and 79A.

After long hesitation over the most obscure and difficult problem with which I have ever been confronted, I have come to the conclusion that the appellants are right. Lord Greene, M.R., whose judgment I have read, has indicated various reasons for this conclusion with which I agree. I will not repeat them, but perhaps add the consideration that, under sect. 78A, there are to be separate arbitrations between railway company and mineowner, and between railway company and royalty owner. Whereas under sect. 79A (6) there is to be only one arbitration between railway company and mineowner, but the royalty owner is to have notice thereof and to be entitled to appear and be heard. This seems also to point to the conclusion that the two sets of sections are independent and self-contained and are not to be treated as inter-related.

But I prefer to rest my conclusion upon the simpler and broader ground that, in estimating "value" under sect. 78A, it is not possible to estimate the prospective and hypothetical liability under sect. 79A. The arbitrator who is estimating "the value of specified minerals" under sect. 78A must do so *now.* The damage to the railway or works for which under sect. 79A contribution is to be made by the mineowner must occur in the future, it may be a distant future. Who can tell what will be "the works" of the railway company to which at that future date damage may be caused by the working of the minerals? In this case it happens that "the Mapperley Tunnel" is the only "protected work" specified in the counter-notice given under sect. 78 (2). But, if the principle claimed by the respondents is to apply, any of the works or buildings above the protected area may be damaged by working coal, and so be a subject for contribution by the mineowner under sect. 79A. When the arbitrator assesses *now* the "value" under sect. 78A, these works may be (*e.g.*) a railway station, signal boxes, sidings, a warehouse. Any of these may be destroyed a month hence by German bombs. The station, or the signal box, may be out of date and require shortly to be rebuilt. No one can know what will be "the works" above the protected area at the future date (possibly remote) when subsidence from the mining below may cause damage to them. The respondents have not attempted to say that the mineowner's possible liability under sect. 79 (2) for damage caused to the railway works by improper working is also a factor to be taken into account in assessing the "value of the specified minerals," no doubt because no arbitrator can forecast the likelihood of any such improper working. I think that it is equally impossible for an arbitrator to forecast what will be the works that may be at a future date damaged by the mining beneath them—quite apart from the difficulty (which I should suppose almost amounted to impossibility) of forecasting what damage by such working is likely to be caused to *any* works.

In the result I think this appeal should be allowed with costs here and below.

Appeal allowed with costs. Leave to appeal to the House of Lords.

Solicitors: *Gregory, Rowcliffe & Co.* (for the appellants); *W. H. Hanscombe* (for the respondents).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

Re AN ARBITRATION BETWEEN PARKER AND OTHERS AND GREAT WESTERN RAILWAY CO.

[COURT OF APPEAL (Goddard and du Parcq, L.JJ., and Vaisey, J.), **March 1, 1944.**]

Railways—Amalgamation—Compensation of employees—Practice of former company to retain employees after 60*—Dismissal at* 60 *by amalgamated company—Railways Act,* 1921 (*c.* 55), *Sched. III, paras.* 3, 4, 5.

The appellants were members of the clerical staff of the Cardiff Railway Co. at the time when, under the Railways Act, 1921, that company was amalgamated with the Great Western Railway Co., and the appellants were transferred into the service of the latter company. The Cardiff company had a practice of not retiring its clerical staff when they reached the age of 60 years but of retaining them so long as they were able to perform their duties. The practice of the Great Western company was to dismiss such staff at the age of 60 years and the appellants were dismissed in accordance with this practice in 1941. They claimed compensation under the provisions of the Railways Act, 1921, Sched. III, para. (3) of which in effect provides that, if the servant of a railway company should, by reason of an amalgamation, be in a worse position in respect to the conditions of his service as a whole, he should be entitled to such compensation as the arbitrator should think fit; para. (5) of the same schedule in effect provided that, if the servant should suffer direct pecuniary loss by reason of the amalgamation, he should be entitled to compensation in accordance with the provisions of the Local Government Act, 1888, s. 120. The arbitrator found that by reason of the amalgamation each of the appellants was in a worse position in respect of his conditions of service as a whole as compared with his conditions of service with the Cardiff Railway Co. and that each had suffered direct pecuniary loss by reason of the amalgamation. The arbitrator then awarded compensation. It was argued by the respondents (i) that the cases did not come within the schedule to the Railways Act, 1921; and (ii) that the award by the arbitrator was bad on the face of it inasmuch as he found for the appellants under both para. (3) and para. (5) of the schedule and yet awarded one sum. It was contended that the same sum could not be right under both paragraphs:— A B C D E

HELD: (i) the appellants were entitled to compensation under the Railways Act, 1921.

(ii) the sum which can be awarded under para. (5) may also be the correct sum to award under para. (3) and it was impossible to say that was an error in law on the face of the award in this respect.

Decision of TUCKER, J. ([1943] 2 All E.R. 743) *reversed.*

[**EDITORIAL NOTE.** In the court below it was held that this loss was not a direct result of the amalgamation, and reliance was also placed upon the fact that this was merely a voluntary practice of the old company. The Court of Appeal have rejected these views and hold that, since there is a worsening of the employee's position, there is a right to compensation. F

AS TO COMPENSATION FOR LOSS ON AMALGAMATION, see HALSBURY, Hailsham Edn., Vol. 27, pp. 117, 118, para. 267; and FOR CASES, see DIGEST, Vol. 38, p. 339, Nos. 500-503.]

APPEAL by employees of the amalgamated company from a decision of TUCKER, J., dated Oct. 18, 1943, and reported [1943] 2 All E.R. 743, where the facts are fully set out. G

H. M. Pratt for the appellants.

H. J. Wallington, K.C., and *N. R. Fox-Andrews* for the respondent railway company.

GODDARD, L.J.: In my opinion, this appeal succeeds, and, with all respect to TUCKER, J., from whom we are differing, I venture to say that, in my view, it is a very clear case. Under the Railways Act, 1921, as is well known, provision is made for the transfer of the officers and servants of railway companies which were being welded into one big company, and provision was made with regard to the compensation of those officers and servants if the terms of service in the amalgamated company were not as favourable as they had been in the original company. Sched. III, para. (3), provides: H

No existing officer or servant so transferred shall, without his consent, be by reason

> of such transfer in any worse position in respect to the conditions of his service as a whole (including tenure of office, remuneration, gratuities, pension, superannuation, sick fund or any benefits or allowances whether obtaining legally or by customary practice of the constituent or subsidiary company) as compared with the conditions of service formerly obtaining with respect to him.

In the preceding paragraph there was a provision by which the amalgamated company could abolish the office or situation of any existing officer or servant which they may deem unnecessary, and an existing officer or servant could relinquish his office or situation if he was called upon to perform duties which were not analogous or which were an unreasonable addition to those which he had performed in his previous service. In that case there is no doubt that the compensation which was to be paid is expressly dealt with under para. (5), which provides:

> Every existing officer or servant whose office or situation is so abolished or who so relinquishes his office or service or whose services are dispensed with on the ground that they are not required or for any reason not being on account of any misconduct or incapacity, or whose salary, wages, or remuneration are reduced on the ground that his duties have been diminished, or who otherwise suffers any direct pecuniary loss by reason of the amalgamation or absorption . . . shall be entitled to be paid compensation for such pecuniary loss . . .

If para. (5) applies, the compensation is to be calculated in accordance with the provisions of the Local Government Act, 1888, s. 120. If, on the other hand, only para. 3 comes into account, the arbitrator, to whom these matters are referred in default of agreement, is to award such sum to be paid by the amalgamated company as he may think sufficient to compensate the servant for such loss or injury.

The matter which arises in this case is one which is not altogether unfamiliar. The Cardiff Railway Co., which was a separate company and is now amalgamated with the Great Western Railway Co., had a practice under which, once they had taken a man into their clerical service, they did not dismiss him so long as he was capable of doing his work. The arbitrator found, and this is a matter of fact which is essentially one for him, that:

> At the time of and previously to the amalgamation, in the case of members of the clerical and office staff of the Cardiff Railway Co. who were of good conduct, it was the customary practice of that company, apart from very exceptional circumstances (which did not in fact exist in the case of any of the claimants at the time of his dismissal), to retain their services so long as they were capable of properly performing their duties. Such practice formed part of the conditions of each of the claimants' service with the Cardiff Railway Co.

Therefore, a man who entered the Cardiff Railway Co. would know that he had got security of tenure so long as he was capable of performing his duties. Although I do not think it is necessary to consider whether the express words "whether obtaining legally or by customary practice of the constituent or subsidiary company" are directly in point here, it is quite obvious that Parliament was considering or giving effect to the state of affairs which they recognised, namely, that service in railway companies is regarded as what is commonly called a sheltered occupation; that is to say, once a man enters a railway company's service, if he behaves himself, he stays there for a very long time. In the case of the Great Western Railway Co., they had a practice, and their practice was this. Although no doubt they could give a week's notice to any man, so long as a man behaved himself—I dare say there may have been certain exceptions as there were in the Cardiff Railway Co.—he would stay there until he was 60, and at 60 his service was terminated. It, therefore, does not seem to be capable of very much argument and it really seems as clear as daylight that the conditions of service under which a man served the Great Western Railway Co. were not as favourable to him as those which obtained when he was serving the Cardiff Railway Co., because in the Cardiff Railway Co. when he reached the age of 60, if he lived to 60 and if he was in good health at 60, he would go on working. Now that he is with the Great Western Railway Co. he will have to go into private life and his wage will cease, whereas if the Cardiff Railway Co. had still been in existence, he would have been able to go on working for such time as he was physically capable of doing so. How long that would be is a matter which the arbitrator has to consider. He may find in the case of some particular man that the man was in a very delicate state of health or had some incipient disease or had a bad family history or something of that kind, and he

might say : " I do not think this man has more than a couple of years' work left in him, and I shall give him compensation having regard to that." In regard to another man he might say : " I see no reason why this man should not be able to go on working for some time, although I should have said his expectation of life was up to 75 I am not necessarily going to say he would have remained physically capable of working up to 75, and I shall make some deduction on that account." Therefore, if the compensation has to be assessed under paras. (3) and (4), it is quite obvious that the matter is left entirely at large for A
the arbitrator. There is no indication given in the Act as to how the compensation is to be assessed. Under para. (5) it is indicated as to how it is to be assessed ; you have to turn to the section of the Local Government Act, 1888, and find out there how the compensation is to be calculated.

It is objected in this case that the arbitrator has found that each of the claimants is in a worse position in respect to the conditions of his service as a whole as compared with the conditions of his service with the Cardiff Railway B
Co., which is tantamount to saying that the arbitrator finds that the claimants have a claim under para. (3), and he has also gone on to say that each of the claimants in consequence of the dismissal suffered direct pecuniary loss by reason of the amalgamation, which is a finding under para. (5). It is said that that cannot be right. With all respect, I do not see why it cannot be right. It may very well be (and I think it probably is the case although I do not know that it is necessary to give a direct finding on the matter) that para. (5) and C
para. (3) can overlap. There are some matters with regard to conditions of service which might form a ground for compensation under paras. (3) and (4), which would not be a direct pecuniary loss under para. (5). Instances have been given by myself and by DU PARCQ, L.J., and VAISEY, J., in the course of the argument. But, on the other hand, it seems to me to be perfectly possible that the particular conditions which are worse or found to be worse in the new service D
may also cause a direct pecuniary loss by reason of the amalgamation under para. (5), and when you have got a case, such as we have at present, it seems to me it is very odd (although, as I say, I do not know that it is necessary expressly to decide it) that you cannot support the award both under paras. (3) and (4) and under para. (5). The arbitrator here has not said : Under para. (3), if that is the man's proper remedy, he is to have so much, but if his proper remedy is under para. (5) he is to have a different sum, and, indeed, he could not do that E
in this award because he was not asked to make his award in the form of a special case. It is said, therefore, that this award is bad on its face because the arbitrator has only fixed one sum.

I ought perhaps to mention here that, as I understand the view of TUCKER, J., from whom we are differing, he thought the award was bad on its face because it professed to give compensation for dismissal. We cannot agree with that because that is exactly in our view one of the things which the Act contemplates F
in the particular circumstances which arise here. It is because of the liability to be dismissed at 60 that the conditions with the Great Western Railway Co. are worse than with the Cardiff Railway Co., and we cannot agree with TUCKER, J., on that point.

With regard to the question that only one sum has been awarded, no matter whether it is under para. (5) or under para. (3), it seems to me that in a case like G
this the arbitrator can say to himself, and probably did say to himself : " Whichever it is under, I ought to give the same amount, and here under para. (5) I find a direction given to me as to how to calculate it. If I was awarding under para. (5) I should give him that sum, and exactly the same considerations which have arisen apply to para. (3) because the pecuniary loss which he has suffered here is due to the fact that his conditions of service have been worsened." I very much doubt whether, in any circumstances, it could be said that this H
award is bad on its face because the arbitrator has awarded a particular sum in this way, and, in my opinion, if he has gone through, as I should think it is extremely likely he has gone through, the mental process I have described, I can see no reason why he should not. If he is confined to paras. (3) and (4) of the schedule, it would simply mean that he would have to make the best estimate he could of the man's loss. I can see no reason why he should not, if he likes, pray in aid the assistance which the scheme of the Local Government Act gives him in trying to find out what is a fair sum to award.

In my opinion, therefore, this appeal succeeds on all points. I can see nothing in this award to show that it is bad in law on its face, and I think the appeal must be allowed and the award of the arbitrator should stand.

DU PARCQ, L.J.: I agree, and but for the fact that we are differing from TUCKER, J., which, of course, has occasioned me to consider the matter very carefully, I should have thought that this was a very plain case.

In his judgment TUCKER, J., in summarising the points made before him by counsel for the railway company, which he adopted, says this, at p. 746:

> The arbitrator has treated the dismissal as giving rise to the claim for compensation, whereas the dismissal took place in the ordinary course of practice of the respondent company and was not directly caused by the transfer as required by para. (3) or by reason of the amalgamation as required by para. (5).

With great respect, it seems to me that that criticism did much less than justice to the arbitrator's very careful award. He has not treated the dismissal as giving rise to the claim for compensation, but it appears to me that he has done exactly what the Act required him to do. He has found as a fact, after considering, as he tells us, all the evidence which was adduced before him, that:

> Each of the claimants during his service with the respondent company became without his consent, by reason of his transfer to the respondent company, in a worse position in respect to the conditions of his service as a whole as compared with the conditions of service with the Cardiff Railway Co. formerly obtaining in respect to him.

That means, as the arbitrator explains by other findings, that, while he was an employee with the Cardiff Co., his employment was governed by a practice by which he would be entitled to remain in their service so long as he was capable of performing his duties, whereas owing to the amalgamation and the transfer he became subject to the practice under which he had to leave the employment of the Great Western Railway at the age of 60. If you are going to compensate him for that worsening of his conditions of service, you are bound to ask: What does he lose by the possibility that at the age of 60 he may still be fit for work and yet have to leave his employment? If you do not know what the position is going to be when he reaches the age of 60, because you are assessing compensation in advance, you have to make the best estimate you can. If you are in the happy position of knowing the facts, because the man has reached the age of 60 and you see him before you and hear about his state of health, then you are bound to have regard to the facts as you know them. But it is really misleading to say that, because the arbitrator says that this man has to go at 60 and finds that he could have done his work for many more years, therefore he is in fact giving damages or compensation for the dismissal. It may be that the result comes to much the same thing, but the arbitrator has founded himself, and properly founded himself, upon the very words of the Act under which he is performing a duty.

It is enough to say, I think, that there is clearly no error in this award on the face of it so far as paras. (3) and (4) are concerned. I agree with GODDARD, L.J., that it is probably right to say that the provisions of paras. (3) and (5) to some extent overlap, and, without deciding it, I am very much disposed to think that the arbitrator was quite right in saying that in the circumstances a claim might be made under para. (5). If so, then under para. (5), no doubt, subject to what was agreed between the parties, the arbitrator was bound to have regard to the provisions of the Local Government Act, 1888, but when he had arrived at a figure in his mind under para. (5), there was nothing whatever to prevent his saying that the same sum was a sufficient sum under para. (4). I fail to follow the argument that it is impossible that the same sum should be right under both. There again it seems to me, with great respect, that TUCKER, J., has erred. I see nothing whatever in the award, in spite of the ingenious argument of counsel for the railway company, to suggest that the arbitrator has made any mistake at all. Certainly no error of law is apparent to me on the face of it, and I agree that this appeal must be allowed.

VAISEY, J.: I agree, and I have nothing that I can usefully add to what GODDARD and DU PARCQ, L.JJ., have said.

Appeal allowed with costs. Leave to appeal to the House of Lords refused.

Solicitors: *Ince, Roscoe, Wilson & Glover*, agents for *Allen, Pratt & Geldard*, Cardiff (for the appellants); *P. W. Pine* (for the respondent railway company).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Re SCARISBRICK SETTLED ESTATES.

[Chancery Division (Cohen, J.), **February 28, 1944.**]

Settlements—Capital money—Application by tenant for life to raise sum to enable him to maintain mansion house as family residence—Jurisdiction of the court to sanction—Settled Land Act, 1925 (*c.* 18), *s.* 64 —*Settled Land and Trustee Acts* (*Court's General Powers*) *Act,* 1943 (*c.* 25), *s.* 1.

By a deed of settlement and in the events which happened the applicant was the tenant for life of certain settled properties including the mansion house known as Scarisbrick Hall. The applicant was married in 1919 but there was no issue of the marriage and, subject to the possibility of a second marriage and to there being issue of that marriage and to the possibility that he might give to his present wife an interest not exceeding a life interest under the settlement, the applicant was absolutely entitled to the settled estates. The applicant took out a summons asking that £10,000 be raised out of the capital moneys held on the trusts relating to the settled estates to enable him to maintain and carry on Scarisbrick Hall as his family residence and to execute any necessary repairs thereto. Evidence was adduced that it was in the interests of all parties interested under the settlement that the applicant should continue to reside for the time being in the mansion house in order that the property might not deteriorate. It was contended on behalf of the applicant that the court had jurisdiction to make the appropriate order under the Settled Land Act, 1925, s. 64, as amended by the Settled Land and Trustee Acts (Court's General Powers) Act, 1943. It was contended on behalf of the trustees of the settled estates that sect. 64 of the 1925 Act, as amended, only authorised the application of capital moneys in "management" as defined by sect. 1 (5) of the 1943 Act, and that all the purposes for which the applicant required the moneys did not come within that definition :—

Held : the continued residence for the time being of the applicant was essential for the preservation of the Hall, which was in the interests of all parties under the settlement. The jurisdiction of the court under sect. 64 is not confined to management and this was a proper case for the exercise of the jurisdiction.

[**EDITORIAL NOTE.** It is here suggested that the Act of 1943 has shown by its terms that the wide jurisdiction exercised by the court under the Settled Land Act, 1925, s. 64, was not authorised by that section. The argument was that the recent Act showed that capital sums could be applied only in "management" of the estate. This view is rejected and the extent of the jurisdiction as previously exercised is confirmed.

As to Transactions Effected under Order of Court, see HALSBURY, Hailsham Edn., Vol. 29, pp. 745, 746, para. 1037 ; and for Cases, see DIGEST, Vol. 40, p. 773, No. 3045, and DIGEST, Supp., Vol. 40, No. 2763a.]

Case referred to :

*(1) *Re White-Popham Settled Estates*, [1936] Ch. 725 ; [1936] 2 All E.R. 1486 ; Digest Supp. ; L.J.Ch. 368 ; 155 L.T. 553.

Summons by a tenant for life of settled land asking that, under the Settled Land Act, 1925, s. 64, as amended, a sum be raised out of capital moneys held on the trusts of the settled property to enable him to maintain and carry on the mansion house. The facts are fully set out in the judgment.

C. E. Harman, K.C., and *F. McMullan* for the applicant.

J. S. Pennycuick for the trustees of the settled land.

Cohen, J. : This summons asks that £10,000 be raised out of capital moneys held on the trusts relating to certain town properties comprised in the resettlement mentioned in the title to the summons and that this sum be advanced to Sir Everard Scarisbrick (hereinafter referred to as "the applicant") to enable him to maintain and carry on the mansion house of Scarisbrick Hall as his family residence and to execute any necessary repair thereto. It came before me in the first instance in chambers, but, as it raised a question of jurisdiction, I adjourned it into court for argument.

The settlement originated in the will and codicil dated respectively Feb. 28, 1857, and Oct. 11, 1859, of Charles Scarisbrick, who died on May 6, 1860, the relevant trusts being those relating to an undivided third share of certain estates thereby devised upon trust for the testator's younger son, Sir Charles Scarisbrick, for life, with remainder as therein set forth. The devolution of the estates is now governed by a resettlement dated Dec. 21, 1917, as confirmed by the Scarisbrick Settlement Act, 1918.

Under that instrument as so confirmed the property therein referred to as "the Scarisbrick Agricultural and Mineral Estate," consisting of an estate called the Greaves Hall Estate in the county of Lancaster and an undivided share of hereditaments and mines and minerals situate or arising in the same county outside the borough of Southport as then constituted, was limited and settled to uses enabling Sir Tom Talbot Leyland Scarisbrick (the father of the applicant) to exercise the powers of a tenant for life in possession, and subject thereto to the use that the applicant should receive a yearly rentcharge during the joint lives of his father and himself, and subject thereto to the use of trustees during the life of the said Sir Tom Talbot Leyland Scarisbrick upon a discretionary trust for his benefit with remainder to uses enabling the applicant to exercise the powers of a tenant for life in possession, and subject thereto to the use that Dame Josephine Ethel Scarisbrick (wife of the said Sir Tom Talbot Leyland Scarisbrick) should receive the yearly rentcharge of £2,500 for her life, and subject thereto to the use of the respondents Smalley and Thomas Phillips and John Edward Reid-Cuddon during the life of the applicant upon a discretionary trust for his benefit, and subject thereto to uses in strict settlement in favour of the sons and daughters of the applicant and the younger sons and the daughters of Sir Tom Talbot Leyland Scarisbrick, with remainder to such uses as the survivor of Sir Tom Talbot Leyland Scarisbrick and the applicant should by will or codicil appoint, and subject thereto to the use of the applicant in fee simple. That deals with the Agricultural Estate.

By cl. 11 of the resettlement the hereditaments and undivided share thereby assured, other than the Scarisbrick Agricultural and Mineral Estate (which I shall hereafter refer to as "The Scarisbrick Town Properties"), were limited and settled (subject to certain terms which are now satisfied) to such uses upon such trusts and in such manner generally as Sir Charles Scarisbrick (the applicant's grandfather) Sir Tom Scarisbrick and the applicant should by deed jointly appoint, and in default of and subject to any such appointment to such uses upon such trusts and in such manner generally as after the death of any one of them the survivors of them should by deed jointly appoint, and in default of and subject to any such appointment to the same uses and upon the same trusts (other than and except the uses limiting yearly rentcharges) as thereinbefore declared in respect of the Agricultural Estate, and certain money and investments were settled as capital money arising from the Scarisbrick Town Properties, and the respondents Smalley and Thomas Phillips and John Edward Reid-Cuddon were appointed trustees of the said resettlement for the purposes of the Settled Land Acts, 1882 and 1890.

It will be observed that, under the resettlement the general power of appointment conferred on Sir Charles, Sir Tom and the applicant jointly was not available to the last survivor. The present trustees of the resettlement are the respondents Smalley and Cockshott.

Sir Charles Scarisbrick died on Jan. 15, 1923. Sir Tom Scarisbrick died on May 18, 1933, leaving no issue except the applicant and a younger son who died in infancy. The applicant married on Nov. 18, 1919, but there are no children of the marriage. Accordingly, so far as the Town Properties are concerned (and this application relates only to capital moneys arising from the Town Properties) the only persons in existence who are interested therein are the applicant and his wife. There is the possibility that, if his wife died, he might marry again and have issue; but, subject to this possibility and any interest not exceeding a life interest which he may give to his present wife, the applicant is absolutely entitled to the Town Properties.

Scarisbrick Hall did not form part of the settled estates at the time of the resettlement, being then vested in another branch of the family, but on Sept. 29, 1933, it was conveyed to the uses affecting the Scarisbrick Agricultural and Mineral Estate, the purchase money, £50,000, being raised by an exercise of the joint power of appointment then vested in Sir Tom Scarisbrick and the applicant.

As a result of proceedings in this division, the sanction of the court was required to any exercise of that power and it was given on July 18, 1923, a further £13,000 being raised in like manner for repairs and improvements to the Hall.

The figures I have mentioned indicate that the house is very large and expensive to maintain, and I have been shown photographs of it which clearly confirm this indication. It appears from the evidence that neither Sir Tom nor the applicant has been able to keep up the settled estates out of income and that substantial sums have had to be raised out of capital to enable them to continue to live in the Hall. So far as the applicant is concerned, in the year 1931 a sum of £20,000 was charged under the joint power of appointment for the benefit of the applicant after the death of Sir Tom, and this sum has been applied in supplementing the net income of the applicant, but has now been exhausted. A sum of £10,000, which was charged by an appointment in the year 1923 under the joint power as a fund to meet the cost of repairs to the Agricultural Property which would otherwise have been payable out of income, has also now been almost exhausted and there is no practicable method remaining of supplementing the net income. The difficulties of maintaining the estates out of income were no doubt increased by the war and had it not been that the Hall was let to the Red Cross Society under a tenancy agreement dated Dec. 31, 1940, the sum of £20,000 which I have mentioned would no doubt have been exhausted earlier. Under a supplementary agreement certain parts of the Hall are reserved for the occupation of the applicant and his family. I need not go into the details of this agreement. Suffice it to say that, by the effect of the agreements the deficit of the net income of the settled property is reduced to some extent, but it still remains at a substantial amount and is certain so to remain for some years at least owing to taxation and other circumstances, and unless a substantial sum can be raised out of capital in aid of income, Scarisbrick Hall will have to be abandoned as the applicant's family residence, and, if possible, sold, but it is unlikely that a satisfactory sale could be effected during the continuance of or soon after the present war. Until a sale is effected the necessary expenditure on upkeep of Scarisbrick Hall in order to maintain its selling value will be heavy owing to the size and ornate character of the Hall. There is no other house on the settled estate which could be made available as a residence for the applicant and his wife and, if he leaves Scarisbrick Hall, as he is prepared to do, the rent for another residence will have to be provided.

It may be said that there can be little hope of the applicant being able to continue to live in and maintain the Hall when the war comes to an end. I think this is almost certainly true, but I am satisfied by the evidence of Mr. Fielding, Fellow of the Auctioneer's Institute, that immediate realisation is probably impracticable and would certainly be improvident. Mr. Fielding further points out that that portion of the Hall which is occupied by the applicant contains much ancient wood carving and wainscoting, mostly taken from the original building on the site, and the interior decorations are of a highly elaborate character; and that the woodwork and decorations, which include painted and gilded ceilings of great beauty, would suffer serious depreciation if the Hall were not lived in and maintained. It is, therefore, clearly desirable in the interests of all parties interested under the settlement that the applicant should for the time being continue to reside at the Hall. The evidence clearly establishes that it is impossible for him to do so out of income and I am satisfied that, subject to the question of jurisdiction, I ought to authorise advances out of capital to enable him to do so.

I now turn to the question of jurisdiction. Counsel for the applicant relies on the Settled Land Act, 1925, s. 64, which, as amended by the Settled Land and Trustee Acts (Court's General Powers) Act, 1943, reads as follows:

> (1) Any transaction affecting or concerning the settled land, or any part thereof, or any other land (not being a transaction otherwise authorised by this Act, or by the settlement) which in the opinion of the court would be for the benefit of the settled land, or any part thereof, or the persons interested under the settlement, may, under an order of the court, be effected by a tenant for life, if it is one which could have been validly effected by an absolute owner.

Subsect. (2) defines "transaction" in these terms:

> In this section "transaction" includes any sale, extinguishment of manorial incidents, exchange, assurance, grant, lease, surrender, reconveyance, release, reservation, or

> other disposition, and any purchase or other acquisition, and any covenant, contract or option, and any application of capital money (except as hereinafter mentioned) and any compromise or other dealing or arrangement;

That is, I think, all that I need read from that section. Counsel for the applicant says that I can authorise any application of capital money provided I am satisfied that the transaction affects the settled land or any part thereof or any other land and is either (*a*) for the benefit of the settled land or any part thereof, or (*b*) for the benefit of the persons interested under the settlement.

Counsel on behalf of the trustees, while favouring the application on its merits, says that I have no jurisdiction to authorise the transaction under sect. 64. He admits that, before the passing of the Settled Land and Trustee Acts (Court's General Powers) Act, 1943, it was generally accepted that such payments could be authorised if the conditions were satisfied, but he submits that that Act makes it clear that this view was erroneous. He says that, if it were correct, there would have been no need for sect. 1 of the 1943 Act. That Act has as its title:

> An Act to extend temporarily the powers of the court under the Settled Land Act, 1925, s. 64, and the Trustee Act, 1925, s. 57; and to amend the first-mentioned section as respects improvements.

The last words are immaterial; I have already given effect to them in reading sect. 64. Sect. 1, so far as is material, is in the following terms:

> The jurisdiction of the court under the Settled Land Act, 1925, s. 64 (which confers power on a tenant for life to effect under an order of the court any transaction, including an application of capital money) and, so far as regards trustees for sale of land, the jurisdiction of the court under the Trustee Act, 1925, s. 57 (under which the court may make an order conferring on trustees power to effect any transaction, including an expenditure of money, and may direct in what manner money to be expended is to be paid as between capital and income) shall include power, in the circumstances specified in subsect. (2) of this section, to make an order authorising any expense of action taken or proposed in or for the management of settled land or of land held on trust for sale, as the case may be, to be treated as a capital outgoing, notwithstanding that in other circumstances that expense could not properly have been so treated.

Then by subsect. (2):

> The said circumstances are that the court is satisfied (*a*) that the action taken or proposed was or would be for the benefit of the persons entitled under the settlement, or under the trust for sale, as the case may be, generally; and either (*b*) that the available income from all sources of a person who, as being beneficially entitled to possession or receipt of rents and profits of the land or to reside in a house comprised therein, might otherwise have been expected to bear the expense of the action taken or proposed has been so reduced by reason of circumstances arising out of war conditions as to render him unable to bear the expense thereof or unable to bear it without undue hardship.

Then by subsect. (3):

> In determining whether to make such an order as aforesaid the court shall have regard to all the circumstances of the case, including the extent of the obligations, whether legally enforceable or not and whether or not relating to the land, of the person referred to in para. (*b*) of the last preceding subsection, the extent to which other persons entitled under the settlement or trust for sale are likely to benefit from the action taken or proposed or from the relief which would accrue to that person from the making of the order, and the extent to which the making of the order would be likely to involve a loss to any other person so entitled without his receiving any corresponding benefit.

Then by subsect. (5):

> In this section, the expression "management" includes all the acts referred to in the Settled Land Act, 1925, s. 102 (2), and references in this section to expense of management include references to the expense of the employment of a solicitor, accountant, surveyor, or other person in an advisory or supervisory capacity.

In the case before me there is no doubt that the evidence establishes a deficiency of available income and that the other conditions mentioned are satisfied. But counsel for the trustees points out that that section only authorises the application of capital moneys in "management," as defined by subsect. (5). He further points out that some of the items on which it is proposed to expend the £10,000 do not come within the definition, for example, the cost of an abortive application to Parliament in relation to the settled estates in 1940. He says that, this being so, such application of capital moneys, if ever authorised by the 1925 Act, must be regarded as having been excluded by the 1943 Act. There can, in my view, be little doubt as to the jurisdiction before the 1943 Act in view of the decision in *White-Popham's* case (1); and it would be strange if an Act entitled as one to extend (not modify) powers in fact restricted them. I can find nothing in the language of the section which would justify me in imposing such restriction.

I therefore conclude that, provided I am satisfied that the conditions I have already mentioned are satisfied, I have jurisdiction to make the desired order. I have already indicated that, in my view, the second condition is satisfied, that is to say, that the transaction is one for the benefit of the persons entitled under the settlement concerning the settled land. As regards the first condition, it may be argued that some of the expenditure, *e.g.*, the advance already made to the applicant, including the advance in connection with the abortive Bill, did not directly affect or concern the settled land. This is, I think, doubtful, but I will assume that it is well founded. Even so, I am satisfied that I have jurisdiction, for it is clear that, if the applicant had to repay those advances the deficiency in his income would be such that he could not continue to reside in and maintain Scarisbrick Hall. His continued residence for the time being is established by evidence to be essential for the preservation of the Hall. In these circumstances, all the conditions prerequisite to the making of an order are, in my opinion, satisfied.

Case adjourned into chambers to determine amount to be authorised and the conditions on which it should be advanced to the applicant.

Solicitors: *Pritchard, Englefield & Co.*, agents for *Buck, Cockshott & Cockshott*, Southport (for all parties).

[*Reported by* R. L. Ziar, Esq., *Barrister-at-Law.*]

Re ROGERS, LLOYDS BANK, LTD. *v.* LORVAND AND OTHERS

[Chancery Division (Vaisey, J.), **January 28, 31, 1944.**]

Wills—Construction—Vesting—Gift of fund to child on attaining the age of 21 years—Direction to executors to pay income during infancy and after death of life tenant to mother of child to be applied for advancement and education of child.

The testator bequeathed the sum of £2,000 in trust for his wife for life and after her death to his grandson on his attaining the age of 21 years with a proviso that, should the wife die before the grandson attained the age of 21, then he directed the executors to pay the income of such fund to the mother of the grandson for his advancement and education. The wife died in 1941 and in 1943 the grandson died at the age of 10 years. It was contended on behalf of the personal representatives of the grandson that the gift to him became vested on the death of the testator's wife:—

Held: there was no such complete gift of the entirety of the income to the child as to displace the *prima facie* contingency arising from the words "on his attaining the age of 21 years." The gift was, therefore, contingent and failed.

[**EDITORIAL NOTE.** A gift, though in form contingent, may be construed as vested if the whole of the income of the gift is given to the beneficiary although the contingency is not fulfilled. In this case, if the will properly construed meant that the whole of the income was to be applied for his maintenance, it would have been held to be a vested gift. The words are, however, held not to be sufficient to provide that the whole income should be so applied, because a person to whom income is to be paid for maintenance of an infant cannot be forced to account for the income.

As to Gift of Interim Interest, see HALSBURY, Hailsham Edn., Vol. 34, pp. 391-396, paras. 436-440; and for Cases, see DIGEST, Vol. 44, pp. 1085-1100, Nos. 9361-9496.]

Cases referred to:

(1) *Berkeley* v. *Swinburne* (1834), 6 Sim. 613; 28 Digest 242, *1004*; 3 L.J.Ch. 165.
(2) *Hadow* v. *Hadow* (1838), 9 Sim. 438; 28 Digest 243, *1005*.
*(3) *Browne* v. *Paull* (1850), 1 Sim. (N.S.) 92; 28 Digest 244, *1009*; 20 L.J.Ch. 75; 16 L.T.O.S. 550.
(4) *Re Yates, Yates* v. *Wyatt*, [1901] 2 Ch. 438; 43 Digest 788, *2270*; 70 L.J.Ch. 725; 85 L.T. 398.
(5) *Re De la Hunty, O'Connor* v. *Butler*, [1907] 1 I.R. 507; 44 Digest 965, *8179ii*.

Summons to determine whether upon the true construction of the will a gift was vested or contingent. The facts are fully stated in the judgment.

M. Bowles (*H. A. Rose* with him) for the plaintiffs.

R. F. Roxburgh, K.C., and *Harold Lightman* (for *R. W. Goff* on war service) for the residuary legatees.

J. N. Gray, K.C., and *George Maddocks* for the personal representatives of the grandson.

VAISEY, J.: This summons raises a question on the construction of two wills which, as far as material, are in identical words. They are wills of a husband A and his wife and each is dated Jan. 12, 1940. The wife died on Aug. 24, 1941, and her will was proved on Jan. 10, 1942. The husband died on Oct. 21, 1941, and his will was proved on Mar. 21, 1942. A legatee named in each will and described in both as a grandson, Ian Roger Pearson, died on Mar. 25, 1943, aged about 10 years.

The question arises between the residuary legatees under the wills and the B persons entitled on the death of the grandson intestate, and is whether a trust fund was vested in the grandson so that it passed to the persons entitled on his intestacy or whether the gift was a contingent one and has failed and the fund has passed to the residuary legatees under the respective wills.

The wills provided for the appointment of the plaintiffs as executors and trustees and, after a general gift of all property to the executors upon trust for sale, the executors were directed to invest a sum of £2,000 in authorised invest- C ments. The will then provided as follows:

> . . . to hold the same upon trust for my wife for life and after her death for my grandson Ian Roger Pearson on his attaining the age of 21 years provided that should my wife die before the said Ian Roger Pearson shall attain the age of 21 then I direct the bank to pay the income of such fund to his mother Sadie Pearson for the advancement and education of the said Ian Roger Pearson.

There is then a residuary gift and the persons entitled under that are the first D two defendants. The question asked by the summons is:

> Whether on the true construction of the said will of the said Thomas Rogers deceased the interest of the said Ian Roger Pearson in the capital sum of £2,000 was an interest which was vested as from the date of the death of [the wife] or an interest which was contingent on his attaining the age of 21 years.

I think that whichever way this case is decided the intentions of the testators E will hardly be effectuated. I have, however, to follow certain rules laid down for the construction of such a clause so far as they are applicable.

A gift to a person on attaining a particular age is *prima facie* a contingent gift with the consequence that, if this person does not attain that age, the gift fails. But there are certain well-recognised indications that a gift which is *prima facie* contingent will be construed as being vested. The most familiar of these indications is an express direction to pay the whole of the income arising F from the gift for the benefit of the legatee until the attainment of the specified age. This has always been held to amount to a gift of the whole of the legacy. The matter has been refined to what is to me a meticulous extent; but the general principle is that, if you can find in the terms of the gift any words which presuppose that the income belongs to the legatee in its entirety, then these words displace the *prima facie* implication that he gets nothing until the particular age has been reached.

G In the present case no one can dispute that, if the trust has been merely for the grandson upon attaining 21 years and he had died at the age of 10, he would have taken nothing. The question I have to decide is whether the nature of the case is altered by the words in the proviso:

> . . . provided that should my wife die before the said Ian Roger Pearson shall attain the age of 21 then I direct the bank to pay the income of such fund to his mother H Sadie Pearson for the advancement and education of the said Ian Roger Pearson.

Is it possible to imply from this proviso that the whole of the income from the trust fund, whether or not the child's mother is alive, must in its entirety be applied to the child's advancement or education. I have reached the view that it is not. There is a general principle that, where money is given to a parent for the maintenance of his children, he is not bound to account for its application. For this proposition three cases are stated in JARMAN ON WILLS, 7th Edn., at p. 902. They are *Berkeley* v. *Swinburne* (1), *Hadow* v. *Hadow* (2), and *Browne* v. *Paull* (3). In the last-named of the three cases the two earlier ones are discussed by LORD CRANWORTH, V.-C. After stating the facts of the *Berkeley* case (1), LORD CRANWORTH, V.-C., says, at p. 102 :

> His Honour's judgment is very short, and no reasons are given ; but it evidently proceeded on the ground that where, during the minority of a child, the interest of such child's legacy is directed to be paid to the parent, to be applied for or towards its maintenance, there the direction as to the application is a mere charge, for the benefit of the child, on what is, substantially, a gift to the parent subject to such charge.

He then proceeds to deal with *Hadow's* case (2), which was to the same effect. It was there held that the testator meant that the wife should have the income of the children's property to maintain them during minority without account. On the authority of these cases counsel for the residuary legatees pointed out that (i) this is a case where some of the income might not be used for the maintenance of the child, and thus it fell short of a mere trust ; (ii) the direction is limited to a general direction for maintenance and such a direction negatives the intention that such income should be fully applied during the whole of the minority ; and (iii) in the light of these authorities, such direction is not enough to displace the *prima facie* presumption of contingency.

On the other hand it is said that the interest of the child was vested, that the direction to pay to the mother must be regarded as a simple trust to her and, upon the principle that no trust is to fail for want of a trustee, in the event of death of the mother someone else would have to make a similar application of income.

On behalf of the personal representatives of the grandson my attention was called to *Re Yates* (4). There a testator bequeathed to his wife an annuity of £1,000 and directed the trustees to pay a further annuity of £300 per annum :

> . . . until my daughter shall attain the age of 21 years and to be applied by her my said wife in and about the maintenance and education of my said daughter.

It was held that the annuity of £300 given by the testator to his widow did not cease to be payable by reason of the death of the widow during the minority of the daughter. This case seems to me an admirable example of the principle that only where the whole of the fruits of the legacy are given to the legatee is the presumption of contingency displaced.

In the interesting Irish case, *Re De la Hunty* (5), it was held by the Irish Court of Appeal reversing the judgment of the Master of the Rolls that, under a bequest to the testatrix's husband of all her property " to be applied " by him to the maintenance and education of her children, the husband took all the property so bequeathed as a trustee for the children and not beneficially. FITZGIBBON, L.J., says, at p. 512 :

> Probably there is no subject upon which there is a greater wilderness of authority than that now before us ; and that wilderness is a desert, where the words of the particular instrument under consideration require no interpretation, and where no principle of law governs its construction . . . The words which declare how the property given is " to be applied " are co-extensive with the gift—*all* is " to be applied " in the way prescribed. Unless these words prescribing the application are to be absolutely rejected, applying as they do to the entire property, they must govern the application of that property, and they impose on the person to whom the property is given an obligation co-extensive with the gift.

There is nothing in this case to displace the clear element of contingency which is to be found in the words " on his attaining the age of 21 years." It seems to me that to decide in favour of the representatives of the grandson would mean omitting from this will the words " on his attaining the age of 21 years." To my mind it requires strong and definite indication to the contrary if I am to convert what is an expressly contingent gift into a gift which is absolute. I do not find that the testator in this case has succeeded in effectively eliminating from this gift its contingency. I, therefore, decide that the gift of £2,000 was contingent on the child's attaining the age of 21 years.

Declaration accordingly.

Solicitors : *Gard, Lyell & Co.*, agents for *Theodore Bell, Cotton & Curtis*, Cheam (for the plaintiffs and the first two defendants) ; *Bower, Cotton & Bower*, agents for *George Davies*, Manchester (for the last two defendants).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

LUIS LOPEZ CORDON-CUENCA *v.* R.

[PRIVY COUNCIL (Viscount Simon, L.C., Lord Atkin, Lord Porter, Lord Clauson and Sir George Rankin), **December 13, 1943, February 11, 1944.**]

Privy Council—Gibraltar—Criminal law—Special courts—Special provision for review of death sentence—Review only necessary where special court created A *under defence regulations—Necessity for special leave to appeal to Privy Council—Emergency Powers (Defence) Act,* 1939 (*c.* 62), *ss.* 1 (2), 4—*Emergency Powers (Defence) (No.* 2) *Act,* 1940 (*c.* 45), *ss.* 1, 2—*Trial of Special Offences Ordinance (Gibraltar),* 1943, *para.* 2.

The appellant was convicted on Aug. 25, 1943, of an offence against a defence regulation and sentenced to death. He was tried by a special court created under the Trial of Special Offences Ordinance, 1943 (Gibraltar), B para. 2. That ordinance was made by the Governor of Gibraltar under the authority of Letters Patent empowering him to make laws for the peace and good government of Gibraltar. The power to make defence regulations is derived from the United Kingdom Emergency Powers (Defence) Acts and those Acts gave power to make provision for securing that persons may, in such circumstances as may be provided by the C regulations, be tried by such special courts as may be provided and that provision should be made for such proceedings to be reviewed by not less than 3 persons who hold or have held high judicial office in all cases in which sentence of death has been passed. No such review had taken place in the present case and it was contended that for this reason the appellant had been convicted without jurisdiction:—

HELD: (i) the special provision for review applied only where the trial D was before a special court created under the defence regulations and not before a special court created under the Trial of Special Offences Ordinance, 1943. The proceedings were, therefore, valid.

(ii) the Order in Council regulating appeals from Gibraltar (S.R. & O., 1909, p. 794) does not apply to criminal cases and in such cases special leave to appeal is necessary.

E [**EDITORIAL NOTE.** It was argued here that the provision requiring review was a general provision relating to all special courts, but the Privy Council have decided that it is applicable only to special courts created under the defence regulations made in pursuance of the Emergency Powers (Defence) Acts.

FOR THE EMERGENCY POWERS (DEFENCE) ACTS, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, p. 930, and Vol. 33, p. 552.]

Cases referred to:

(1) *Chung-Chuck v. R.* [1930] A.C. 244; Digest Supp.; 99 L.J.P.C. 71; 142 L.T. 266.

F APPEAL by special leave by the accused from a conviction by a special court made on Aug. 25, 1943. The facts are fully stated in the judgment of their Lordships delivered by VISCOUNT SIMON, L.C.

L. U. Borenius for the appellant.

The Attorney-General (*Sir Donald B. Somervell, K.C.*), *the Solicitor-General* (*Sir David Maxwell Fyfe, K.C.*) and *Kenelm Preedy* for the Crown.

G VISCOUNT SIMON, L.C.: The appellant was convicted on Aug. 25 last, before the Chief Justice of Gibraltar, sitting as a Special Court without a jury, under the provision of para. 2 of the Trial of Special Offences Ordinance, 1943 (Gibraltar), for an offence against the Gibraltar Defence Regulations, 1939, reg. 23, and was sentenced to death. This ordinance was made by the Governor under the authority of letters patent empowering him to make laws for the peace order and good government of the City and Garrison of Gibraltar, and para. 2 H of the ordinance enacted that:

> Where any person shall have been committed for trial before the Supreme Court in respect of an offence alleged to have been committed, whether before or after the coming into force of this Ordinance, against the Defence Regulations, 1939, reg. 23, the Chief Justice shall appoint and hold a special court for the trial of such cause and such trial shall have the same validity in every respect as if it had taken place at the time at which it would have been held in due course.

Regulation 23, at the relevant date, was in the following terms:

> If, with intent to help the enemy, any person does, or attempts or conspires with

any other person to do, any act which is designed or likely to give assistance to the naval, military or air operations of the enemy, to impede such operations of His Majesty's forces, or to endanger life, he shall be guilty of felony and shall on conviction on indictment suffer death.

The power to make defence regulations for Gibraltar is derived from the Emergency Powers (Defence) Act, 1939. That Act authorises the making by order in council of defence regulations for the United Kingdom for securing the public safety, the defence of the realm, the maintenance of public order, A
and so forth, and by sect. 1 (2) enacted that "Defence Regulations may (a) make provision for the apprehension trial and punishment of persons offending against the regulations." Further, by sect. 4 of the Act, His Majesty may by order in council direct that the provisions of the Act shall extend, with the modifications specified in the order, to any colony. This was done by an order in council of Aug. 25, 1939 (the day after the statute of 1939 became law)—The Emergency Powers (Colonial Defence) Order, 1939—as a consequence of which B
the Governor of Gibraltar was empowered to make defence regulations for the colony. But the Act nowhere enables those defence regulations to make provision for the trial by special courts of those offenders who are not subject to the jurisdiction of courts martial.

This omission is cured by the United Kingdom Emergency Powers (Defence) (No. 2) Act, 1940: an Act the purpose of which is stated to be "to remove doubts as to the extent of the powers which may be exercised by His Majesty C
under the Emergency Powers (Defence) Act, 1939."

After reciting that "by the Emergency Powers (Defence) Act, 1939, His Majesty was enabled to exercise certain powers for the purpose of meeting the emergency existing at the date of the passing of that Act," but that "the said powers did not enable provision to be made for the trial by courts martial of persons not being subject to the Naval Discipline Act, to military law, or to D
the Air Force Act" and that "by reason of the development of hostilities since that date it had become expedient to remove doubts as to the extent of the said powers in order to secure that provision for the trial of such persons by special courts may be made where necessary" the statute enacts that:

> . . . the powers conferred on His Majesty by the Emergency Powers (Defence) Act, 1939 (hereinafter referred to as "the principal Act") to make by Order in Council such Defence Regulations as appear to him to be necessary or expedient for E
> securing the public safety . . . include power to make provision for securing that . . . persons . . . may in such circumstances as may be provided by the Regulations be tried by such special courts . . . as may be provided.

The Act further provides that:

> (2) After para. (a) of subsect. (2) of section one of the principal Act there shall be inserted . . . "(a.a.) make provision for their" [i.e. offenders'] "trial by such courts . . . and in accordance with such procedure as may be provided for by the Regulations . . . , so F
> however that provision shall be made for such proceedings being reviewed by not less than three persons who hold or have held high judicial office, in all cases in which sentence of death is passed . . . "

Finally it declares that:

> 2. This Act may be cited as the Emergency Powers (Defence) (No. 2) Act, 1940, and shall be included amongst the Acts which may be cited together as the Emergency G
> Powers (Defence) Acts, 1939 and 1940.

It was submitted to their Lordships that, as the conviction and death sentence pronounced by the Chief Justice were not subject to review as described above, the special court presided over by the Chief Justice which tried and convicted the appellant was without jurisdiction and its proceedings invalid.

The argument, as their Lordships understood, was that, the offence being constituted by regulations made under the Act of 1939, the court to try such H
offences must be appointed under the additional powers inserted in that Act by the provisions of the Act of 1940. The combined provisions of the two Acts, it was said, alone gave power to create special courts to deal with such offences.

The conclusive answer to this contention, in their Lordships' view, is that the special court which tried the appellant was created by the Trial of Special Offences Ordinance (cited above) and not under the Emergency Powers Acts or regulations made thereunder. Nor need it be created under these Acts or regulations. The regulation defines the offence, but it does not establish the court, and the court exists and exercises its jurisdiction quite apart from the regulations. It is true that the later Act empowers the appointment of special courts to try offences created by defence regulations, but it does not confine the trial of these offences to such courts nor compel their creation for that purpose. The power is permissive and not obligatory, and the validity of the regulations and of the trial is not dependent upon the appointment of the special courts whose creation is permitted by the Act of 1940. The offence can be tried by any court exercising jurisdiction either as a result of the powers conferred by that Act or under any other lawful authority. In their Lordships' opinion the objection to the jurisdiction of the court cannot be sustained and in these circumstances the conviction and sentence must stand.

Counsel for the appellant rightly abandoned the remaining point taken in the appellant's case, viz. that the Chief Justice, having in the first instance declared himself satisfied that the objection taken was a good one, could not, after further argument and reflection, rule that it failed. No consequences followed from the expression of the Chief Justice's original view, except an adjournment. There was no acquittal or discharge, and the argument is untenable.

For purposes of record, their Lordships think it well to add that after conviction and sentence, the Chief Justice entertained an application for leave to appeal to His Majesty in Council, and purported to grant leave, under the impression that the Order in Council regulating appeals to His Majesty in Council from Gibraltar (S.R. & O., 1909, p. 794), applies to a criminal case. It does not: the order in council is in the same terms as that considered by the Judicial Committee in *Chung-Chuck* v. *R.* (1), when it was held that the language of the Order did not authorise such leave to appeal in a criminal matter. If such leave is given, it must be by His Majesty in Council. In order to avoid the frustration of the proceedings from this cause, their Lordships advised His Majesty that special leave to appeal should be given, and this was so given by Order in Council of Dec. 10, 1943.

Appeal dismissed.

Solicitors: *Wontner & Sons* (for the appellant); *Burchells* (for the Crown).

[*Reported by* HUBERT B. FIGG, ESQ., *Barrister-at-Law.*]

JOSHUA HENSHAW & SONS *v.* THE MAYOR, ALDERMEN AND BURGESSES OF THE BOROUGH OF ROCHDALE.

[COURT OF APPEAL (Scott, Luxmoore and Goddard, L.JJ.), **February 1, 1944.**]

Building Contracts—Forfeiture clause—Time fixed for completion—Contract continuing after date for completion—Whether forfeiture clause applicable—Whether consent of court necessary under Courts (Emergency Powers) Acts before serving notice under forfeiture clause.

In Nov., 1938, the respondents entered into a contract with the Rochdale Corporation for the construction of an activated sludge plant at the corporation's sewage disposal works. The contract fixed a date, Mar. 1, 1940, for the completion of the work but enabled the corporation surveyor to extend the time at his discretion. It also contained a forfeiture clause whereby for a number of given reasons, including the failure of the company to carry on the work with the diligence required by the surveyor, the corporation were entitled to give the respondents 48 hours' notice and to take the work entirely out of their hands. The work was not finished on the date fixed for completion, but continued long after even though the surveyor had not extended the time for completion. In July, 1940, the parties entered into a supplementary contract with the object of incorporating into the original contract certain war conditions. By Sept., 1941, the surveyor was dissatisfied with the progress of the work and with the conduct of the respondents and sent them a letter specifying the reasons for his dissatisfaction and requiring them to amend their conduct. On failure of the respondents to comply with the surveyor's order, the corporation gave them a 48 hours' notice that they intended to take the work wholly out of their hands and to employ other persons to perform it. The respondents then sued the corporation for breach of contract. It was contended on behalf of the respondents (i) that the forfeiture clause ceased to apply after the expiration of the time fixed for the completion of the contract; (ii) that the respondents were entitled to damages against the corporation for giving notice under the forfeiture clause without first obtaining leave to do so under the Courts (Emergency Powers) Acts :—

Held : (i) the forfeiture clause in the contract was not dependent on the contract being completed by a fixed date, but was equally applicable to its being completed within a reasonable time. A

(ii) it is not necessary to obtain the leave of the court under the Courts (Emergency Powers) Acts before giving notice under the forfeiture clause.

[**EDITORIAL NOTE.** The first point in this case is important as it qualifies a statement in Hudson on Building Contracts on this matter. In discussing the second point, the court considers to some extent the position of the parties under the emergency legislation with reference to this usual forfeiture clause. B

As to Exercise of Forfeiture Rights in Building Contracts, see HALSBURY, Hailsham Edn., Vol. 7, pp. 294, 295, paras. 538-541; and for Cases, see DIGEST, Vol. 7, pp. 406, 407, Nos. 295-297.]

Case referred to :

*(1) *Walker* v. *London & North Western Ry. Co.* (1876), 1 C.P.D. 518; 7 Digest 406, *296*; 45 L.J.Q.B. 787; 36 L.T. 53.

Appeal by the defendants and cross-appeal by the plaintiffs in the event of the defendants succeeding in their appeal from the judgment of His Honour T. Eastham, K.C., Official Referee, dated May 21, 1943. The facts are stated in the judgment of the court. C

R. M. Montgomery, K.C., and *B. Ormerod* for the appellants.

G. Justin Lynskey, K.C., and *H. I. Nelson* for the respondents.

Scott, L.J. : This is the judgment of the court, prepared by Luxmoore, L.J., and agreed to by Goddard, L.J., and myself; and I am reading it for Luxmoore, L.J. D

On Nov. 28, 1938, Joshua Henshaw & Sons (hereinafter called the plaintiffs) entered into an agreement with the Rochdale Corporation (hereinafter called the defendants) for the construction of an activated sludge plant at Roch Mills Sewage Disposal Works, Rochdale, for the sum of £50,290. On Nov. 4, 1941, the plaintiffs sued the defendants for damages for breach of this contract. E The trial of the action was in due course remitted to His Honour Tom Eastham, K.C., and was tried by him. In his judgment he declared that the plaintiffs were entitled to recover damages on a basis and upon terms agreed between the parties and consequent on such declaration he ordered that the amount agreed by the parties in accordance with his declaration should be paid into a joint account of their solicitors pending an appeal. For some reason which was not F explained to us the amount was not mentioned in the order. This is a serious defect, for it is difficult to understand how the order in its present form could be enforced in case of necessity.

The defendants have appealed against this judgment; and there is a cross appeal by the plaintiffs, which only becomes material if the defendants succeed in their appeal.

The contract provided (by cl. 29) that the work should be completed on or G before Mar. 1, 1940, unless the surveyor should certify, in the manner provided, for the extension of the time for completion; and (by cl. 31) that, in case any circumstances should delay or impede the execution of the works or any of them, the surveyor might from time to time, if he thought fit, without prejudice to the contract, certify in writing that the time for completing the works should be extended to such further time or times as he might deem reasonable and as he might set forth in such certificate or certificates. The contract was not com- H pleted on Mar. 1, 1940; but no extension of time was applied for and none was granted. The time for completion was, as the referee finds, waived because the work continued long after the date fixed for completion; and on July 27, 1940, the parties entered into a contract supplementary to the original contract. Its main object was to incorporate into the original contract certain war conditions; but there is no necessity to refer to the terms of this supplemental contract. The original contract contained a clause numbered 28, which was in the following terms;

> The contractor shall carry on the work with due diligence and as much expedition as the surveyor shall require, and in case the contractor shall fail to do so, or shall neglect to provide proper and sufficient plant and materials, or to employ a sufficient number of workmen to execute the works, which he shall be ordered to execute, with due diligence or the despatch required, or if the works of this contract are, in the judgment of the surveyor, not being carried on in all respects in strict conformity with the specification and to his satisfaction, or with such progress as would enable them to be efficiently completed at the time, or in the manner required and specified, the same shall be intimated to the contractor by the surveyor, and in case he refuse to alter or amend any defective or unsatisfactory work or materials, or comply with any order he may so receive to that effect, or in case he shall fail in the observance and performance of any of the provisions herein contained, or any part of his undertaking, or shall become a bankrupt or insolvent, or shall liquidate by arrangement, or shall compound or propose any composition with his creditors for the settlement of his debts, or shall carry on or propose to carry on his business under inspectors on behalf of his creditors, or shall commit any act of bankruptcy, then the corporation or their authorised officers shall have full power without vitiating the contract or affecting the obligations, liabilities and responsibilities of the said contractor, the whole of which shall, unless otherwise agreed on in writing to the contrary, continue to be in force, and they are hereby authorised, after giving the contractor 48 hours notice in writing thereof, to take the works wholly or in part out of the hands of the contractor, and to take possession of all the plant, tools and materials belonging to him, and use or sell the same as absolute property of the corporation, and to engage or employ any other person or persons, and procure all necessary materials and implements for the due execution and completion of the said works; and the costs and charges incurred by them in so doing shall be ascertained and certified by the surveyor, and it shall be competent for the corporation to deduct the amount of such costs and charges from any money due or to become due to the contractor under this contract, or to call upon the sureties to make good the amount which may become due to the corporation.

The Official Referee's judgment proceeds on the footing that, notwithstanding the expiration of the time originally fixed for completion, cl. 28 continued to be operative. The validity of this view is the subject-matter of the cross-appeal and will be dealt with later; for present purposes this judgment proceeds on the footing that the referee was right in holding that cl. 28 continued to be operative. The Official Referee found the following facts: (*a*) The plaintiffs failed to carry on the works with the diligence and with as much expedition as the surveyor required; (*b*) the plaintiffs failed to employ a sufficient number of workmen to execute the works which they were ordered to execute with due diligence or the despatch required; (*c*) the facts set out in the surveyor's letter of Sept. 1, 1941 (except the allegation that the plaintiffs neglected to provide proper and sufficient plant and materials) are true; (*d*) the surveyor was honestly dissatisfied with the plaintiffs' conduct and had good grounds for being so dissatisfied; (*e*) the plaintiffs had not by Sept. 11, 1941, altered or amended their conduct or taken any reasonable or adequate steps to alter or amend their arrangements so that the contract might be completed satisfactorily or expeditiously; (*f*) the plaintiffs' omission and neglect amounted to a refusal to alter or amend their conduct or to comply with the surveyor's order; (*g*) the plaintiffs failed in their observance and performance of the provisions of cl. 28 of the contract and of the terms of the contract; and (*h*) the corporation were entitled by cl. 28 to give the notice of Sept. 11, 1941. The notice referred to was a 48 hours' notice that the corporation intended to take the work wholly out of the hands of the plaintiffs and to employ other persons to perform the same.

It was contended by the plaintiffs in the court below, and on the cross-appeal in this court, that cl. 28 ceased to have any application after the expiration of the time fixed by the contract for completion. This contention was based on the following passage, which appears in HUDSON ON BUILDING CONTRACTS (6th Edn.), at p. 412:

> In the case of contracts giving a power of forfeiture for not proceeding with the work at the required rate, if the contract date for completion has ceased to be binding, no forfeiture for delay in progress can be made, for there is no period in respect of which speed can be gauged. The clause, therefore, can only be acted upon and enforced in respect of delay when there is a date fixed for completion, and confers no power of forfeiture after that date has passed or has ceased to be applicable.

The author cites as authority for this statement the decision in *Walker* v. *London and North Western Ry.* (1). Although we think the statement quoted is too wide, we see no reason to differ from the decision. It depended on the terms

of the forfeiture clause, which was made exercisable if the work was not prosecuted at the required speed, that is, the speed required to finish the work on the contract date. This is quite different from anything provided in the present contract. Cl. 28 is not dependent on the contract being completed by the fixed date. It provides for the execution of the work with due diligence and as much expedition as the surveyor shall require, the employment of a sufficient number of workmen to execute the works with due diligence and for a number of other contingencies, all which provisions are as much applicable to the A
fulfilment of the contract within a reasonable time as to its completion on the contract date.

The Official Referee held that, after the contract date had been passed without any extension to a later fixed date named by the surveyor, the duty of the plaintiffs was to complete the contract within a reasonable date; and that all the terms of the contract, including cl. 28, continued to apply with such modifications as were necessary to make those terms applicable to the reasonable B
date. In our judgment, the Official Referee was right in refusing to accept the plaintiffs' argument with regard to cl. 28; and we are, therefore, of opinion that the cross-appeal fails. We think the corporation were entitled to stop (as they did) any further work being done by the plaintiffs on Sept. 13, 1941.

It is clear from the findings of the Official Referee, that the plaintiffs were guilty of serious breaches of contract at the date when the work was stopped; C
and that, apart from the question under the Courts (Emergency Powers) Acts hereafter referred to, the defendants had acted strictly in accordance with their contract. On this basis, it is difficult to understand how the plaintiffs could possibly maintain an action for damages for breach of contract by the defendants, who had, as already stated, acted in accordance with their contract. In this connection it is material to observe that, both in the writ and in their statement of claim, the sole cause of action relied on by the plaintiffs is breach D
of contract by the defendants. The plaintiffs in their reply raise the plea that the defendants' action in taking the works out of the plaintiffs' hands was in breach of the contract, and was unlawful and contrary to the provisions of the Courts (Emergency Powers) Acts; but there was no attempt to amend the writ or statement of claim by adding an additional or alternative claim for damages by reason of any action on the part of the defendants contrary to the provisions of these Acts. It was argued that the defendants committed a breach of con- E
tract and that the plaintiffs were entitled to recover damages for that breach because the defendants gave the notice under cl. 28 without having first obtained leave to do so under the Courts (Emergency Powers) Acts. It is difficult to follow this argument. The defendants in giving the notice to stop the work acted, as the Official Referee finds, in accordance with the terms of the contract. It may well be that if, after giving the notice, the defendants found it necessary F
to enter into possession of anything, leave to do so would have to be obtained under the Courts (Emergency Powers) Acts, and that, if they did enter into possession of any property without first having obtained leave to do so, they would be guilty of having committed an illegal act, for which they would be liable to the plaintiffs in damages; but such damages would not be referable to breach of contract, and would of necessity be ascertained on a different basis. Indeed, such damages might well be only nominal. The giving of the notice G
under cl. 28 was a step which was a necessary preliminary to any application under the Courts (Emergency Powers) Acts. Although this point does not appear to have been taken before the Official Referee, we are of opinion that it was not open to the plaintiffs on their pleadings to sue for or recover damages for any wrongful act of the defendants under the provisions of the Courts (Emergency Powers) Acts. We were told that the sum placed by the defendants into the joint names of the solicitors to the parties was fixed on the basis of H
breach of contract alone, without reference to any entry by the defendants without leave under the Courts (Emergency Powers) Acts. In our judgment, the action, being based solely on breach of contract, ought to have been dismissed. We are, consequently, of opinion that the appeal should be allowed. In the circumstances, any claim on the part of the plaintiffs for damages for wrongful entry into possession contrary to the statutory provisions remains open to them; but we think it right to add that, as at present advised, it seems impossible for them to claim with any hope of success that the defendants,

in giving the notice stopping the work, re-entered into possession of land: for the land on which the works were being executed belonged to and was in the possession of the defendants. The plaintiffs had not possession of the land: their only right was in the nature of a licence to enter upon it for the purpose of executing the works in accordance with the contract; and in stopping the execution of those works, under cl. 28 of the contract, the defendants were doing nothing more than revoking such licence. The works which had already been executed by the plaintiffs when the notice was given had become part and parcel of the land and were already in the possession of the defendants. With regard to the plant and tools brought on to the site by the plaintiffs, the plaintiffs were expressly told they were at liberty to remove them. Consequently, the only property in respect of which there could have been any wrongful taking of possession contrary to the provisions of the Courts (Emergency Powers) Acts, is such materials as the plaintiffs had brought on to the land and had not, at the date of the notice, been incorporated in works already executed. We express no opinion on this matter, because it may be made the subject of litigation between the parties.

In the result the appeal must be allowed and the action dismissed. The cross-appeal fails. The defendants are entitled to their costs of the appeal and cross-appeal and of the action.

Appeal allowed and the action dismissed. Cross-appeal dismissed. Defendants to have costs of appeal and cross-appeal and of the action.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *H. Bann*, Town Clerk, Rochdale (for the appellants); *Hyman, Isaacs, Lewis and Mills*, agents for *Herbert J. Davis, Berthen & Munro*, Liverpool (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

NOTE

GOVER *v.* FIELD

[Reported p. 151, *ante.*]

Add the following to the headnote:

Upon the proper construction of sect. 1 of the 1939 Act and on the facts of this case, the rent had been increased since Sept. 1, 1939. The determination of the standard rent was retrospective and, therefore, the proper rent on Sept. 1, 1939, was 3*s.* 8*d.* per week, and the letting at 10*s.* per week in July, 1940, was an increase of the rent.

RICHARD THOMAS & CO., LTD. *v.* THE COUNTY VALUATION COMMITTEE AND THE ASSESSMENT COMMITTEE.

[COURT OF APPEAL (Scott, Goddard and du Parcq, L.JJ.), **February 24, 25, March 10, 1944.**]

Rates and Rating—Assessment—Machinery—Transformers and distribution boards—Main transmission of power—Rating and Valuation Act, 1925 (*c.* 90), *s.* 24, *Sched. III -Plant and Machinery* (*Valuation for Rating*) *Order*, 1927 (*S.R. & O.*, 1927, *No.* 480).

Electric current was brought into a large works from the grid at a voltage of 11,000 volts. From the first distribution board some of this current was led straight to machines operating at 11,000 volts and the remainder taken through transformers to a second distribution board at 440 volts. From this board some passed to the machinery and some to another distribution board at 110 volts. Similar arrangements applied to other current generated at the works at 6,000 volts and 2,200 volts:—

HELD: all the above were part of the "main transmission of power" and, therefore, part of the hereditament for rating purposes.

Decision of the Divisional Court (VISCOUNT CALDECOTE, L.C.J., CHARLES and HALLETT, JJ.) ([1943] 2 All E.R. 707) *affirmed.*

[**EDITORIAL NOTE**. The Court of Appeal have affirmed the decision of the Divisional Court on this highly technical subject. Their Lordships have only found it necessary to deal with the matter in very general terms which merely confirm the more detailed consideration given to the matter in the Divisional Court.

As to Rating of Machinery and Plant, see HALSBURY, Hailsham Edn., Vol. 27, pp. 393, 394, para. 827; and for Cases, see DIGEST, Vol. 38, pp. 531-534, Nos. 772-795.]

Cases referred to:

(1) *Kirby* v. *Hunslet Union Assessment Committee*, [1906] A.C. 43; 38 Digest 533, 785; 75 L.J.K.B. 129; 94 L.T. 36.

*(2) *South Wales Aluminium Co.* v. *Neath Assessment Committee*, [1943] 2 All E.R. 587.

Appeal by the ratepayers from a decision of the Divisional Court given on Oct. 28, 1943, and reported [1943] 2 All E.R. 707, where the facts are fully stated.

A. S. Comyns Carr, K.C., and *A. A. Warren* for the appellants.

Craig Henderson, K.C., and *Harold Williams* for the valuation committee.

Erskine Simes for the assessment committee.

Scott, L.J. [delivering the judgment of the court]: This appeal turns solely on the interpretation of the provisions made by and pursuant to the Rating and Valuation Act, 1925, s. 24, which determine where the statutory line is to be drawn between those parts of the plant and machinery of a factory or works which are, for rating purposes, to be deemed part of the hereditament of the occupier, and, therefore, rateable, and those parts in regard to which no account is to be taken of their value in arriving at the assessment. Before 1925 there had been judicial decisions allowing a valuer of a factory for rating purposes to have regard to some extent to the value of the plant and machinery, which made the hereditament a factory as distinct from a mere warehouse or residence: *e.g.*, *Kirby* v. *Hunslet Assessment Committee* (1). The indirect result was to bring the value of the equipment, in greater or less degree, within the ambit of rating liability. This development of the law of rating was thought unfair by manufacturers, and, in the Act of 1925, sect. 24 was included for the purpose of dealing with hereditaments containing plant and machinery, except those "the value of which is ascertained by reference to the accounts, receipts or profits of the undertaking carried on therein." It contains provisions for distinguishing in an assessment between such parts of the plant and machinery as in their nature may fairly be regarded as appertaining to the hereditament and those other parts which may properly be regarded as having the character of chattels and, therefore, as being non-rateable. The method adopted by Parliament was to apply the distinguishing principle laid down in sect. 24 of the Act by means of a classification to be described in the Third Schedule to the Act; but Parliament evidently thought it wise to delegate the task of drawing up the classification to a special body, who could frame it in consultation with the manufacturers. That decision is expressed in sect. 24 (3), which is as follows:

> (3) For the purpose of enabling all persons concerned to have precise information as to what machinery and plant falls within the classes specified in the said Third Schedule, there shall be constituted a committee consisting of five persons to be appointed by the Minister, and the said committee shall as soon as may be after the passing of this Act prepare a statement setting out in detail all the machinery and plant which appears to the committee to fall within any of the classes specified in the said schedule.

Subsects. (4) and (5) provided that when the committee so appointed had prepared their "Statement" and the Minister had approved it with or without amendment, it should be laid on the table of both Houses of Parliament and, unless an address was presented to the contrary by either House, it should become the Third Schedule with statutory effect as if enacted in the Act itself. The committee, being duly appointed, prepared its classifying "Statement," which the Act said was to enable all persons concerned to have precise information as to what machinery and plant was to become rateable and what not: and the "Statement" was duly promulgated in the Plant and Machinery (Valuation for Rating) Order, 1927. The classification was, we think, based broadly on the distinction between the supply and transmission of power on the one hand and the utilisation of such power in the manufacturing processes on the other. Electric power for driving plant and machinery had obviously to be dealt with separately from, though comparably with, supply and transmission by other forms of power; but we do not think any help is obtainable for the purpose of construing the provisions relating to electric power by comparing the language of the Statement about steam-driven motive power. The Statement deals quite separately with electric power; and our decision must depend solely on the meaning of the language used about electricity. The analogy of other power is likely rather to mislead.

The total number of days spent in the Divisional Court and this court on finding out what the Statement means do not seem, at first sight, to indicate that its informatory value is as high as Parliament anticipated when it passed sect. 24 (3). However, the very helpful argument of counsel for the valuation committee has satisfied us that, so far as this case is concerned, the " Statement " is not only intelligible, but quite clear.

The language of the Third Schedule gives the key. Pursuant to sect. 24 (1) (*a*), it defines the classes of machinery and plant to be deemed to be part of the hereditament; and its first class is thus expressed:

> Machinery and plant (together with . . . cables, wires and other appliances and structures accessory thereto) which is used or intended to be used . . . in connection with any of the following purposes . . . (*a*) the generation, storage, primary transformation or main transmission of power in or on the hereditament.

Then follows para. (*b*), which deals with heating, lighting, draining and certain other purposes, with which this appeal is not concerned; but to both paragraphs there is attached a proviso containing (*inter alia*) these words:

> Provided that, in the case of machinery or plant which is in or on the hereditament for the purpose of manufacturing operations or trade processes, the fact that it is used in connection with those operations or processes for [certain of the purposes mentioned in para. (*b*)] shall not cause it to be treated as falling within the classes of plant or machinery specified in this Schedule . . .

i.e., as deemed to be part of the hereditament. The importance of this proviso is that it contrasts " the purposes of manufacturing operations " and " trade processes " with the purposes of " generation, storage, primary transformation and main transmission of power "; and thereby indicates the boundary line between rateable and non-rateable plant and machinery. This key is of paramount importance for unlocking the problem of the " Statement " on which the appeal depends; for the language of sect. 24 (3) and (5) together clearly imports that the " Statement " is to explain and not to alter the Third Schedule.

The distinction thus drawn in the Third Schedule itself is, in our opinion, the very basis of the " Statement." By way of definition it elaborates the two fundamental phrases of the Schedule: " primary transformation of power " and " main transmission of power "; and, naturally enough, begins it with the *terminus a quo* and ends it with the *terminus ad quem*. About the former no difficulty can arise; and, in our opinion, the committee has prevented any real difficulty arising about the latter, although the whole of this litigation hinges on that very point. The material parts of the " Statement " are as follows:

> " Primary transformation of power " means and includes any transformation of electrical power in or on the hereditament by any transforming plant which changes the pressure or frequency or form of current of the power as generated in or on or supplied to the hereditament to another pressure or frequency or form of current for distribution in the hereditament wherever such transformation is effected at some point in the main transmission as hereinafter defined. " Main transmission of power " means and includes all transmission of power from the generating plant or point or points of supply in or on the hereditament up to and including: (i) Where power is transmitted to any other hereditament, the point or points at which power passes from the hereditament . . . (iii) Where electrical power is transmitted by means of a cable or cables, the main distribution board or boards to which the cable or cables from the generator or generators or point or points of supply is or are led either directly or with the intervention of a transformer or transformers, and whose bus bars carry or are intended to carry electrical energy at the pressure at which the power distribution circuits are supplied . . .

The basis of the definition in para. (iii) of the terminus of " main transmission " on any transmission circuit is the " main distribution board " at which two things happen, viz.: (i) the supply current comes in and goes out at the same pressure (*i.e.*, voltage); and (ii) it goes out direct to one or more " distribution circuits "; so that the only question of construction which remains is the meaning of " distribution circuits." We have no doubt that the phrase points to the same conception as " power used in connection with plant or machinery used for manufacturing operations or trade processes," the phrase of the proviso to the Third Schedule, para. (1). " Transmission " thus ends where " distribution " begins.

That, in our view, is the only question in this appeal and we do not think it necessary to state the facts at length. We think the word " distribution " is wholly suitable to describe the subordinate transmission of electricity throughout the field of " manufacturing operations and trade processes," which follows after " main transmission."

Reference was made to the decision of ATKINSON, J., in *South Wales Aluminium Co., Ltd.* v. *Assessment Committee* (2); and we were supplied by counsel for the valuation committee, with the consent of counsel for the appellants, with extracts from the special case there, and with an explanatory diagram drawn by counsel for the valuation committee as a graphic part of his speech before us, in order to explain the facts in that case. It is sufficient to say that, on the facts of that case, as so made clear, the decision of ATKINSON, J., was in truth a dismissal of the appeal on its particular facts.

In the present case, for the reasons we have given, we agree with the judgment of the Divisional Court; and the appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Collins, Woods & Vaughan Jones*, Swansea (for the appellants); *Vernon Lawrence*, Newport, Mon. (for the county valuation committee); *T. P. H. Watkins*, Pontypool (for the assessment committee).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

THE CORPORATION OF FOREIGN BONDHOLDERS *v.* INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and Luxmoore, L.JJ.), **March 9, 1944.**]

Income Tax—Exemption—Charity—Protection of interests of holders in the United Kingdom of foreign bonds—Whether established for " charitable purposes "—Income Tax Act, 1918 (c. 40), *s.* 37 (1) (*b*), *Sched. D.*

The appellant corporation was formed to protect the rights and interests of holders of public securities, especially foreign and colonial securities issued in the United Kingdom. It was contended that the corporation came within the class of charities which are beneficial to the community, since its ultimate object was to benefit the country as a whole, and that, therefore, the corporation was entitled to exemption from income tax under the Income Tax Act, 1918, s. 37:—

HELD: the protection of the interests of foreign bondholders was not a charitable purpose.

Decision of MACNAGHTEN, J., ([1943] 2 All E.R. 670) *affirmed.*

[**EDITORIAL NOTE.** The Court of Appeal have affirmed the decision in this case, taking the view that the objects of the corporation are purely the protection of private interests and, therefore, not charitable.

AS TO MEANING OF CHARITY FOR INCOME TAX PURPOSES, see HALSBURY, Hailsham Edn., Vol. 17, pp. 310-314, paras. 617-621; and FOR CASES, see DIGEST, Supp., Income Tax, Nos. 472*a*-476k.]

APPEAL by the taxpayer from a decision of MACNAGHTEN, J., dated Oct. 15, 1943, reported [1943] 2 All E.R., at p. 670, where the facts are fully set out.

J. Millard Tucker, K.C., and *J. S. Scrimgeour* for the appellants.

The Solicitor-General (*Sir David Maxwell Fyfe, K.C.*), *J. H. Stamp*, and *Reginald P. Hills* for the Inland Revenue Commissioners.

LORD GREENE, M.R.: The appellants are a corporation founded under an Act of Parliament intituled the Corporation of Foreign Bondholders Act, 1898. By virtue of that Act they succeeded to an earlier body which had been incorporated as a company limited by guarantee under the Companies Acts, and had accumulated a fund amounting to £100,000. Parliament thought it right that the affairs and activities of that earlier corporation should be set upon a more satisfactory basis and, accordingly, the present appellants were incorporated.

It has long been the practice of investors in this country who are so minded to invest money in the bonds of foreign states and foreign corporations. Their experiences in doing so have often and notoriously been unfortunate, and the original corporation was formed and its subscriptions obtained for the purpose of protecting the interests of investors of that class. The present corporation has objects of a similar nature. In addition to protecting, watching over and generally doing its best to further the interests of such bondholders (a comprehensive phrase which I use for brevity), it places its information and its statistics, A and all the other matter it has collected, at the service of any member of the public who is interested in such matters. The object of the corporation may, I think, summarily be stated in this way. It exists to enable a certain limited class of investor to protect, so far as possible, his investment, and to get his money back, or as much of it as can be extracted from a reluctant foreign government. That is the object of the corporation. Nobody can suggest B that the investors themselves are to be regarded in any sense as doing anything more than looking after their private interests. Yet it is said that this corporation, whose object is to assist them in so doing, is established for charitable purposes.

Counsel for the appellants, in an engaging argument adorned with excursions into elementary economics, has endeavoured to put this body before us as one which exists for the public purpose of protecting the foreign investments of this C country, and thereby doing a public good. It cannot, I think, be disputed that, in the matter of helping the investor in foreign bonds and applying whatever persuasion can be brought to bear upon defaulting foreign governments, the country is benefited by the operations conducted by this corporation; but it is quite untrue to say that a body which is established for the purpose of protecting private investors becomes a charity, because one of the results of its operations is to do something which is beneficial to the state. D

In my opinion, the facts have only to be understood for the question raised by this appeal to be answered, and it must be dismissed with costs.

MACKINNON, L.J.: I agree.

LUXMOORE, L.J.: I also agree.

Appeal dismissed with costs. Leave to appeal to the House of Lords refused.

E Solicitors: *Slaughter & May* (for the appellants); *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* R. L. ZIAR, ESQ., *Barrister-at-Law.*]

F

JACKSON *v.* FISHER'S FOILS, LTD.

[KING'S BENCH DIVISION (Humphreys, Asquith and Cassels, JJ.), **January 27, 1944.**]

Emergency Legislation—Essential work—Reinstatement—Dismissal of employee for alleged serious misconduct—Direction to reinstate—Employee paid wages but not given work—"Reinstatement"—Defence (General) Regulations, 1939, reg. 58A—*Essential Work (General Provisions) (No.* 2) *Order*, 1942 (*S.R. & O.*, 1942, *No.* 1594), *art.* 5. G

The respondents, a firm scheduled under the Essential Work (General Provisions) (No. 2) Order, 1942, dismissed one of their employees alleging serious misconduct. After an inquiry into the matter by a national service officer and the local appeal board, the respondents were directed by the national service officer to reinstate the employee as from a given date. H From that date the respondents paid the employee the wages which he had been receiving before his dismissal, but failed to provide him with any work. It was contended on behalf of the respondents that the Order draws a distinction between "employment" and "work" and that the employee had been reinstated in his employment by being paid his weekly wage:—

HELD: upon the true construction of the order, "reinstatement" does not consist merely of paying an employee his wages, but includes the provision of work unless there is no work available for him to do.

[**EDITORIAL NOTE.** The decision in this case turns upon the construction of the Order only and does not consider the common law principle that a master is bound to provide work for his employee. The decision is, therefore, that "reinstatement" in the Order means not only putting the employee back on the pay roll, but also providing him with suitable work.

For the Essential Work (General Provisions) Order, 1942, see BUTTERWORTH'S EMERGENCY LEGISLATION, [14] 128].

Cases referred to:

(1) *Dixon (William), Ltd.* v. *Patterson*, [1943] S.C. (J.) 78.
*(2) *Hodge* v. *Ultra Electric, Ltd.*, [1943] 1 K.B. 462; [1943] 1 All E.R. 681.

Appeal by way of case stated from a decision of the justices of the peace for the county of Middlesex sitting at Wealdstone, on May 14, 1943, dismissing an information by the appellant, a national service officer, against the respondents alleging failure to comply with a direction to reinstate in their employment a specified person within the meaning of the Essential Work Order. The facts are fully set out in the judgment of Humphreys, J.

The Solicitor-General (*Sir David Maxwell Fyfe, K.C.*), and *W. Arthian Davies* for the appellant.

Valentine Holmes for the respondents.

Humphreys, J.: This is a case stated by justices of the peace, who dismissed certain informations which were exhibited against the respondents, who are a limited company, charging them that they, being a person carrying on an undertaking scheduled under the Essential Work (General Provisions) (No. 2) Order, 1942, did on or about Jan. 12, 1943, fail to comply with a direction given by a national service officer to reinstate in his employment in the undertaking one John Messias, a specified person within the meaning of the said Order, the local appeal board having been of the opinion that the dismissal of the said John Messias on the ground of serious misconduct was not justified.

I do not think, myself, that it is necessary—and if not necessary, it is certainly not desirable—to express any views of a general character about this Essential Work Order. Certain general observations have been made, with which I would respectfully concur, in the Scottish Court, the Court of Justiciary, in *Dixon* v. *Patterson* (1), the part of the judgment which is material here beginning at the bottom of p. 83; but I think the language of the Order and the machinery of the Order are made sufficiently clear from the terms of the information in this case.

No point has been taken to the contrary, and I think it is sufficient to state that a person who is carrying on an undertaking (and the respondents here were carrying on an undertaking) scheduled under this Order, who does dismiss on the ground of serious misconduct one of his employees, the employee being referred to in the Order as a specified person, is liable to have an inquiry into that matter made by other persons, and under art. 5 of the Order it appears that that inquiry is made by a national service officer, who makes certain representations to, and commits the matter to, what is called the local appeal board. Then that local appeal board, after considering the matter, makes a recommendation to the national service officer, and the national service officer, after considering any such recommendation, may do one of several things: He may, in such a case, approve of that which has been done; he may take steps to alter that which has been done; and one of the things which he may do is that he "may . . . direct the reinstatement of" that "specified person who has been dismissed." I agree with counsel for the respondents that that must mean to reinstate him in his employment from which he, that specified person, has been dismissed.

That is what was done in this case, and what is found in the case is that the specified person, John Messias, who had been employed since December, 1941, having been dismissed on Dec. 11, 1942, for alleged serious misconduct, he, John Messias, took the steps which I have quite vaguely indicated, with the result that, after the local appeal board had made a recommendation, the national service officer made his order directing the respondent company to reinstate him on Jan. 12, 1943, in the employment from which he had been dismissed.

What in fact the respondents did upon that is stated in the case, and I think it is better to confine oneself to the exact language of the case.

He presented himself for work at the respondents' undertaking on the same day. He was not given work. From the day upon which the dismissal took place, the machine which John Messias had operated had been taken over and worked by another man, who had been upgraded for that purpose. From Jan. 12 onwards John Messias did no work for the respondent company, but he was paid the wage of £3 12*s*. per week, which is called the basic wage, which he had been receiving theretofore. There is a further point that, on more than A one occasion between Jan. 12, 1943, and Feb. 9, 1943, the respondent company told John Messias that work might be available for him at a later date in another factory owned by the same company.

The question which is raised in this case is whether the conduct of the respondents is or is not a compliance with that direction, and that raises a question of what is the meaning of the expression "an order to," or "a direction to" reinstate "in your employment," if you are the owner of a factory, a man B whom you have dismissed.

That sort of case was considered in the Scottish case to which I have referred, and the Lord Justice-Clerk, LORD COOPER, in the course of his judgment, dealt with the question of the meaning of the word "reinstated," and expressed himself as follows, at p. 85:

> The natural and primary meaning of "to reinstate" as applied to a man who has C been dismissed (*ex hypothesi* without justification) is to replace him in the position from which he was dismissed, and so to restore the *status quo ante* the dismissal.

Again I say, I respectfully agree with that definition of the meaning of the word "reinstate."

A question under this Order came before this court, consisting of CHARLES, TUCKER and CROOM-JOHNSON, JJ., in the course of last year, and it is reported D under the name of *Hodge* v. *Ultra Electric, Ltd.* (2). The facts of the case there were these: A woman who was employed in a factory was dismissed, or perhaps that is rather a harsh word to use in her case, but application was made for leave to terminate her employment, not for any fault at all, but because there was not enough work for her; she was what is called redundant, and permission was given to terminate her employment on that ground; but subsequently, following a recommendation of the local appeal board, the national service officer E revoked the permission that he had given for the termination of her employment, and issued a direction to the respondents for the reinstatement of that woman in their employment as from a specified day. On the day in question that lady attended and offered herself for work. She was told, as the fact was, that there was no work available for her, and she was not allowed to remain on the respondents' premises, but was paid her wages. Thereafter she attended from time to time, but was never given any work to do, for the reason, and F only for the reason, that there was no work to give her, as found in the case. In those circumstances there was a prosecution of the employer for failing to comply with the terms of that direction, and the question arose whether the action of the respondents in that case was a compliance with the direction. The justices held, apparently, that the employee had been reinstated, and the Crown argued to the contrary. In this court, upon the case stated, counsel G for the respondents in the present case, happened to be the counsel for the respondents, and he argued that the word "employment" is used in two senses, firstly, strictly in the sense of the relationship between master and servant, and, secondly, colloquially, in the sense of the word "work." He said:

> Strictly, "work" defines the particular nature of the service rendered to the employer. Throughout this order the distinction is carefully maintained [between employment and work], "employment" being . . . used in the sense of the relationship between H the parties, while "work" is confined to the work which the employee does.

Counsel for the respondents has favoured us with a repetition of that argument in this case. He also argued in that case that, if his first argument was not accepted, there was a perfect answer to the prosecution of these persons, for nobody can be convicted of a criminal offence in failing to do that which they cannot do, so long as it is not their own fault that they cannot do it; and, inasmuch as the sole reason for failing to give work to this woman was that there was no work to give her, and that was found to be perfectly genuine, and the real reason for not giving her work, this court held that the respondents, the employers there, had not committed any offence at all in failing to obey the terms of a direction with which, through no fault of their own, they were unable to comply.

That is the *ratio decidendi* of that case, and the court also had to consider the first argument of counsel for the respondents to which I have referred, and I think it is quite clear from the judgment of certainly two of the three judges, that they declined to accede to that argument. The leading judgment was given by Charles, J., and I need only read that part of it which deals with that which is material in this case. After saying that, in that case the respondents had not exhibited any desire to evade responsibility, and had done all that they could do to carry out the Order, Charles, J., said this, at p. 465 ([1943] 1 All E.R., at p. 682):

> It appears to me that, in a case of this kind the word "reinstatement" connotes the putting back, so far as is possible, of the person dismissed into the same position as that which he occupied when the dismissal took place. I cannot give accord to the submission that the idea of giving work is not to receive any consideration. I think it must; because work and wages are very closely knit together under the regulations and the Essential Work Order. Equally do I feel, however, that when employers are directed to reinstate an employee and they do all that the respondents did here to put that employee back in his previous position and only fail to provide him with work because there is no work for him to do, those employers have, in fact, reinstated the employee.

In the course of his judgment, Tucker, J., said this, at p. 466 ([1943] 1 All E.R., at pp. 683, 684):

> It appears to me that reinstatement involves putting the specified person back, in law and in fact, in the same position as he occupied in the undertaking before the employer terminated his employment. In my view, on the facts before them, the justices were perfectly entitled to come to the conclusion that it had not been proved to their satisfaction that there had been any failure on the part of the respondents to comply with the direction given them by the national service officer. If there had been anything in the nature of a refusal by the respondents on Aug. 10 or thereafter to provide Mrs. Birch with suitable work when such work was available, different considerations would arise . . .

The matter was put in this way, by Croom-Johnson, J., at p. 466 ([1943] 1 All E.R., at p. 684):

> I assume that there was an obligation on the respondents to find some work for Mrs. Birch, but I cannot think that there was an obligation to find work every day or to find what was described in one of the cases to which we were referred, as continuous work. . . . In other words, the obligation on the employer is an obligation to give work if there is work available, and not an absolute obligation to give work when there is none in fact.

Now, counsel for the respondents argued that the facts of this case were comparable to the facts in that case to which I have just referred, but, in my opinion, they are the exact reverse, and so far as the observations of the judges in that case are *in pari materia* here, it seems to me that they are entirely in favour of the view which I have formed myself, and that is that a person, an employer, who is directed to reinstate in his employment a person whom he has dismissed, is not complying with that direction by putting that person upon the pay roll and nothing else.

Having expressed that opinion, I go on to consider whether there is anything in the findings in this case which would indicate, however remotely, that the sort of consideration which induced the judges in *Hodge* v. *Ultra Electric, Ltd.* (2) to express the view that they did are present here in this case. If I thought that the matter was doubtful I should be in favour of sending the case back to the justices in order that they might answer in terms the question: "Do you find that there was work available for this man, or do you find that there was not work available for this man?"; but I think they have sufficiently explained the reason why, and the circumstances in which, John Messias, when he presented himself for work, was not given work. I have read the material passages, and I need only say that, in my view, it is made clear enough that what happened was that John Messias was a man who, for some reason or other—we are not concerned with whether it was a good reason or a bad reason—had become obnoxious to the management of this concern. They came to the conclusion (and I assume that they came to it *bona fide*) that it was desirable in the interests of their factory, and, therefore, in the public effort, that that man should cease to be employed at that place, and that is why they dismissed him. I can find nothing in the case which would indicate that they made any effort to get him work, or that they took any step of any sort which would justify them in saying: "We did our best, but for this, that, and the other reason, we could not put this man back at work"; but I come to the conclusion that this was a case of a deliberate refusal. I do not say by that, and I do not mean by that, that they were not *bona fide* in the matter. I have no doubt that they were. I should assume always that the management of a factory, in dismissing a man, do so in what they believe to be the interests of the factory, and not from spite or any such motive as that; but that they did deliberately refuse to give this man work because they did not want him working in the premises, I think is made tolerably clear by this case, and my view is that a man is not reinstated in his employment when he is just put back upon the pay roll, any more than it could be argued that a man was reinstated in his employment if what the employer did was to say: "We will not let you come near the premises, but we will give you a pension for life equal to the wages that you were getting before." Nobody could then argue that he was reinstated in his employment, and that, to my mind, is very much what happened here.

For those reasons I think the magistrates were wrong in dismissing this information.

ASQUITH, J.: I agree, and I would only add this, that, if the matter were *res integra*, I personally should find some difficulty in resisting the argument of counsel for the respondents under his first head. That argument, if I understand it rightly, was this: "'Reinstatement' means reinstatement in his employment, and his employment means the contractual position which he occupied as against his employer before his dismissal, and that contractual position was in the present case one which permitted the employer to withhold work from the employee provided he paid him his wages." But I am satisfied that the matter is covered by authority. It appears that this precise argument was addressed by counsel for the respondents to the court in *Hodge* v. *Ultra Electric, Ltd.* (2), where, for instance, at p. 465, he argued:

> In the present case Mrs. Birch was reinstated so far as her relationship with the respondents was concerned. She was, therefore, reinstated within the meaning of the order.

That was part of the argument which he put forward. The result implies that the court rejected this argument and HUMPHREYS, J., has cited some passages in the judgment which show that more explicitly.

For those reasons I concur in thinking that this appeal must be allowed.

CASSELS, J: I agree that this appeal should be allowed. The respondents were carrying on a scheduled undertaking in respect of which the man Messias was a specified person. Both were subject to the Essential Work Order. The specified person was dismissed for misconduct. The machinery of the Order was put into operation, and as a result the national service officer directed the reinstatement of the specified person. The specified person presented himself for work. He was not given work, but he was given his wages, and the respondents contend that they have complied with the direction of the national service officer so long as they pay him. If no work is available, it may well provide the employer with an explanation of a reinstatement in which the only thing done is to pay the wages (see *Hodge* v. *Ultra Electric, Ltd.* (2)), but where work is available, a man who is not working is unemployed; he can scarcely be said to be reinstated in his employment or his work within the meaning of this Order by attending only at pay time.

I do not think that the respondents complied with the Order merely by taking the specified person back into the undertaking at the same basic wage. I think that the justices came to a wrong decision in point of law, and that this appeal should be allowed.

Appeal allowed with costs. Case remitted to the justices with an intimation that an offence has been committed.

Solicitors: *Solicitor to the Ministry of Labour and National Service* (for the appellant); *J. H. Lambert & Co.* (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

INLAND REVENUE COMMISSIONERS *v.* OSWALD.

[Court of Appeal (Lord Greene, M.R., MacKinnon and Luxmoore, L.JJ.), **March 16, 1944.**]

Income Tax—Mortgage interest—Mortgage of reversionary interest—Capitalisation of interest at option of mortgagee—Whether mortgagor assessable to income tax in respect of capitalised interest—Income Tax Act, 1918 (c. 40), *All Schedules Rules, r.* 21.

The respondent was the sole surviving trustee of a settlement under which B. was entitled to a reversionary interest. B. mortgaged her interest and a clause in the instrument provided that all interest which should not be paid within 21 days after falling due might at the option of the mortgagee be capitalised. This power was exercised on two occasions. Later B. died and subsequently the reversionary interest fell in. The value of the interest although sufficient to pay off the original principal moneys was insufficient to meet the net capitalised interest after deduction of tax. On the footing that the respondent had received the proceeds of the reversionary interest and handed it over to the mortgagees, he was assessed to tax, under the All Schedules Rules, r. 21, on the capitalised interest. Such an assessment could not be made unless the mortgage provided for the capitalisation of the gross interest and not the net sum after deduction of tax. It was contended that the words "all interest" indicated the gross amount of interest charged :—

Held : upon the true construction of the clause in the instrument relating to the capitalisation of interest, the mortgagee had an option to capitalise only the net amount of interest due after deduction of tax and the assessment must be discharged.

Decision of Macnaghten, J. ([1943] 2 All E.R. 754) *affirmed.*

[**EDITORIAL NOTE.** It was sought to distinguish this case from the *Lawrence, Graham* case (1). The contention was that that case was a capitalisation of net interest and that the present was one of the capitalisation of the gross interest, but the Court of Appeal have held that upon its true construction the document here in question provides for the capitalisation of net interest and thus this case is covered by the previous decision.

As to Liability under All Schedules Rules, r. 21, see HALSBURY, Hailsham Edn., Vol. 17, pp. 235, 236, para. 474 ; and for Cases, see DIGEST, Supp., Income Tax, Nos. 369e-380c.]

Cases referred to :

*(1) *Inland Revenue Comrs.* v. *Lawrence, Graham & Co.* [1937] 2 K.B. 179 ; [1937] 2 All E.R. 1 ; Digest Supp. ; 106 L.J.K.B. 772 ; 157 L.T. 219 ; 21 Tax Cas. 158.

*(2) *Paton* v. *Inland Revenue Comrs.*, [1938] A.C. 341 ; [1938] 1 All E.R. 786 ; Digest Supp ; 107 L.J.K.B. 354 ; 158 L.T. 426 ; 21 Tax Cas. 626.

(3) *Glamorgan Quarter Sessions* v. *Wilson*, [1910] 1 K.B. 725 ; 28 Digest 63, *319* ; 79 L.J.K.B. 454 ; 102 L.T. 500 ; 5 Tax Cas. 537.

(4) *Re Morris, Mayhew* v. *Halton*, [1922] 1 Ch. 126 ; 28 Digest 72, *378* ; 91 L.J.Ch. 188 ; 126 L.T. 281.

(5) *Rhokana Corpn., Ltd.* v. *Inland Revenue Comrs.*, [1938] A.C. 380 ; [1938] 2 All E.R. 51 ; Digest Supp. ; 107 L.J.K.B. 377 ; 159 L.T. 170 ; 21 Tax Cas. 552.

(6) *Carnarvon* (*Earl*) v. *Inland Revenue Comrs.* (1934), 19 Tax Cas. 455 ; Digest Supp.

(7) *Marland* v. *Inland Revenue Comrs.* (1934), 19 Tax Cas. 467 ; Digest Supp.

(8) *Cross* v. *London & Provincial Trust, Ltd.*, [1938] 1 K.B. 792 ; [1938] 1 All E.R. 428 ; Digest Supp. ; 107 L.J.K.B. 423 ; 159 L.T. 217 ; 21 Tax Cas. 705.

(9) *O'Callaghan* (*H.M. Inspector of Taxes*) v. *Newstead* (1940), 23 Tax Cas. 535.

(10) *Lambe* v. *Inland Revenue Comrs.*, [1934] 1 K.B. 178 ; Digest Supp. ; 103 L.J.K.B. 69 ; 150 L.T. 190 ; 18 Tax Cas. 212.

(11) *Inland Revenue Comrs.* v. *Westminster* (*Duke*), [1936] A.C. 1 ; Digest Supp. ; 104 L.J.K.B. 383 ; 153 L.T. 223 ; *sub nom. Westminster* (*Duke*) v. *Inland Revenue Comrs.*, 19 Tax Cas. 490.

(12) *Re Jauncey, Bird* v. *Arnold*, [1926] Ch. 471 ; 32 Digest 407, *860* ; 95 L.J.Ch. 377 ; 134 L.T. 728.

Appeal by the Crown from a decision of Macnaghten, J., dated Oct. 25, 1943, and reported [1943] 2 All E.R. 754. The facts are fully stated in the judgment of Lord Greene, M.R.

All Schedules Rules, r. 21 (1), provides as follows :

> Upon payment of any interest of money, annuity, or other annual payment charged

with tax under Sched. D, or of any royalty or other sum paid in respect of the user of a patent, not payable, or not wholly payable, out of profits or gains brought into charge, the person by or through whom any such payment is made shall deduct thereout a sum representing the amount of the tax thereon at the rate of tax in force at the time of the payment.

The Attorney-General (*Sir Donald B. Somervell, K.C.*), *J. H. Stamp* and *Reginald P. Hills* for the Crown.

J. Millard Tucker, K.C., and *J. S. Scrimgeour* for the respondent.

The Attorney-General : The decision in the *Lawrence, Graham* case (1) has been impliedly overruled by the decision in *Paton's* case (2), in that there must be a real payment of tax, a contructive payment is insufficient. If the decision in the *Lawrence, Graham* case (1) still stands, the present case does not fall within the ambit of that decision. In the *Lawrence, Graham* case (1) the provision was for the capitalisation of net interest and the rule evolved from that case only applies where the capitalisation is of net interest. In the present case the capitalisation is of the gross interest. Under the clause in the agreement it is "the interest" which can be capitalised, whereas in the *Lawrence, Graham* case (1) it was "the sum due." The "interest" which the mortgagor is under an obligation to pay is the gross interest and although the mortgagor can satisfy that obligation by paying the net sum that is by reason of a machinery rule and cannot affect the construction of the word "interest." [Counsel referred to *Glamorganshire Quarter Sessions* v. *Wilson* (3) and *Re Morris* (4).]

Stamp followed on the same side.

Tucker, K.C. : The *Lawrence, Graham* case (1) is still good law. The present case is precisely covered by that decision. Upon the construction of the agreement in the present case, the capitalisation is for the sum that is not paid and that is the net amount because the mortgagor can discharge his liability by paying the net amount. It is only the net amount which can be lawfully capitalised. Counsel referred to *Rhokana Corpn.* v. *Inland Revenue Comrs.* (5), *Carnarvon* v. *Inland Revenue Comrs.* (6), *Marland* v. *Inland Revenue Comrs.* (7), *Cross* v. *London & Provincial Trust, Ltd.* (8), *Re Morris* (4), *O'Callaghan* v. *Newstead* (9), *Lambe* v. *Inland Revenue Comrs.* (10), *Westminster* (*Duke*) v. *Inland Revenue Comrs.* (11), and *Re Jauncey* (12).]

Scrimgeour followed on the same side.

The Attorney-General in reply.

LORD GREENE, M.R. : This appeal deals with one of the most troublesome questions that from time to time falls to be considered under the Income Tax Acts, namely, the application of those Acts to cases of mortgages which provide for the capitalisation of interest in arrear.

The respondent, against whom the assessment in question was made, is the sole surviving trustee of a settlement. Under that settlement a Mrs. Beyfus, whom I will call the mortgagor, was entitled to a reversionary interest. She mortgaged her interest by three successive instruments, a mortgage and two instruments of further charge. There was also another transaction which I propose to ignore, as it has nothing to do with this case.

The second of the two further charges, which was dated May 18, 1905, contained a special clause which applied both to the original mortgage, the first further charge and the second further charge, providing for capitalisation of unpaid interest at the option of the mortgagee. The precise language of that clause I shall have to examine in a moment.

The mortgagees exercised the power of capitalisation on two occasions, the first being on Aug. 9, 1935, and the second on Sept. 13, 1938, the arrears of interest being very large.

The mortgagor died on Jan. 11, 1933. No representation has ever been taken out to her estate and it is not too much to suppose that she died possessed of no assets of any value. That circumstance explains why it is that this particular controversy has arisen, as will become clearer in a moment.

On June 29, 1938, the reversion fell into possession on the death of the tenant for life under the settlement. The trust fund, including cash, amounted in value to £7,600. The principal sums secured by the mortgage and the two instruments of further charge amounted to £3,100, with the result that, after discharging certain costs, there was a sum of £4,399 over and above the principal amounts secured. That £4,399, excluding whatever part of it may have been attributable to current interest, as distinct from capitalised interest, was in point of fact in amount far below the arrears of the net interest payable under these hypothecations, that is to say, the interest after deduction of tax.

The footing upon which the Crown's claim is made is that the trustee of the settlement, namely, the present respondent, is assessable to tax in respect of interest under the All Schedules Rules, r. 21, as being the person "by or through whom a payment of interest is made." We are proceeding on the footing that the trustee has handed over to the mortgagees the whole of the proceeds of the reversionary interest. The assessment is made on the footing that, under r. 21, the trustee, on handing over so much of the proceeds as did not represent the original capital, was bound to deduct tax at the proper rate, and account for it to the Revenue on the basis that interest could not be said to have been paid (as on the facts before us it clearly could not be said to have been paid) out of income brought into charge to tax. That was the nature of the assessment. It was said, in support of that, that when this money was handed over by the trustee to the mortgagees, that constituted a payment of interest at the date when it was handed over, and that, accordingly, the trustee, in making that payment, ought to have deducted tax at the rate in force at the time of payment—that is the language of r. 21 (1)—and accounted for it to the Revenue.

The Special Commissioners, whose decision was affirmed by Macnaghten, J., discharged the assessment on the ground that the present case was covered by the decision of this court in *Inland Revenue Comrs.* v. *Lawrence, Graham & Co.* (1). In the course of the argument before us, a considerable discussion ranged round that decision, and it was suggested at one time that it ought not to be regarded any longer as being law, the suggestion being that, in some way, the principles on which it was decided were inconsistent with the reasoning of the House of Lords in *Paton* v. *Inland Revenue Comrs.* (2). I do not think it necessary or right for us in this court to deal in any way with what has been said with regard to the *Lawrence, Graham* case (1), nor can I possibly treat it as having been impliedly overruled by the *Paton* case (2). The decision in *Paton's* case (2) was on a different matter. Different reasoning applied to it. In my opinion, the decision in the *Lawrence, Graham* case (1) is a decision which is binding upon this court and which, accordingly, the court will follow.

In order to appreciate its application to the present case, it is worth while indicating what, for present purposes, appears to be the principle to be extracted from the *Lawrence, Graham* case (1). It is always dangerous to paraphrase the language of another judgment, but I have already, in an earlier case, given an opinion as to the gist of the decision.

I think on the present occasion, as the approach is rather different, no harm will be done if I indicate what seem to me to be the relevant propositions to be extracted from the *Lawrence, Graham* case (1). That case, like the present, was a case in which the Crown was claiming tax from an intermediary. The intermediary was a firm of solicitors who had dealt with the funds in question, and it was a claim as against them that there had been a payment of interest by or through them. Accordingly, it was said they were under a statutory obligation to deduct tax and, in the circumstances, to account for it to the Revenue. They escaped liability on the ground that the sum which had passed through their hands was a sum from which tax had already been deducted.

Rule 21, when it gives power to assess an intermediary, obviously does not enable an assessment to be made against the intermediary through whose hands nothing but a net sum has passed. In such a case the Crown must enforce its rights against the person who, for convenience, I will call the principal, that is to say, the mortgagor or the borrower. If the mortgagor has deducted tax and has handed the net amount to his intermediary and the intermediary pays that net amount over to the mortgagee, there can be no liability or accountability on the intermediary. On the other hand, the mortgagor who has deducted the tax is accountable under r. 21, assuming it is a r. 21 case, and not a case where, under r. 19, he is entitled to retain tax. The effect of the decision in the *Lawrence, Graham* case (1), therefore, was that the solicitors, who were intermediaries there, having handled what was nothing more than a net sum, could not lawfully be assessed. As I say, that does not mean that the Crown loses its tax except by the fortuitous and irrelevant circumstances of the insolvency of the mortgagor.

That is where the shoe pinches in this case, because if, as in the *Lawrence, Graham* case (1), tax is to be treated as having been deducted on the occasion of the capitalisation, then the trustee, in handing over, in satisfaction of the mortgage obligations of the mortgagor, the proceeds of this reversionary interest, cannot be treated, as between himself and the Revenue, as having paid away a gross sum. If that view be right, the result would be that the Crown could not attack the trustee. The person whom they would have to attack would be the mortgagor herself who, by virtue of the provision in the deed, would be treated under the principle in the *Lawrence, Graham* case (1), as having deducted tax on the occasion of the capitalisation. But the mortgagor's estate being, in the present case, quite obviously insolvent, if the Crown cannot succeed in raising an effective assessment against the trustee, it will lose its tax. That is a misfortune, if that be the result, due entirely to the fact that the mortgagor's estate is insolvent.

In the *Lawrence, Graham* case (1) it was pointed out that there is nothing to prevent a debtor agreeing with his creditor, when the occasion for payment of interest arrives, to satisfy his net interest obligation, that is to say, the interest less tax, by some means other than cash payment—for instance, by the assignment of a chattel. In that case, what was equivalent in the view of the court to the assignment of the chattel was the capitalisation of the net interest which was unpaid. But, on the occasion of that capitalisation, the subject matter of the capitalisation being the amount of the net interest, the mortgagor must be treated as having deducted the tax which, under r. 21, he was bound to deduct, and remained, accordingly accountable to the Revenue.

The relevant passage is on p. 195 ([1937] 2 All E.R. at pp. 10, 11) and is in the following terms:

> If instead of paying the full amount of the interest the debtor pays to his creditor the interest less the tax, he has fulfilled his obligation, even though the payment exhausts his cash in hand or, if paid by cheque, leaves nothing standing to his credit at his bankers. So long as the net interest and no more reaches the hands of the creditors the Crown has no cause for complaint. Nor can the Crown be concerned with the form in which the net interest reaches the hands of the creditor. The creditor may, if he thinks fit, agree to accept in full satisfaction of the net amount a bill or a bond or a chattel provided that the money value of what he gets in exchange does not exceed the net interest due. If this be so, a mortgagor and a mortgagee may validly agree that, in the event of failure by the mortgagor to pay the net interest as it falls due, the mortgagee will from time to time accept in full discharge of the mortgagor's liability to pay it a capital charge for a like amount upon the mortgage security. As and when each charge takes effect the tax will have been deducted within the meaning of the rule, for the capital charge merely takes the place of a payment by the mortgagor of the net amount and can never exceed that net amount in money value.

In that passage, the court, in the judgment read by ROMER, L.J., is putting the substitution of a new capital liability for the interest liability on the same footing as a satisfaction of net interest by, for instance, the assignment of a chattel. As between mortgagor and mortgagee that is the position. The court is also saying, as I read it, that, as between those parties and the Crown, the position is that deduction has been made on the occasion of capitalisation and the person who makes the deduction is the mortgagor who is, accordingly, accountable.

Accepting that principle fully, and applying it to the present case, it seems to me that the only question we have to decide is whether the principles laid down in that case are applicable to the particular document which we have before us. If they are, the Crown's claim must fail.

The argument for the Crown on that point was of this nature. It was said, and truly said, that in the *Lawrence, Graham* case (1) the relevant document was construed by this court as being a contract between the mortgagor and the mortgagee under which the sum to be capitalised, on any occasion when capitalisation took effect, was the net interest liability of the mortgagor; in other words, that capitalisation was to be the capitalisation of the net and not the gross interest. If, on its true construction, the relevant clause in this case provides similarly for capitalisation of the net interest, and not the gross interest, then the decision in the *Lawrence, Graham* case (1) is admittedly precisely in point.

I propose, first of all, to examine shortly the relevant provisions of this

particular clause. By way of preface, I may call attention to two matters. First, it seems to me that the whole conception of an agreement for the capitalisation of the gross amount of interest is one which, in its nature, would be very remarkable and, I should have thought, most unlikely. Capitalisation, it must be remembered, includes two elements in its normal use: one is, what I may call, the interest element, namely, the fact that something which previously had not borne interest should not produce interest. That is a plain interest element. The other element is that what was originally an obligation to pay interest is turned into an obligation to pay capital as between the A
mortgagor and the mortgagee.

It does seem to me highly improbable that a mortgagee, when stipulating for capitalisation, should stipulate for a provision under which he would be entitled to interest on a sum which he never could receive; that is to say, that portion of the interest amount which the mortgagor is entitled to deduct when paying interest. An example will make this clear. If you have a mortgage B
carrying interest at 6 per cent. and the rate of tax is, let us say, for the sake of simplicity, 10*s*., the mortgagor can satisfy that liability by paying £3, and the mortgagee, when he has got it, can invest that £3 and earn interest upon it. If capitalisation is limited to the net amount, namely, £3, it is on £3 and no more that interest would be received by the mortgagee in future. If, on the other hand, the capitalisation is what for brevity we have called a gross capitalisation, the mortgagee thereafter will be receiving from the mortgagor interest not C
on £3, which is the sum he would have received if the interest had been paid, but on £6, a sum which he never would have received. Why it should enter the head of a mortgagee to stipulate for a benefit of that kind I do not understand.

The next point is this. If the agreement for capitalisation means that the sum to be capitalised is the gross interest and not the net interest, I cannot for myself see what sort of benefit the mortgagee is going to gain by insisting on gross rather than net capitalisation, because I share the difficulty of counsel D
for the Crown in seeing how it could be said that the mortgagor and mortgagee, by stipulating for a gross capitalisation, can defeat the Crown's claim for tax. Therefore, it would follow that, when the payment of this alleged gross sum comes to be made, the payer would deduct tax from it. What good, therefore, would the lender have done to himself by insisting upon a capitalisation of the gross sum rather than a capitalisation of the net sum? Those are merely E
improbabilities and cannot affect the construction of this language, if the words mean what the Crown says they mean. But I think it is legitimate to bear those matters in mind in considering the exact language which the parties have used.

So far as relevant, the capitalisation clause is as follows:

> And it is hereby further agreed and declared that all interest which shall fall due [on the said principal sums] . . . and shall not be paid within 21 days after the dates F
> thereby and hereby appointed for payment thereof may at the option of the mortgagee be capitalised.

I pause there for a moment. It is perfectly true that the liability of a mortgagor is in law a liability to pay the gross amount of the interest. But he is equally in law entitled to discharge that liability and free himself from it by paying that amount less tax. Accordingly, what comes to the hand of the mortgagee must always be the net amount, unless the mortgagor, under a case falling G
under r. 19, is of so benevolent a disposition that he does not exercise his right to deduct, a possibility, human nature being what it is, that can well be disregarded. When, therefore, this clause uses the phrase "all interest which shall fall due and shall not be paid," it seems to me that it is contemplating the precise cash transaction which, normally, on the due date of the interest falling due, would take place between mortgagor and mortgagee, namely, payment. That transaction would be a payment in cash of the net amount and not H
a payment of the gross amount; therefore, it seems to me that that language by itself is sufficient to show that this is dealing with what one would expect the parties to deal with, a capitalisation of the net amount and nothing more.

It seems to me that later on in the clause there are words which strengthen that conclusion, because at the end these words follow:

> . . . and nothing in this proviso contained shall prevent the mortgagee, notwithstanding the capitalisation of the interest, from subsequently exercising all the rights, powers and privileges of the mortgagee as if the interest had not been paid

or capitalised.

What would have been the position of the mortgagee if the capitalisation had not taken place? His right, and his only right, would have been to obtain from the mortgagor the net amount of interest—nothing more. It appears to be improbable that that sentence would have been penned if the rights after capitalisation related to a sum arrived at on a totally different basis from the basis on which the sum to be paid would have been arrived at if it had been A paid.

The clause then goes on:

> . . . and it shall be lawful for the mortgagee to treat a portion of the interest as capitalised and a portion as if no option as aforesaid had been expressed by the mortgagee.

That is contemplating that the result of the mortgagee's action may be that there will be at some time and for some purposes a portion capitalised and a portion not capitalised. It seems to me it would be very extraordinary to have B a position where there would be two portions of interest, one of them a capitalised portion on a gross basis, and one an uncapitalised portion effectively on a net basis. Those words seem to me to confirm the view which I have already expressed, which I think is to be extracted from the opening words; and the general result appears to me to be sensible and in accordance with what would be expected from reasonable persons.

C Therefore, looking at the mere construction of the document, it seems to me that it is one which provides for the capitalisation of net interest. It follows, if that view be right, on the principle in the *Lawrence, Graham* case (1), that neither the trustee nor the mortgagee handled anything more than the net sum, and the only person liable to the Crown is the mortgagor who, by the operation of the bargain which she made, has to be treated as having deducted tax on the occasions of the capitalisation.

D It is said that the decision in the *Lawrence, Graham* case (1) depended on the presence there of the expression "the sum due." The phrase there was this:

> The sum due in respect of the half-year's interest so unpaid shall be converted into and become principal money.

It is contended that the whole decision turned on the presence of the words, "the sum due," as distinct from the words "the interest." It is perfectly true that ROMER, L.J., in delivering the judgment of the court, laid emphasis E on that difference in language; but he quite clearly did so as fortifying and reinforcing his general conclusion. I am quite unable to accept the suggestion that his reference to that particular phraseology formed the real basis of the decision. That reference was introduced by the words "in this connection it is to be noticed," a form of words which is very commonly used by judges when they are bringing on an additional argument which reinforces the main one, certainly not a formula such as one finds when the court is describing F what, in its view, is the real gist and basis of its decision.

It seems to me, so far as the question of construction is concerned, all that can be extracted from the *Lawrence, Graham* case (1) is that, if, on the true construction of a deed of mortgage, or whatever the document may be, the provision for capitalisation is a provision for capitalisation of the net amount, then the legal consequences indicated in the judgment would follow. But it G must turn on the construction of the individual instrument. The presence or absence of any particular phrase, important though it may be, cannot by itself be decisive, because you have to read each particular instrument as a whole and ascertain what it means.

On that basis, having done my best to construe the clause in this way, I think it should be construed in the way which I have mentioned, which, as I say, is consistent with good sense and business.

H In the result, therefore, I think both the Commissioners and MACNAGHTEN, J., were right in thinking that this case is covered by the decision of this court in the *Lawrence, Graham* case (1). This appeal must be dismissed.

MACKINNON, L.J.: I agree.

LUXMOORE, L.J.: I also agree.

Appeal dismissed with costs. Leave to appeal to the House of Lords granted.

Solicitors: *Solicitor of Inland Revenue* (for the appellants); *Ranger, Burton & Frost* (for the taxpayer).

[*Reported by* R. L. ZIAR, ESQ., *Barrister-at-Law.*]

LAYEN *v.* LONDON PASSENGER TRANSPORT BOARD.

[King's Bench Division (Tucker, J.), **February 9, 1944.**]

Arbitration—Limitation of time—Commencement of arbitration—Limitation Act, 1939 (*c.* 21), *s.* 27.

Street Traffic—London Passenger Transport Board—Compensation—Worsening of conditions of employment—Opportunity of promotion—Limitation of time—London Passenger Transport Act, 1933 (*c.* 14), *ss.* 73, 85 (2)—*Limitation Act,* 1939 (*c.* 21), *s.* 27.

The respondent was employed in the solicitor's department of the London County Council and had attained the maximum remuneration in his grade in 1931. He would not have been entitled to receive any higher rate of remuneration unless he was promoted to a higher grade. On July 1, 1933, he was transferred to the appellant Board. Just previously an opportunity of promotion for the respondent had occurred, but before anything was done he was transferred. It was held on the facts that he had lost an opportunity of promotion worth £150. The arbitrator fixed the date at which he would probably have received promotion as April, 1934. The respondent first wrote to the appellant Board on Dec. 31, 1938, asking for compensation for the worsening of his conditions of employment. There were subsequent letters up to May 10, 1943, after which an arbitration was held. It was contended that the arbitration was out of time under the Limitation Act, 1939, s. 27 :—

Held : (i) though there may be cases where the cause of action in such a case as this arises after the date of transfer, here the opportunity of promotion was open at the date of transfer and that was the date on which the cause of action arose.

(ii) if the first letter of Dec. 31, 1938, was an application for arbitration—a matter which must in this case be referred back to the arbitrator for his finding—then the respondent was in time and entitled to an award.

[**EDITORIAL NOTE.** This case raises a very important matter in these cases of compensation for the worsening of conditions of employment upon the transfer of undertakings. It is suggested that in the majority of cases the worsening happens once and for all at the date of transfer and since the passing of the Limitation Act, 1939, any claim after the expiration of six years from that date will generally be barred.

For the Limitation Act, 1939, s. 27, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, p. 240.]

Case Stated by the Standing Arbitrator appointed under the London Passenger Transport Act, 1933, s. 79. The facts are fully set out in the judgment.

A. S. Comyns Carr, K.C., and *N. R. Fox-Andrews* for the appellants.

A. T. Denning, K.C., and *H. J. Astell Burt* for the respondent.

Tucker, J. : The London Passenger Transport Act, 1933, s. 73, provided for the transfer of certain staffs to the London Passenger Transport Board on the day appointed by that Act, and it gave the transferred persons certain rights of compensation to which I will refer hereafter. One of the persons so transferred was Norman David Layen, who was born in March, 1887, and had been in the employment of the London County Council in their solicitor's department. He had previously held a temporary appointment, but he became a permanent member of the staff as from May, 1907, and he was then in what was known as the minor establishment. In that establishment after May, 1930, as a result of schemes of re-organisation of the department which took effect as from Apr. 1, 1929, the law clerks were put into a separate class with two divisions, Grade I and Grade II, and in the latter grade there were three divisions : (a 1), (a) and (b). The applicant was placed in Grade II (a). He attained the maximum pay for that grade in 1931, and, unless promoted, he would not thereafter be entitled to any increase of pay.

The arbitrator has found that, at the appointed day—July 1, 1933—when Layen was compulsorily transferred and became an officer or servant of the Board, a vacancy had occurred by death in the department in which Layen was, and, in the ordinary course of events, that vacancy would, by April, 1934, have resulted in Layen reaching Grade II (a 1).

The London Passenger Transport Act, 1933, s. 73 (2), provides as follows :

> Subject to the provisions of this Act, every existing officer or servant shall, as from the appointed day, be transferred to and become an officer or servant of the Board and if any question arises as to whether any person is so transferred, that question shall be determined by an arbitrator. . . .

Sect. 85 (2) provides :

> Subject to the provisions of this Act, all contracts, deeds, bonds, agreements, and other instruments, and all working arrangements subsisting immediately before the appointed day, and affecting the undertakers of any undertaking specified in Pts. I, II, III or VI of the Second Schedule to this Act shall, in so far as they relate to that undertaking, be of as full force and effect against or in favour of the Board, and may be enforced as fully and effectually as if, instead of the undertakers, the Board had been a party thereto.

There is no finding in this case that at the date of transfer or immediately thereafter there was any material alteration with regard to the conditions of his service, and, therefore, it must be assumed that as from that date he was transferred subject to the same terms and conditions as those on which he had previously been serving. But he did thereby, as a result of that transfer, on the findings of the arbitrator lose this opportunity of obtaining promotion at a later date, which date the arbitrator fixed as April, 1934.

When this matter came before the arbitrator the first point that was taken by the London Passenger Transport Board was that the claim of Layen was barred by the Statute of Limitations. Prior to the Limitation Act, 1939, the Statute of Limitations did not apply to statutory arbitrations, but by that Act the Limitation Act is applied to statutory arbitrations as from July 1, 1940. Therefore, as from that date, it became permissible for the London Passenger Transport Board to raise in a proper case the Statute of Limitations in answer to such a claim.

The first question to be decided in applying the Limitation Act to statutory arbitrations is the date of the commencement of the arbitration, because the period of six years has to be calculated from the date when the arbitration commences. Sect. 27 (3) of the Act of 1939 provides :

> For the purpose of this Act and of any such enactment as aforesaid, an arbitration shall be deemed to be commenced when one party to the arbitration serves on the other party or parties a notice requiring him or them to appoint an arbitrator or to agree to the appointment of an arbitrator, or, where the arbitration agreement provides that the reference shall be to a person named or designated in the agreement, requiring him or them to submit the dispute to the person so named or designated.

In this particular case, having regard to the view that the arbitrator took, it did not become material for him to decide the precise date when this arbitration commenced for the purposes of sect. 27 of the Act of 1939. In para. 21 of the special case he refers to various applications which were made from time to time by Layen, the first being on Dec. 31, 1938, and the last being on May 10, 1943, applications in writing in various forms. It is quite impossible for me on the material before me contained in that paragraph to decide which, if any, of these applications should on its proper construction be held to be a notice requiring the Board to submit the dispute to arbitration. Therefore, it will be necessary—in view of my decision in this case the nature of which I have not yet intimated—for this case to go back to the arbitrator in order that he may decide which of these applications, if any, constitutes the commencement of the arbitration within the meaning of sect. 27. Having ascertained what is the proper date for the commencement, a period of six years will then be calculated, and only causes of action or causes of arbitration—as they have, for convenience, been referred to in this case—which have arisen within that period of six years can come within the jurisdiction of the arbitrator.

The next question is whether on the facts this special case discloses any cause of action which has arisen within six years of the commencement of the arbitration. The contention on behalf of the London Passenger Transport Board is that in all these cases the material date on which the cause of arbitration arises is the appointed day, July 1, 1933. The subsections of sect. 73 of the 1933 Act, which deal with this particular matter, and under which this claim was made, are subsects. (3) and (4) which provide as follows :

> (3) No existing officer or servant so transferred shall, without his consent, be by reason of such transfer in any worse position in respect to the conditions of his service as a

whole as compared with the conditions of service formerly obtaining with respect to him and, in determining whether an officer or servant is, or is not, in a worse position, regard shall be had to all relevant considerations, including tenure of office, remuneration, gratuities, pension, superannuation, sick fund and any other benefits or allowances, whether provided for himself or for his widow, family or representatives and whether obtaining legally or by customary practice of the authority company or person under whom he held his office or employment.

(4) If any question arises as to whether the provisions of the last preceding subsection have been complied with, that question shall be referred to the standing arbitrator, and if the arbitrator is of opinion that those provisions have not been complied with and that the officer or servant in question has thereby suffered any loss or injury, not being a direct pecuniary loss in respect of which he is entitled to compensation under the provisions hereafter in this section contained, the arbitrator shall award to him such sum to be paid by the Board as he considers sufficient to compensate him for that loss or injury.

For the purposes of the Statute of Limitations it was contended by the London Passenger Transport Board before the arbitrator that, as regards the cause of action, the time ran from July 1, 1933. On the other side it appears to have been contended—and this contention was accepted by the arbitrator—that the time does not begin to run until the question arises which is referred to in subsect. (4): "If any question arises as to whether the provisions of the last preceding subsection have been complied with, that question shall be referred to the standing arbitrator," and the arbitrator has held that there is no cause of action until a question has arisen between the applicant and the Board.

Counsel for the respondent does not seek to support that view. If that were the true view, the applicant in any case could indefinitely delay his claim, and the Statute of Limitations could never be effective except where six years had elapsed from the time of his raising the question. He contends, however, that these two subsections create a continuing duty on the part of the London Passenger Transport Board at all times to secure, in effect, that there shall be no worsening at any time of the conditions of service of one of these transferred officers, and that every time any transferred person suffers any loss as a result of the failure of that continuing duty, there is a cause of arbitration, and that any number of different arbitrations can be brought and claims made at various points when there is a worsening of conditions of service. He points out that there may be many cases in which the man's conditions of service have been worsened, but it cannot be established that they were the result of the transfer. Counsel, therefore, contends in this case that the arbitrator having found that this applicant would, but for the transfer, have been promoted on Apr.1,1934, and having found that, for the five succeeding years he would in that case have received an increased salary of £30 a year, he was entitled to award him—as he in fact did—£150, because as each increased payment fell due there was a loss by Layen; that when we get to April, 1935, at any rate—which was, I think, the first date on which the increase would have become effective—there was a loss of £30; that in April, 1936, there was another loss; that at each of those dates a claim could have been made under these subsections and that time, accordingly, runs with regard to each of those losses from the date when the increased salary would otherwise have been payable.

Looking at these subsections, and contrasting them with the provisions of subsects. (6) and (7)—although the language of subsect. (3) is very far from clear—the conclusion at which I have arrived is that it was intended to fix the compensation for this worsening of conditions once and for all at some one specific date, whatever that date may be, and I do not read subsects. (3) and (4) of sect. 73 as creating a continuing duty for an indefinite period of time to maintain the equivalent conditions of service to those which existed in the man's previous employment. I think that that view is strengthened by these words in subsect. (3): "in respect to the conditions of his service as a whole as compared with the conditions of service formerly obtaining." I think that that visualises that at some date—whatever that date may be—the arbitrator has to look at the position as a whole, doing the best he can to assess the loss with regard to the future, and taking into account such facts as may have occurred at the time when he makes his award.

That being so, the next question which arises is, what is the material date in this particular case? I can quite see that the appointed day may not in every case be the material date, for this reason, that there may be cases in which there is no worsening of the man's conditions of service in his new employment until some little time after the transfer has taken place. It may be that there have not been opportunities of settling the precise terms of his new employment, and I think it would be impossible to say that, in such cases, the date is the appointed day. I think that the date in those cases would be the time when the actual worsening occurs as a result of the alterations in the conditions, whenever that may be. But in this particular case, there being findings—as it appears to me—that the only thing that Layen suffered was a loss of opportunity of promotion, that that opportunity was one which was actually open on the date of transfer, July 1, 1933, and that there was then that existing vacancy which would have given him the opportunity, the loss of which the arbitrator has assessed at £150, the award does not purport to cover any other worsening of conditions of service. It is purely for the loss of that opportunity, which existed on July 1, 1933, and which was lost at the moment when he was compulsorily transferred to the Board at that date.

Therefore, in my view, in this particular case the date when his cause of action arose was July 1, 1933, the date upon which he—by reason of his transfer—lost this opportunity once and for all. Accordingly, I think that the time runs in this case, for the purposes of the Statute of Limitations, as from July 1, 1933. Whether or not Layen is completely precluded from obtaining any compensation will depend upon the arbitrator's finding with regard to the date when the arbitration commenced, because it appears from para. 21 of the special case that there is just a possibility of one date saving Layen, and that is the first letter of Dec. 31, 1938.

If I am right with regard to the date from which time runs, I think that the other dates in para. 21 would not avail him, but, if he can establish that the letter which he wrote on Dec. 31, 1938, was a notice requiring arbitration for the purposes of the Limitation Act, 1939, s. 27, then that would bring him within the six years. The case will have to go back to the arbitrator to adjudicate upon that matter, and, as he did not apply his mind to this question, he is, of course, not confined to the documents to which he has referred in that paragraph of his award. The matter is completely open to him to decide what was the date when this arbitration commenced. It may have commenced otherwise than as a result of any one of those particular documents.

I think that that in substance disposes of the case, but other matters have been referred to, and they may possibly arise when the matter goes back before the arbitrator or they may arise in a higher court hereafter in any event, so that I think that I must deal with them quite shortly.

One point made on behalf of the Board is that, in any event, having regard to the arbitrator's finding in para. 10 of the special case, the award of £150 cannot be justified because the arbitrator, having found that Layen would have got this promotion as from Apr. 1, 1934, goes on to find:

> By promotion he would have commenced in Grade II (a 1) at the same salary but would have received annual increases on a certificate of satisfactory service to a maximum of £420 per annum. The annual increment for Grade II (a 1) was not proved in evidence.

Criticism is made that, as there was no evidence as to the exact amount of the annual increases, the arbitrator was not justified in giving the maximum amount for each of the years in question, and it is further pointed out that, in any event, on his own finding, the increase would apparently not have taken effect in the first year. One is very loth to be critical with regard to matters of this kind which depend upon evidence, but it does appear to me that there is some substance in those criticisms, especially with regard to the first year at any rate, which has been taken into consideration in arriving at the £150. As this matter, subject to any appeal, is going back to the arbitrator, I think that it should go back to him for the purpose also of re-assessing the amount of compensation, if he finds that there is any compensation recoverable having regard to the Statute of Limitations, and that he should reconsider the amount in the light of those facts which appear from the award itself.

A further criticism has been made that this prospect of promotion is really fallacious, because it is said that there would have been a vacancy in this Grade II (a 1) only if some occupant of that grade had been promoted to fill the vacancy which arose, and which could be occupied only by an admitted solicitor.

It is said that there was no evidence that any of the gentlemen in this grade were admitted solicitors, and that, therefore, the whole thing proceeds on a fallacy. I think that that is a question of fact. There is nothing set out about it one way or the other in the case, and I think that I must assume that the finding of the arbitrator on that matter is unassailable, as I cannot inquire into matters of fact, which do not appear in the case stated.

There is a cross-appeal on which two points are raised. One is that the arbitrator ought to have included in his award some sum in respect of Layen's loss of opportunity of reaching a still higher grade or class, namely Class I. With regard to that the arbitrator has found :

> So far as the applicant was concerned, he is a person of character, industry and ability and had no set-backs in his career as an employee of the London County Council. I am satisfied and hold that, but for his transfer to the respondents' service on July 1, 1933, he would have reached Grade II (a 1), but I am not satisfied and do not hold that he would with any certainty have received further promotion. He would have had a reasonable chance if opportunity offered.

I think that the arbitrator is clearly finding here that the applicant's capabilities were such as to give him a reasonable chance of reaching this Class I if the opportunity occurred, but I certainly read his award as indicating that in his view there was no reasonable assessable loss of opportunity of promotion to that particular class. I, therefore, think that he was quite entitled to refuse to award anything in that respect.

Award remitted.

Solicitors : *A. Herbert Grainger* (for the appellants) ; *J. R. Cort Bathurst* (for the respondent).

[*Reported by* R. Boswell, Esq., *Barrister-at-Law.*]

MAYOR, ALDERMEN & COUNCILLORS OF THE METROPOLITAN BOROUGH OF HAMPSTEAD *v.* ASSOCIATED CINEMA PROPERTIES, LTD.

[Court of Appeal (Scott, Goddard and du Parcq, L.JJ.), **March 8, 9, 16, 1944.**]

Rates and Rating—Rateable occupation—Lease of unfurnished dwellinghouses taken in case of emergency—Houses empty and unused—Whether rateably occupied.

The respondents were the lessees of a number of unfurnished dwellinghouses which they intended to use as offices in the event of enemy action damaging their existing offices. The houses were ready for occupation but were entirely devoid of movable furniture and tenant's fixtures. The respondents were under no obligation to repair or maintain the premises until they actually entered into possession. As their offices were not damaged, they had no occasion to use the houses and the question arose whether they were in rateable occupation of the premises :—

Held : there was no rateable occupation of the premises, since a mere intention to occupy in hypothetical circumstances which may never come into existence is not rateable occupation.

Decision of the Divisional Court (Viscount Caldecote, L.C.J., Charles and Hallett, JJ.) ([1943] 2 All E.R. 696) *affirmed.*

[**EDITORIAL NOTE.** It is well-settled that an intention to occupy must be supported by some overt act on the premises in order to amount to rateable occupation. The importance of the present case is the consideration of the facts arising out of the conditions due to enemy action in England.

As to Rateable Occupation, see HALSBURY, Hailsham Edn., Vol. 27, pp. 351-355, paras. 782-785 ; and for Cases, see DIGEST, Vol. 38, pp. 426-431, Nos. 10-55.]

Cases referred to :

*(1) *Borwick* v. *Southwark Corpn.*, [1909] 1 K.B. 78 ; 38 Digest 426, *16* ; 78 L.J.K.B. 121 ; 99 L.T. 841.

(2) *Westminster* (*Mayor*) v. *Southern Ry. Co.* (*Assessment Committee*), [1936] A.C. 511 ; [1936] 2 All E.R. 322 ; Digest Supp. ; 105 L.J.K.B. 537 ; 155 L.T. 33.

*(3) *Liverpool Corpn.* v. *Chorley Union Assessment Committee*, [1913] A.C. 197; 38 Digest 428, *36*; 82 L.J.K.B. 555; 108 L.T. 82.

*(4) *R.* v. *Melladew*, [1907] 1 K.B. 192; 38 Digest 426, *15*; 76 L.J.K.B. 262; 96 L.T. 189.

APPEAL by the rating authority from a decision of the Divisional Court reported [1943] 2 All E.R. 696, where the facts are fully stated.

Sydney Turner, K.C., and *Erskine Simes* for the appellants.

A. S. Comyns Carr, K.C., and *G. D. Squibb* for the respondents.

DU PARCQ, L.J. [delivering the judgment of the court]: For the purposes of this judgment, the facts found with regard to the houses in question may be stated as follows. (i) The respondent company had never used them for any purpose. (ii) The object of the respondent company in becoming tenants of the houses was "to have accommodation available for offices in the event of their present offices being rendered unfit for use by enemy action or should they desire to use" the houses "owing to the exigencies of their business." (iii) No steps had been taken to adapt the houses "for use for emergency offices . . . but they were at all material times capable of being so used without any structural alteration."

The questions for our determination are whether, on these facts, the justices were bound to hold (as they thought themselves to be) that the company were occupiers of the houses, and, if they were not bound so to hold, whether that decision can be justified on the facts found. The Divisional Court thought that both those questions should be answered in the negative, and we agree with them.

It is well-settled that, in order to constitute occupation under the Statute of Elizabeth, there must be use and enjoyment of the hereditament. Thus in *Borwick* v. *Southwark Corpn.* (1), at p. 83, BIGHAM, J., defined occupation for the purposes of rateability as being "constituted of legal possession and of permanent (as distinguished from mere temporary) user."

When the hereditament is a house, it is not rateable unless it is occupied as a house, unless, that is to say, it is used for one of the purposes for which a house may be used. In *Westminster City Council* v. *Southern Ry. Co.* (2), LORD RUSSELL OF KILLOWEN stated the rule, without qualification, in these words, at p. 529 [1936] 2 All E.R. at p. 326:

> The owner of an empty house has the legal possession, but he is not in rateable occupation.

In the instructive passage in *Liverpool Corpn.* v. *Chorley Union Assessment Committee* (3), at p. 211 (which was quoted by CHARLES, J., in the Divisional Court), LORD ATKINSON elaborated an explanation of the rule which had been given earlier by LORD HALSBURY. It may be observed that every owner who has the legal possession of an empty house, may, if he pleases, occupy it or otherwise use it at any time; and it may ordinarily be assumed that he would occupy it if ever it suited his purpose to do so. If it were legitimate to regard him as an occupier for that reason, the rule stated by LORD RUSSELL, which has long been firmly established, would cease to have any meaning or effect.

It was contended, however, on behalf of the appellants that (in the words of their counsel) "the possibility of physical occupation coupled with the intention to occupy physically in case of need," constituted rateable occupation. In support of this submission much reliance was placed on the two cases which the justices had regarded as compelling them to hold that the respondents were occupiers. Of these the first was *R.* v. *Melladew* (4). The hereditament there in question was a warehouse. It is the business of a warehouseman to let unoccupied space for the purpose of the temporary storage of goods. To be available for this purpose, the warehouse must be empty, in whole or in part. If the owner makes a public announcement that he is prepared to let space in an empty warehouse, he may reasonably be said to be using that warehouse for the purposes of his business. This, briefly, was the *ratio decidendi* of *R.* v. *Melladew* (4), and it has, in our judgment, no relevance to the present case.

Borwick v. *Southwark Corpn.* (1), the other case relied on by the justices, may appear at first sight to give more support to the appellants' contention. The correctness of this decision has been doubted; and, if it were necessary to read it as affirming the proposition that a mere intention to occupy empty premises in a problematical contingency is equivalent to occupation, we should regard it as contrary to established principle and unsound. It is, however, clearly distinguishable on the facts from the present case. In *Borwick's* case (1), the owners of the hereditament were manufacturers who had bought it with the object of having premises to which they might transfer their business in the event of some emergency arising such as the destruction of their existing factory by fire, or, as it was shortly put, as "stand-by" premises. It was argued that the mere proof of this motive was enough to make the premises rateable. There was proof, however, of the additional fact that the manufacturers had installed on the premises shafting and wooden benches suitable for their business. It was on this fact that LORD ALVERSTONE, L.C.J., based his judgment. He said, at p. 83 :

> I think they are making use of it by having the necessary shafting and benches upon the premises in readiness for use.

He deliberately refrained from expressing any opinion on the question (which did not then arise for decision) whether in these circumstances the building would be rateable as a warehouse only and not as a factory. BIGHAM, J., who treated the case as purely one of fact, also attached much importance to the erection and maintenance of the shafting and the provision of benches. WALTON, J., alone seems to have accepted the view for which the appellants now contend.

It is significant that no case could be cited in which occupation had been held to be established without proof of some overt act amounting to evidence of user. In *Melladew's* case (4), the owner had advertised the premises as a warehouse. In most cases user has been proved by showing that the house has been furnished, or equipped for some business purpose. There is certainly no authority binding on this court for the proposition advanced by the appellants' counsel ; and, in our judgment, a mere intention to occupy premises on the happening of a future uncertain event cannot, without more, be regarded as evidence of occupation.

It is true that it was said by SIR RICHARD HENN COLLINS, M.R., in *R.* v. *Melladew* (4), at p. 201 :

> . . . that the intention of the alleged occupier in respect to the hereditament is a governing factor in determining the question whether rateable occupancy has been established . . .

and that many other authorities show that it is often important to ascertain the owner's intention. When these authorities are examined, however, it becomes manifest that intention is relevant only when it goes to show present occupation and user. The instances given by SIR RICHARD HENN COLLINS, M.R., in the passage just cited make this plain. A person is found living in a house by virtue of an agreement with its owner. Is he an occupier or a mere lodger ? To decide this question, it is necessary to look at the agreement in order to ascertain the intention of the parties. A man has left furniture in a house, though he is not residing there. That fact shows an intention to return or to enter, and so proves that he is enjoying the use of a furnished house. The tenant of a seaside boarding-house has shut it up for the winter. The fact that he intends to re-open it in the summer is proof that he is now using and occupying it as a boarding-house, although the seasonal nature of the trade causes it to be temporarily closed. It is never true to say that a mere intention to occupy, in hypothetical circumstances which may never come into existence, is equivalent to occupation.

For these reasons we agree with the decision of the Divisional Court that the facts found do not establish rateable occupation. The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors : *P. H. Harrold*, Town Clerk, Hampstead (for the appellants) ; *Waterhouse & Co.* (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

S. (otherwise B.) *v.* S.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Bucknill, J.), **February 21, 1944.**]

Divorce—Alimony—Pendente lite—Nullity—Wilful refusal by wife—Whether alimony pendente lite continues until decree absolute.

A decree *nisi* of nullity was granted on the ground of the wife's wilful refusal to consummate the marriage. An order for alimony *pendente lite* had been made before the petition was heard and after the decree *nisi* the wife took out a summons asking for an order that the alimony *pendente lite* should be continued until decree absolute. It was contended that the previous order for alimony *pendente lite* came to an end on the grant of the decree *nisi* :—

HELD : the order for alimony *pendente lite* continued in force until the decree absolute unless it was discharged or varied by the court.

[**EDITORIAL NOTE.** The general rule is that alimony *pendente lite* is payable until the decree absolute. Exceptions have been made where a wife has been proved guilty of adultery and it was here suggested that a similar exception applied in the case of wilful refusal. The decision is, however, that the general rule applies in a case of wilful refusal subject to any special order of the court.

AS TO DURATION OF ALIMONY *pendente lite*, see HALSBURY, Hailsham Edn., Vol. 10, pp. 719, 720, para. 1098 ; and FOR CASES, see DIGEST, Vol. 27, pp. 413, 414, Nos. 4147-4168.]

Cases referred to :

(1) *Ellis* v. *Ellis* (1883), 8 P.D. 188 ; 27 Digest 415, *4185* ; 52 L.J.P. 99 ; 49 L.T. 223.
*(2) *Foden* v. *Foden*, [1894] P. 307 ; 27 Digest 410, *4101* ; 63 L.J.P. 163 ; 71 L.T. 279.
(3) *Dunn* v. *Dunn* (1888), 13 P.D. 91 ; 27 Digest 413, *4159* ; 57 L.J.P. 58 ; 59 L.T. 385.
(4) *Wells* v. *Wells and Hudson* (1864), 3 Sw. & Tr. 542 ; 27 Digest 413, *4158* ; 4 New Rep. 446 ; 33 L.J.P.M. & A. 151 ; 10 L.T. 696.
*(5) *Welton* v. *Welton*, [1927] P. 162 ; Digest Supp. ; 96 L.J.P. 75 ; 136 L.T. 675.
*(6) *Bullock* v. *Bullock and Vargolici*, [1942] P. 134 ; [1942] 2 All E.R. 259.
(7) *S. (falsely called B.)* v. *B.* (1884), 9 P.D. 80 ; 27 Digest 413, *4163* ; 53 L.J.P. 638.

SUMMONS by the wife, after a decree *nisi* had been pronounced against her in nullity proceedings, asking for an order that alimony *pendente lite* should be continued until decree absolute. The facts are fully stated in the judgment.

D. A. Fairweather for the petitioner.

H. Clifford Mortimer for the respondent.

BUCKNILL, J. : In Oct., 1942, the wife petitioned for a decree of nullity on the ground of the husband's impotence or, alternatively, his wilful refusal to consummate the marriage. The husband in his answer admitted that the marriage had not been consummated, but alleged that the failure was due to the wife's impotence or, alternatively, her wilful refusal and asked for a decree of nullity in his favour.

In June, 1943, the registrar made an order that the husband pay the wife alimony *pendente lite* at the rate of £2 per week to commence from the date of the service of the petition. In Nov., 1943, I heard the case, and decided in the husband's favour. The formal decree declared the marriage to be null and void by reason of the wife's wilful refusal to consummate the marriage unless sufficient cause be shown to the court why the decree should not be made absolute within six months from the date of the decree. The husband ceased to pay alimony to the wife from the date of the decree. On Feb. 2, 1944, the wife took out a summons asking in effect for an order that alimony pending suit at the rate of £2 per week should be continued until decree absolute. I made an order adjourning the summons for argument in open court.

The first question for decision is whether the order of June, 1943, to pay alimony pending suit automatically continues until decree absolute or terminates with the decree *nisi*, subject, of course, to any order by the court varying the original order. No guidance on the matter can be obtained by reference to the practice of the ecclesiastical courts before 1857, inasmuch as there was then no intervening period, such as there is now, between the decree *nisi* and the decree absolute. This period did not exist in the original Act of 1857, but was introduced by amending Acts, and was at first three months and subsequently extended to six months. The amending Acts, however, did not deal with the question of payment to the wife during this period. They merely, as now, made provision for interim orders pending suit, and final orders after decree absolute. The absence of any such provisions to meet the case of an innocent wife who has succeeded in obtaining a decree *nisi* strongly indicates that the order for alimony *pendente lite* was intended to include the period between decree *nisi* and decree absolute. As COTTON, L.J., said in *Ellis* v. *Ellis* (1), at p. 189 :

> . . . until the decree becomes absolute the parties are still husband and wife A

In that case the Court of Appeal upheld the decision of SIR JAMES HANNEN, P., that the court had power to order alimony *pendente lite* after a decree *nisi* had been made dissolving the marriage.

In *Foden* v. *Foden* (2) also, LORD HERSCHELL, L.C., made it clear that a petition continues until decree absolute. He said, at p. 312 :

> . . . it was said that there was no pending suit, because a decree *nisi* had been made. B
> That argument is, in my opinion, quite untenable. Till the decree *nisi* has been made absolute, the suit is clearly pending.

If, then, the suit is pending, and the order is to pay alimony pending suit, *prima facie* the order continues in force until the suit is finally determined by decree absolute.

However, when a wife is found guilty of adultery without any extenuating circumstances, the practice is that alimony *pendente lite* automatically ceases C
unless the court otherwise orders. Such a practice was approved by the Court of Appeal in *Dunn* v. *Dunn* (3). In that case COTTON, L.J., said, at p. 93 :

> Until adultery has been proved against the wife she is entitled to support, and the court gives her alimony *pendente lite*. But when her adultery has been proved, though she is still a wife she has lost that right.

At pp. 93, 94 LINDLEY, L.J., added : D

> *Wells* v. *Wells* (4) admits the principle that where the wife is satisfactorily proved to have been guilty of adultery her alimony ceases . . .

Wells v. *Wells* (4) was decided in 1864. In the course of his judgment LORD PENZANCE said, at pp. 545, 546 :

> . . . it is a principle in this and other courts, that, so soon as a wife shall have been false to her marriage vow, she loses the right she had to her husband's support. Keeping E
> this principle in view, it would be nothing less than making the name of the thing paramount to its substance, if the court were to hold that after adultery proved the alimony must still be paid because the "*lis*" continued "*pendens*." I am, therefore, of opinion that, although other undecided matters in controversy may keep the suit alive, the right to alimony perishes on the final conclusion of the wife's guilt. When the cause is tried before the court itself, that final conclusion will have been reached when the court declares its judgment on the facts, for in this court such judgment is final. And if an appeal carries the case forward, it also carries it into another court F
> competent to allot alimony if it pleases.

These cases indicate that the reason why alimony *pendente lite* automatically ceases as soon as the court finds the wife guilty of adultery is that, in such a case she loses the right to her husband's support in accordance with the rule of the common law. Nevertheless, as appears from the judgment of LINDLEY, L.J., in *Dunn* v. *Dunn* (3), the trial judge has power to continue to give alimony G
pendente lite after the wife has been found guilty of adultery. At p. 94, he says :

> If the verdict is against her the onus must lie upon her to show that the alimony ought to be continued. The judge ought to have power to give it to her, but I think it would be wrong to hold that without further order it continues after an adverse verdict.

As an illustration of this power, the Court of Appeal has held in *Welton* v. *Welton* (5) that alimony *pendente lite* may be granted to a petitioning wife H
who has already been found guilty of adultery if her husband has conduced to her adultery by his conduct. At pp. 177, 178, LORD HANWORTH, M.R., stated as a general principle that there is power to make an order for alimony *pendente lite* in the case of a wife already convicted of adultery if she is a competent suitor for a decree of divorce. Moreover, a petitioning wife who has in her discretion statement admitted her own adultery, but is petitioning for a decree on the ground of her husband's misconduct, is not thereby debarred from obtaining or holding an order for alimony *pendente lite*. LORD MERRIVALE,

P., in *Welton* v. *Welton* (5), at p. 167, merely indicated that, in such a case the order for alimony *pendente lite* would probably be refused or discharged. In *Bullock* v. *Bullock* (6), LANGTON, J., said, at p. 135 ([1942] 2 All E.R. at p. 261) that *Welton* v. *Welton* (5) :

> . . . is a very clear authority for the proposition that the mere fact that the woman had admitted adultery, important as it may be, is not always a bar to an application [for alimony *pendente lite*].

A The question, therefore, is whether the practice that alimony *pendente lite* automatically ceases in the case of an adulterous wife should be applied to the case of a wife against whom a decree has been made on the ground of her wilful refusal to consummate the marriage. The answer to this question depends, in my view, on whether there is any substantial difference between a wife found guilty of adultery and a wife who has wilfully refused to consummate the B marriage. In my view, there is a substantial difference. On the other hand, I see no substantial difference between the present case and the case of a wife whose invincible repugnance to the sexual act in former days enabled the court to grant a decree *nisi* annulling the marriage on the ground of her impotence in that particular union. The conduct of an impotent wife clearly does not call for the censure which her adultery would invoke, neither does it, to my mind, relieve the husband from the liability to support her whilst she remains C his wife.

In the case of *S.* v. *B.* (7), where a decree *nisi* had been granted on the ground of the wife's impotence, and an application was made for the alimony pending suit to continue until decree absolute, LORD PENZANCE'S judgment in *Wells* v. *Wells* (4), from which I have quoted, was cited in argument, but SIR JAMES HANNEN, P., held, at p. 81, that in case of nullity alimony *pendente lite* continues payable until the decree absolute.

D I do not see why in this case the conduct of the wife should automatically relieve the husband from his liability to maintain her until the marriage has been annulled by decree absolute. In this connection I adopt the words of SIR FRANCIS JEUNE, P., in *Foden* v. *Foden* (2), a nullity case, where he said, at p. 311 :

> . . . I think it more prudent to adhere to the principle that, as a rule, a marriage E *de facto* carries the right to alimony *pendente lite* until it is finally declared to be void.

On appeal LORD HERSCHELL, L.C., appears to have adopted the same principle when he said, at p. 313 :

> There are obvious reasons why an alleged wife should receive maintenance . . . until her status has been finally determined by the decree of the court.

I, therefore, find in this case that the order of alimony *pendente lite* continues F in force until the decree absolute or until the order is discharged or varied by order of the court. It is always open to the husband to apply to the court for such an order.

Order accordingly.

Solicitors : *Marcy, Russell Cook & Co.* (for the petitioner) ; *Pritchard, Englefield & Co.* (for the respondent).

[*Reported by* D. ARMSTEAD FAIRWEATHER, ESQ., *Barrister-at-Law.*]

G

Re McELLIGOTT, GRANT *v.* McELLIGOTT.

[CHANCERY DIVISION (Vaisey, J.), **February 9, 10, 16, 1944.**]

H *Real Property—Rule in Shelley's Case—Gift to wife and her heirs—Rule not applicable—Law of Property Act*, 1925 (c. 20), *s.* 131.

By his home-made will dated June 3, 1936, the testator gave all his real and personal estate to his wife and her heirs for her and their use and benefit absolutely and for ever. He died on Jan. 19, 1941, leaving a widow and one son. There was no real estate. On behalf of the son it was contended that, as the Law of Property Act, 1925, s. 131, had abolished the rule in *Shelley's Case* (1), the widow took only a life interest in the estate and that there was a remainder to the son or other person or persons who at the widow's death would have been her heir or heirs at law under the general law in force before the Act came into operation:—

Held: upon the true construction of the will there was not a limitation to the widow followed by a limitation to the heirs, and the rule in *Shelley's Case*, therefore, could not have applied to the gift. The words in question were words of limitation and the gift took effect as an absolute gift to the wife.

[**EDITORIAL NOTE.** There has been some discussion as to the effect of the Law of Property Act, 1925, s. 131, upon a gift to A and his heirs. The general view has A
been that such a gift was outside the scope of the rule and was not affected by the section. This view receives support from the judgment in this case, but, the gift being one of personal property, the real issue was not finally decided.

As to the Rule in *Shelley's Case*, see HALSBURY, Hailsham Edn., Vol. 27, pp. 737-743, paras. 1266-1267; and for Cases, see DIGEST, Vol. 38, pp. 705-709, Nos. 497-531.]

Cases referred to: B

*(1) *Shelley's Case, Wolfe* v. *Shelley* (1581), 1 Co. Rep. 93; 38 Digest 705, *497*.

*(2) *Van Grutten* v. *Foxwell, Foxwell* v. *Van Grutten*, [1897] A.C. 658; 38 Digest 706, *500*; 66 L.J.Q.B. 745; 77 L.T. 170.

(3) *Powell* v. *Boggis* (1866), 35 Beav. 535; 44 Digest 450, *2729*; 35 L.J.Ch. 472.

(4) *Re Russell* (1885), 52 L.T. 559; 44 Digest 940, *7966*; *revsg.* 50 L.T. 253.

Summons to determine a question of construction arising under the testator's will. The facts are fully set out in the judgment. C

M. J. Albery for the trustee.

H. Rose for the widow.

J. A. Reid for the son.

Vaisey, J.: In this case the testator, Francis McElligott, by his will dated June 3, 1936, disposed of the whole of his property in the following words:

> My just debts and funeral expenses having been paid I direct that the balance of D
> my estate and effects both real and personal whatsoever and wheresoever be given to my dear wife Anne Grace McElligott (*nee* Hinault) and her heirs for her and their use and benefit absolutely and for ever.

He died on June 19, 1941. The executor appointed by the will renounced probate, and accordingly letters of administration with the will annexed were on Feb. 19, 1942, granted to the plaintiff as attorney for the widow (the lady named in the will) she being then resident abroad. The testator left no real E
estate, and the property passing under the gift in his will which I have quoted now consists of certain Savings Bonds together with a small sum of cash. The widow is the first defendant. Humphrey Francis McElligott, the second defendant, is her son and only child.

The widow claims to be absolutely entitled. The contention put forward on behalf of the son is that she takes a life interest only, with remainder to himself or other the person or persons who at her death would have been her F
heir or heirs at law under the general law in force before Jan. 1, 1926. The argument in support of that contention rests upon the Law of Property Act, 1925, s. 131, to which the marginal heading is "Abolition of the rule in *Shelley's Case* (1)." That section provides so far as material that where, by any instrument coming into operation after the commencement of the Act—the testator's will is undoubtedly such an instrument—an interest in any property is expressed G
to be given to the heir or heirs of any person in words which, but for the section itself would, under the rule in *Shelley's Case* (1), have operated to give to that person an interest in fee simple or an entailed interest, such words are to operate in equity as words of purchase and not of limitation and are to be construed and have effect accordingly; and the section goes on to provide that, in such a case, the heir or heirs is or are to be ascertained according to the old law.

Even if this had been a devise of real estate I am not by any means con- H
vinced that the section would have had any application to it. For it seems to me that, in a limitation to A and his heirs, no interest is "expressed to be given" to the heirs. Nor, in my judgment, was it ever the case that such a limitation vested the fee in A "under the rule in *Shelley's Case* (1)." The rule, as I understand it, dealt with the case of there being two limitations, one a limitation to the ancestor, and then subsequently (and usually after intervening limitations) another separate limitation to the ancestor's heirs. I may refer to the statement of the rule in the case from which it takes its name cited by

LORD MACNAGHTEN in his monumental speech in *Van Grutten* v. *Foxwell* (2), at p. 667:

> It is a rule in law when the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or in tail, that always in such cases "the heirs" are words of limitation of the estate and not words of purchase.

I think it is correct to say that the effect of the rule was that a limitation express or implied to A for life with remainder to his heirs was in law to be regarded as equivalent to a limitation to A and his heirs, and I think that this last mentioned form of limitation was apt to vest the fee in A not under the rule, but independently of it. I do not agree with the contrary view (if such it be) in the passage to which my attention was drawn in FEARNE ON CONTINGENT REMAINDERS, 10th Edn., at p. 77, see WILLIAMS AND EASTWOOD ON REAL PROPERTY (1933), pp. 211-216. In my judgment, therefore, no interest is by this will "expressed to be given" to the heir; nor would the rule in *Shelley's Case* (1) ever at any time or in any circumstances have applied to this gift. Moreover, as there cannot be a fee simple in personal estate, and as there is no question here of any possible "entailed interest," the words cannot in this case have operated so as to bring the section into effect; see *Powell* v. *Boggis* (3). The super-added words "for her and their own use and benefit," etc., do not, in my view, make any difference, or throw any light on the matter. The only other sections of the Act which could possibly have any bearing on the point are sects. 60 and 130. I have considered them, and I need only say that they do not affect the conclusion at which I have arrived.

Apart from the considerations with which I have now dealt there can, I think, be no room for doubting that a limitation of personal estate to one and his heirs operates to vest in the person named an absolute interest; the words being for that purpose adequate although inapt: see *Powell* v. *Boggis* (3), at p. 541, and *Re Russell* (4).

I shall therefore declare that the relevant clause of the will takes effect according to its true construction as an absolute gift to the first defendant, and I shall order the costs of all parties as between solicitor and client to be paid out of the estate in the usual way.

Declaration accordingly.

Solicitors: *Andrew, Purvis, Sutton & Creery* (for all parties).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

Re DAOUST, DOBELL *v.* DOBELL AND OTHERS

[CHANCERY DIVISION (Vaisey, J.), **January 25, 1944.**]

Wills—Construction—Description of donees by relationship—"Nephews and nieces"—Whether persons related by affinity included.

By her will the testatrix directed a division of her residuary estate in equal shares *per capita* between such of her nephews and nieces and descendants of nephews and nieces as should be living at the date of her death. Both at the date of her will and at the date of her death, the testatrix had only one niece and no nephews, nor was it possible that any nephew or niece could come into existence thereafter. The question to be decided was the following: Were the nephews and nieces of the testatrix for the purposes of the will: (*a*) the widower of a niece who predeceased the testatrix and to whom the testatrix referred in other parts of her will as her nephew; (*b*) two nieces of the testatrix's husband, one of whom was referred to in the will as the testatrix's niece; (*c*) the husbands of two nieces of the testatrix's husband.:—

HELD: upon the true construction of the will the persons in (*a*) and (*b*) but not (*c*) were included in the class gift set out in the will.

[**EDITORIAL NOTE.** A testator may by the language which he has used in his will include in a class of relations more persons than those who are strictly included in that class. There are, however, limits to the persons who can be so included and the court here, while willing to include relations by marriage where only one marriage was concerned, has refused to include relations by marriage where it was necessary to pass through two marriages to obtain the desired relationship. The matter, however, is shown to be purely one of the construction of the particular will.

As to Description by Relationship, see HALSBURY, Hailsham Edn., Vol. 34, p. 296, para. 348; and for Cases, see DIGEST, Vol. 44, pp. 822-825, Nos. 6729-6758.]

Cases referred to:

(1) *Re Greene, Bath* v. *Cannon*, [1914] 1 Ch. 134; 44 Digest 823, *6740*; 83 L.J.Ch. 248; 110 L.T. 58.

(2) *Re Winn, Burgess* v. *Winn* (1916), 86 L.J.Ch. 127; 44 Digest 823, *6741*; 115 L.T. 698.

*(3) *Re Helliwell, Pickles* v. *Helliwell*, [1916] 2 Ch. 580; 44 Digest 819, *6707*; 86 L.J.Ch. 45; 115 L.T. 478.

(4) *Sherratt* v. *Mountford* (1873), 8 Ch. App. 928; 44 Digest 822, *6734*; 42 L.J.Ch. 688; 29 L.T. 284.

(5) *Seale-Hayne* v. *Jodrell*, [1891] A.C. 304; 44 Digest 821, *6720*; 61 L.J.Ch. 70; 65 L.T. 57; *affg.* S.C. *sub nom. Re Jodrell, Jodrell* v. *Seale*, [1890] 44 Ch.D. 590, C.A.

*(6) *Adney* v. *Greatrex* (1869), 38 L.J.Ch. 414; 44 Digest 822, *6730*; 20 L.T. 647.

Summons by an executor of the testatrix's will to determine a question of construction arising thereunder. The facts are fully set out in the judgment.

Geoffrey Cross for the plaintiff.

H. O. Danckwerts for the first three defendants.

A. P. Vanneck for the fourth defendant.

Wilfrid M. Hunt for the four remaining adult defendants.

E. M. Winterbotham for the infant defendants.

Vaisey, J.: The testatrix, who was a widow, made her will on Aug. 22, 1940, and died on Dec. 21, 1942. By cl. 7 of the will she directed a division of her residuary estate:

> . . . in equal shares *per capita* between such of my nephews and nieces and descendants of nephews and nieces as shall be living at the date of my death and shall attain the age of twenty-one years or being female marry under that age.

The question is who are the nephews and nieces of the testatrix to whom she was referring in the words I have quoted.

I have, in the first place, to consider what is in contemporary English the proper meaning of the word "nephew" and of the word "niece". There seems no doubt at all that the strict and proper meaning of the word "nephew" is "son of a brother or sister"; and, similarly, "niece" means, in the strict sense, "daughter of a brother or sister." But the meaning of each of these words is, in my judgment, susceptible of extension, having regard to the context and circumstances of the case, in two directions. First of all, the word may describe the child of a brother-in-law or of a sister-in-law; and, in the second place, I think that "nephew" is often used to indicate a niece's husband and "niece" is often used to describe the wife of a nephew. There are, of course, other extensions of meaning which may have to be made in special cases, such as, for example, in the case of an adopted child. Unless compelled by context or circumstances, the court will always construe a class gift to nephews and nieces as a gift confined to children of a brother or sister, and the mere fact that the testator or testatrix has chosen elsewhere in the will erroneously to describe as a nephew or a niece some person not strictly and properly so related to him or her will not affect the general rule by admitting that person into the class. For that I cite as authority *Re Green* (1), and the earlier cases referred to in that decision, and *Re Winn* (2).

The difficulty in the present case, however, lies in the circumstance that both at the date of the will and at the date of her death the testatrix had, in the strict sense, only one niece, namely the first defendant, Eva Ellen Dobell. She had not even one nephew, in the strict sense, nor was it possible at either date for any other niece or any nephew thereafter to come into existence; and I must, I think, assume that the testatrix was sufficiently acquainted with the state of the family, many of whom she names in her will, to have been perfectly aware of that fact if she had brought her mind to bear upon it. The result of that is that a strict application of the general rule to which I have referred would involve the construction of this particular class gift as being equivalent to a gift to the first defendant and her descendants alone.

This seems to me to be a very unlikely intention to attribute to this testatrix, and, therefore, the question which I have to consider is, what other persons ought I to add to the first defendant in order to constitute this class of nephews and nieces.

First, I have to consider the claim of the fourth defendant, William Isaac Lake, who was the husband, and is now the widower, of a niece of the testatrix who had died in the testatrix's lifetime. He is mentioned no fewer than five times in the will and in four out of those five references he is called by the testatrix "my nephew." I think I am entitled to infer that she regarded him as so related to her, firstly, because of her so describing him, and, secondly, because he comes within the second of the two extensions of meaning to which I have referred, that is to say, he was the husband of a niece. Mr. Winterbotham pointed out to me that to admit him to the class might have brought in descendants of his by some wife other than the deceased niece of the testatrix and I feel the force of that. But in fact no such event has happened, with the result that I think he must be admitted to the class, notwithstanding those consequences which might have happened but did not happen by reason of his coming into it. Up to this point the class consists of two persons.

I now consider the claim of the sixth defendant, Mrs. Curtis. She is a daughter of the testatrix's brother-in-law, that is to say, a daughter of her husband's brother. Mrs. Curtis' claim rests chiefly on the fact that she is described by the testatrix as "my niece," being so described when she is given a pecuniary legacy of £200. Some reliance was also placed on the alleged necessity for introducing some plurality into the class of nephews and nieces, which, unless she is admitted to it, would consist, as I have said, of only two constituents. On both these grounds, I think that Mrs. Curtis must come into the class as a niece.

Mrs. Richter, the eighth defendant, is the sister of Mrs. Curtis, and she is also given a legacy of £200 by the testatrix, but when named in connection with that bequest she is not described as a niece. I can see no sufficient reason, however, for excluding her. If Mrs. Curtis was, as I have held, a niece in the contemplation of the testatrix, I find it hard to believe that her sister was not equally so regarded. In admitting Mrs. Richter as a niece of the testatrix, within the meaning of the rule, I am fortified by what was decided by SARGANT, J., in *Re Helliwell* (3), of which it will suffice for me to read the first part of the headnote:

> By treating or naming definite individuals as relations of the testator when they are not strictly such, and by thereby indicating that he is using a word of relationship in a looser sense than its strict one, a testator may include in a general gift to relations of that class—such as nephews and nieces—not merely the specially named individual, but also other persons who are in a corresponding position.

Applying that principle, I think that not only Mrs. Curtis but Mrs. Richter must be brought in as nieces of the testatrix, within the meaning of her will.

No other person standing in a similar relation to the testatrix has to be dealt with; and I have now dealt with Mrs. Dobell, the husband of the deceased niece, William Isaac Lake, and the two ladies who were nieces, in the true sense, of the testatrix's husband.

There now remains the fifth and seventh defendants, who are respectively the husbands of Mrs. Curtis and Mrs. Richter. On their behalf Mr. Hunt put forward an argument that they should be admitted to the class, really, I think, on the ground that only by so admitting them could we produce the necessary plurality of nephews. That claim I feel that I must disallow. I find it more difficult to believe that the testatrix regarded the husbands of her brother-in-law's daughters as her nephews than to believe that the expression "nephews and nieces" necessarily indicates that there must be more than one nephew and more than one niece in the class. I ought also perhaps to have said that Mr. Hunt suggested that they should come in by analogy to the arguments which have been successfully advanced in the case of the defendant, William Isaac Lake. As regards the argument of a necessary plurality, I have come to the conclusion that that is an argument which carries grammatical pedantry much too far, and the only equivalent which I can think of would be the attitude which would find impropriety in saying that the sum of £5 1*s.* 1*d.* was an amount in pounds, shillings and pence.

I have been referred to several cases, of which I should, I think, mention *Sherratt* v. *Mountford* (4), and *Re Jodrell* (5), and also the same case in the

House of Lords. I do not know that those cases assist me very much, but in any event what I have decided is not, in my judgment, in any way inconsistent with what is said in any of them. But I might, perhaps, refer a little more closely to *Adney* v. *Greatrex* (6), which was a decision of Lord Romilly, M.R., under very similar circumstances. The headnote is :

> A testator, after giving a legacy to each of several persons, whom he called respectively his nephews and nieces, gave the residue of his property to be divided between all his nephews and nieces equally, share and share alike. At the date of the will, the testator had one nephew and one niece, who were both mentioned in the will, and there was no possibility of his having future nephews or nieces. The other persons mentioned in the will, and therein respectively called the testator's nephews and nieces, were, in fact, the nephews and nieces of his wife. Held, that the nephews and nieces by affinity were included in the gift of residue.

That was the decision, but I wish in conclusion to cite, and respectfully to adopt some words of Lord Romilly, M.R., at p. 416 :

> I think that in cases of this description you are not bound by previous authorities which are not exactly in the same words, but you are bound to take this as your cardinal rule : look at the whole family, read the will all through, and say what a reasonable man would take to be the meaning of the words. I think the meaning was that they must all take. I cannot say I have come to this conclusion without hesitation, but in my opinion it is the safest course I can take, and I shall so decide. But I beg leave to have it considered that my judgment does not in the slightest degree affect any other case, and that if it is ever cited before any judge I beg to say I disclaim its application to any case except one in which identically the same words are used as I have here before me.

To which I think I can add without impropriety, "and in which the surrounding circumstances proper to be looked at are also identical."

Declaration accordingly.

Solicitors : *Smith & Hudson*, agents for *Dobells & McCready*, Plymouth (for all parties).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

W. (otherwise B.) *v.* W.

[Probate, Divorce and Admiralty Division (Hodson, J.), **March 7, 1944.**]

Divorce—Nullity—Practice—Particulars—Whether particulars will be ordered of plea contained in the petition of a female petitioner alleging incapacity.

In a suit for nullity the petitioner alleged that the respondent was at the time of the ceremony of marriage and had been at all times from that date incapable of consummating the same. The respondent applied for particulars of the plea but the application was refused by the registrar on the ground that it was not the practice of the court to allow such particulars where the petitioner was a female. It was further contended on behalf of the petitioner (i) that the pleading was sufficient as it stood, and that, even if the respondent were entitled to particulars, the order should be refused for practical reasons ; and (ii) that it would be impossible to give particulars in such a case without pleading the evidence :—

Held : in a suit for nullity based on the ground of incapacity, since incapacity may take many forms, it is reasonable for the respondent to require particulars so as to be prepared at the trial with the necessary evidence. It is possible to state concisely the nature of the incapacity without setting out the evidence.

[**EDITORIAL NOTE.** It is the function of a pleading to show the opposite party the case he has to meet at the trial so that he shall not be then taken by surprise. At the same time a party is not to be required to disclose his evidence. It is here said that in the case of a female petitioner particulars of incapacity can be given without disclosing the evidence and should be given since an allegation of incapacity does not of itself show what particular form of incapacity is relied upon.

As to Particulars in Nullity Cases, see HALSBURY, Hailsham Edn., Vol. 10, pp. 709, 710, paras. 1067-1070 ; and for Cases, see DIGEST, Vol. 27, pp. 399, 400, Nos. 3956-3980.]

Case referred to :

(1) *Philipps* v. *Philipps* (1878), 4 Q.B.D. 127 ; 38 Digest 776, *1114* ; 48 L.J.Q.B. 135 ; 39 L.T. 556.

APPEAL from an order of the registrar refusing an application for particulars of a plea contained in a petition for nullity. The facts are fully stated in the judgment.

E. Holroyd Pearce for the petitioner.

D. A. Fairweather for the respondent.

HODSON, J.: This is an application for particulars of a plea contained in the petition of a female petitioner alleging that the respondent was at the time of the ceremony of marriage and has ever since been incapable of consummating the same.

The registrar refused to order particulars of the nature of the incapacity, and the respondent has appealed against such refusal. It was suggested that there was an inveterate practice of the court not to order such particulars, at any rate in cases where the petitioner was a female, although it was conceded that a similar order had been made on a number of occasions where the position was reversed. I cannot see that there can be any distinction in principle between the two cases, although it is obvious that in many suits for nullity on the ground of incapacity there can be nothing to be gained by making such an application. Accordingly, such applications are unlikely to be common. Since the matter was adjourned into court, I have not been able to discover that any order such as is asked for in the present case has ever been obtained by a male respondent, although it may be that such particulars have been given in response to a request for particulars without the compulsion of an order.

It is to be borne in mind that, in a suit for nullity on the ground of incapacity, medical inspectors are appointed by the court, whose report is available to both sides and will in most cases disclose any incapacity which is apparent upon inspection. This does not necessarily dispose of all those cases where physical malformation is alleged to exist, and it is always open to the parties to call expert or other evidence in addition to that of the medical inspectors appointed by the court. There remain the cases where no incapacity is apparent, and yet incapacity to consummate the particular marriage is said to exist. Such cases by far outnumber those where any malformation can be found.

It has been argued on behalf of the petitioner that the pleading is sufficient as it stands, and that, in law, it is no more correct to order particulars of incapacity to perform a particular act than to order particulars of failure to do so. This argument is not, I think, well founded, since an allegation of incapacity to perform an act goes further than a mere allegation of failure. It is not a mere negative averment, but an allegation that a condition of things exists which can be more particularly defined. Indeed, failure to consummate the marriage is alleged separately by para. 2 of the petition and no application for particulars is made in respect of this paragraph. It is no doubt true that it would be frivolous in many classes of action to apply for particulars of the nature of incapacity where the mere fact of inability to perform a particular act is alleged in pleading. On the other hand, incapacity may take many forms, and in a suit for nullity based on this ground it is not unreasonable on the face of it for the person against whom the allegation is made to be put on his guard in order that he may be prepared at the trial with expert or other evidence to meet the case brought against him. This is in accordance with the often quoted passage contained in the judgment of COTTON, L.J., in *Philipps* v. *Philipps* (1), where he said, at p. 139:

> . . . in my opinion, it is absolutely essential that the pleading, not to be embarrassing to the defendants, should state those facts which will put the defendants on their guard and tell them what they have to meet when the case comes on for trial.

The petitioner has further argued that, even if theoretically the respondent may be entitled to particulars, yet such an order should be refused for what have been described as practical reasons. It is said that the parties themselves are the only possible witnesses who can deal directly with capacity or incapacity, and that the expert witnesses, if any, must necessarily in giving their evidence deal with the facts deposed to by the parties after having an opportunity of considering those facts. Hence nothing is to be gained, it is said, from particularising the allegation in detail before the trial. I do not think that this conclusion is correct, for it might be that, having heard the evidence called on behalf of the petitioner, the respondent might find that he had not brought witnesses with the necessary qualifications to deal adequately with that evidence and might be put in the position of having to seek an adjournment in order that such evidence may be adduced. It is further argued that it is practically impossible to comply with an order for particulars of the nature of the incapacity without pleading the evidence in support of the allegation. I do not think that this objection is well founded. In stating concisely the nature of the incapacity alleged, there is no necessity to set out in detail the evidence to be adduced to prove the fact.

I, therefore, hold that the respondent is entitled to the order asked for in this A case, that is to say, that particulars of the nature of the incapacity alleged should be filed and delivered by the petitioner within 14 days.

Appeal allowed.

Solicitors: *Kenneth Brown, Baker, Baker* (for the petitioner); *A. E. Hamlin, Brown & Co.* (for the respondent).

[*Reported by* D. Armstead Fairweather, Esq., *Barrister-at-Law.*]

B

SIGNY *v.* THE ABBEY NATIONAL BUILDING SOCIETY.

[Court of Appeal (Lord Green, M.R., MacKinnon and Luxmoore, L.JJ.), **March 10, 1944.**]

Landlord and Tenant—Rent restriction—Standard rent—"First let"—Dwelling- C *house first let furnished—Subsequently let unfurnished—Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (c. 17), *s.* 12 (1) (*a*), (2) (i).

A certain house was not let at any time on or before Sept. 1, 1939. On Jan. 8, 1940, the house was let for the first time at a rent of £130 per annum inclusive of rates and all the furniture, fixtures and fittings therein. In September, 1942, the appellants let the house at a rent of £115 per annum D unfurnished and exclusive of rates. The question for the decision of the court was whether for the purposes of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (1) (*a*), as modified by Sched. I of the 1939 Act, the house was first let under the 1940 agreement or the 1942 agreement:—

Held: on the true construction of the section, the first letting for the purpose of fixing the standard rent of the dwellinghouse within the purview E of the Acts was the first letting of the dwellinghouse without the use of furniture.

[**EDITORIAL NOTE.** The Acts define the standard rent (*inter alia*) as the first letting after a certain date, without saying whether the letting is a furnished letting or a letting of the house without the use of furniture. Since the Acts do not in general apply to furnished lettings, it is decided that the first letting for the purposes of fixing the standard rent is the first letting as an unfurnished house. F

As to Standard Rent, see HALSBURY, Hailsham Edn., Vol. 20, pp. 312-315, paras. 369, 370; and for Cases, see DIGEST, Vol. 31, pp. 564-566, Nos. 7117-7132.]

Cases referred to:

(1) *Newman* v. *Anderton* (1806), 2 Bos. & P.N.R. 224; 31 Digest 225, *3642*.

(2) *Wilkes* v. *Goodwin*, [1923] 2 K.B. 86; 31 Digest 560, *7080*; 92 L.J.K.B. 580; 129 L.T. 44.

Appeal by the landlords from an order of His Honour Judge Drucquer G dated Dec. 10, 1943. The facts are fully set out in the judgment of the court delivered by Luxmoore, L.J.

Sebag Shaw for the appellants.

Elliott Gorst for the respondents.

Luxmoore, L.J. [delivering the judgment of the court]: On Dec. 10, 1943, His Honour Judge Drucquer determined that the standard rent of No. 18, H Western Avenue, Golders Green, for the purposes of the Rent Restrictions Acts was fixed by a letting effected on Jan. 8, 1940, by an agreement made between Lottie Nicholls as landlord and Siemion & Filipsohn as tenants. The rent reserved under this agreement was £130 per annum, and the letting included the house and all the furniture, fixtures and effects therein.

The judge made his order on an application made by Mr. and Mrs. Signy, to which the National Building Society were respondents, that society having let the house at a yearly rent of £115 in Sept., 1942. This letting was of the house without any furniture. The rateable value of the house was at all material times £51. Under the first agreement the landlord agreed to pay the rates, while under the second agreement the rates were payable by the tenants.

The National Building Society appealed against the order of the county court judge.

Since the presentation of the appeal the National Building Society has amalgamated with the Abbey Road Building Society, and all the property of both A companies has become vested in a new company called the Abbey National Building Society, and on the application of that company this court made an order directing that the proceedings should be carried on between the new company as appellants and the respondents.

The question to be determined is whether on the true construction of the Rent Restriction Acts the letting of the house furnished at an inclusive rental of £130 a year on Jan. 8, 1940, was its first letting for the purposes of fixing its B standard rent under the Acts. The county court judge held that (*a*) the house became controlled under the 1939 Act, (*b*) it was not let before Sept. 1, 1939, nor, on that date, and (*c*) it was first let on Jan. 8, 1940, by the agreement already mentioned at a rental of £130 a year inclusive of rates and use of furniture.

On these facts he held that the standard rent of the house was £130 a year under and by virtue of the provisions of sect. 12 (1) (*a*) of the 1920 Act as modified by Sched. I of the 1939 Act.

C The appellants contend that the county court judge was in error in so holding and that the standard rent ought properly to be fixed at £115 exclusive of rates, this being the rent reserved on the letting to the respondents which the appellants contend is the first letting of the house for the purposes of the Acts.

The basis of the county court judge's decision is that the words "first let" in sect. 12 (1) (*a*) of the 1920 Act as modified refer to the first letting in fact D without reference to the Rent Restriction Acts, and that, in its ordinary significance rent includes the periodic payments in respect of a furnished house as well as of one that is unfurnished, for rent of a furnished house is deemed to issue entirely out of the realty and may, therefore, be distrained for: *Newman* v. *Anderton* (1). If this be the correct interpretation of sect. 12 (1) (*a*), surprising anomalies must necessarily result. For example, take the case of two precisely similar houses next door to one another in the same street. One is let for the first time E unfurnished at £60 per annum, and the other is let also for the first time but furnished at £120 per annum. The standard rent in the one case is £60 and in the other £120. Such a result would obviously be contrary to the whole policy and intendment of the legislation with regard to the fixing of rent for houses within the purview of the Rent Restriction Acts.

In our judgment, the key to the true meaning of sect. 12 (1) (*a*) as modified is to be found when its object is considered. What the section is providing for F is the fixing of the standard rent for dwellinghouses which fall within the scope of the Acts. It is provided that, except for certain purposes which are set out in sects. 9 and 10 of the Act of 1920 and to which it is immaterial for present purposes to refer, the Acts have no application to a dwellinghouse *bona fide* let at a rent which includes payments in respect of the use of furniture: see sect. 12 (2) (i) of the Act of 1920. It is to be observed that there is no express G reference in this paragraph to a "furnished house" or to a "house let furnished," expressions in common daily use; the reference is to a

> . . . dwellinghouse *bona fide* let at a rent which includes payments in respect of . . . use of furniture . . .

The words of the proviso are obviously more suitable to describe a house let with some articles of furniture in it than to one completely furnished. In H *Wilkes* v. *Goodwin* (2), a maisonette had been let to a tenant at a rent of £80 per annum to include the use of the linoleum with which certain of the floors were covered. The Court of Appeal held that, unless the linoleum was so trifling in quality or value as to be negligible—which was a question of fact for the county court judge—its use was sufficient to satisfy the words "use of furniture" in the proviso and the premises were excluded from the operation of the Acts. BANKES, L.J., called attention in his judgment to the wording of the proviso and to the reference in the side note to sect. 9 of the Act of 1920, namely, "houses let furnished." In addition to this side note there is a reference in the side note to sect. 10 of the same Act to "furnished lettings." Bankes, L.J., said, at p. 95:

> In the popular sense a house is not "let furnished" unless it is more or less completely furnished. It cannot be disputed that sect. 9 must apply to houses only partially or incompletely furnished as well as to furnished houses. This conclusion drives one back to the question of what is meant by the expression in the body of sect. 9 (1), and in the proviso (i) to sect. 12 (2), "payment for the use of furniture." I cannot think that this expression was intended to refer to a house let furnished. On the contrary, it appears to me to have been deliberately selected to indicate something different from the letting of a furnished house.

The context shows that he is not there saying that a house let furnished is not excluded from the Act, but that the words are not limited to a house let furnished so as to exclude from the section a house let partially or incompletely furnished, for he states that houses let furnished in the popular sense are within the scope of both sections. Scrutton, L.J., said, at p. 96:

> . . . in my view . . . furniture is not confined . . . to the complete furniture of a furnished house . . .

while Younger, L.J., held that the sections in question applied only to furnished houses in the popular sense. It is, I think, necessary to keep these considerations in mind when construing the material section. The expression "standard rent" is defined thereby to mean:

> . . . the rent at which the dwellinghouse was let on Sept. 1, 1939, or where the dwellinghouse was not let on that date the rent at which it was last let before that date, or [and this applies to the present case] in the case of a dwellinghouse which was first let after the said Sept. 1, the rent at which it was first let.

The object is plainly to fix the standard rent of a dwellinghouse to which the Acts apply, that is, having regard to subsect. (2) (i) of sect. 12, a dwellinghouse without the use of furniture. It seems to us that the section read as a whole is fixing the rental value of the house, so long as that value does not include any substantial payment for use of furniture, as the criterion for deciding the question whether a house falls within the Acts or not. In the case of a house let completely furnished at an inclusive rent, it is obvious that a substantial part of that rent must be attributable to the fact that the house is so furnished. If the answer to the question whether a particular house falls within the Acts or not depends on an examination of the circumstances in which the rent was fixed with regard to the subject-matter of the letting, the same consideration must logically be applied to the subject-matter of the first letting and the rent reserved thereby. A letting of a dwellinghouse completely furnished is a letting of something more than the dwellinghouse, for it includes also the letting of the furniture in it. In sect. 12 (1) (*a*) the first letting which is to fix the "standard rent" of a dwellinghouse within the purview of the Acts, namely, an unfurnished dwellinghouse, is the first letting of the dwellinghouse and nothing else, and we can find no justification for reading the section as if the words "whether furnished or unfurnished" are to be implied.

A careful consideration of the Acts, including especially the provisions of sects. 9, 10 and 12 (2) (i), seems to us to impose a restricted meaning on the word "rent," for otherwise the standard rent of an unfurnished house, to which alone the Acts apply, would be fixed, if the first letting at the material date should happen to be of that house furnished, with reference to the rent of a furnished house, to which the Acts have no application.

For these reasons we hold that the first letting material to be considered in the present case is the letting to the respondents of the house unfurnished, and consequently that the standard rent ought to be fixed at £115, with such addition as is necessary to provide for the fact that the tenant is responsible for the rates attributable to the house.

The appeal must be allowed, and the respondents must pay the costs here and below.

Appeal allowed with costs.

Solicitors: *Tucker, Turner & Co.* (for the appellants); *F. Bernard Smith* (for the respondents).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

ALEXANDER *v.* TREDEGAR IRON & COAL CO., LTD.

[COURT OF APPEAL (Scott, Goddard and du Parcq, L.JJ.), **March 9, 10, 13, 17, 1944.**]

Mines—Coal mine—Statutory regulation of mines—"Obstruction" of haulage road—Trucks not known to be on the road—Negligence of fireman—Defence of common employment—Coal Mines Act, 1911 (*c.* 50), *ss.* 47, 102 (8)—*Coal Mines General Regulations,* 1913 (*S.R. & O.,* 1913, *No.* 748), *regs.* 58, 98, 103.

Master and Servant—Common employment—Whether doctrine of common employment modified by Essential Work Order—Essential Work (*General Provisions*) (*No.* 2) *Order,* 1942 (*S.R. & O.,* 1942, *No.* 1594).

Two repairers had been ordered by the fireman in charge of the district to accompany him when he was taking a damaged tram, drawn by a horse, to the pit bottom for repair. In order to arrive at their destination they had to proceed, for part of the way, along the main haulage road, where there was a steep incline down which trams were lowered by gravity and pulled up again by a haulage engine. Owing to the negligence of the fireman, who failed either to telephone to the engine house at the pit bottom to ask that the road should be kept free for his party, or to signal that he and his party were coming, a collision occurred between his party and a journey of trams coming down the haulage road and the fireman and the two repairers were killed. In an action by a dependant of one of the deceased, it was contended by the plaintiff that the death of the two repairers had been caused by a breach of the statutory duty imposed on the defendants by the Coal Mines Act, 1911, s. 47, which requires that "Every haulage road shall be kept clear as far as possible of pieces of coal and other obstruction," or, alternatively, by the negligence of the defendants at common law. It was further contended that the defence of common employment does not apply to men whose employment comes within the Essential Work Order:—

HELD: (i) [SCOTT, L.J., *dissenting*] the word "obstruction" does not include a truck which is being legitimately moved along the rails but which causes a collision owing to a failure to signal or a disregard of signals.

(ii) the defence of common employment is not affected by the Essential Work Order.

[**EDITORIAL NOTE.** The matter of general importance here is the question whether the doctrine of common employment applies to men subject to the Essential Work Order and on this matter the Court of Appeal are unanimous. It was argued that the fact that a man had to work or to continue to work where he was directed was inconsistent with the presumption that he voluntarily undertook the risks of his employment arising from the negligence of his fellow workers which is the basis of the doctrine of common employment. This argument is rejected and it is held that the doctrine is a presumption of law applicable to every contract of service. The question under the Coal Mines Act and Regulations raises again a nice question of the application of the *ejusdem generis* rule, but, apart from this, is confined to the particular regulation.

AS TO COMMON EMPLOYMENT, see HALSBURY, Hailsham Edn., Vol. 22, pp. 191-194, para. 322-328; and FOR CASES, see DIGEST, Vol. 34, pp. 207-210, Nos. 1697-1729.]

Cases referred to:

*(1) *Smelting Co. of Australia* v. *Inland Revenue Comrs.*, [1897] 1 Q.B. 175; 36 Digest 676, *1577*; 66 L.J.Q.B. 137; 75 L.T. 534.

(2) *Fanton* v. *Denville,* [1932] 2 K.B. 309; Digest Supp.; 101 L.J.K.B. 641; 147 L.T. 243.

*(3) *Radcliffe* v. *Ribble Motor Services, Ltd.*, [1939] A.C. 215; [1939] 1 All E.R. 637; Digest Supp.; 108 L.J.K.B. 320; 160 L.T. 420.

(4) *River Wear Comrs.* v. *Adamson* (1877), 2 App. Cas. 743; 36 Digest 105, *705*; 47 L.J.Q.B. 193; 37 L.T. 543.

(5) *Sussex Peerage Case* (1844), 11 Cl. & Fin. 85; 42 Digest 650, *569*; 6 State Tr. N.S. 79; 3 L.T.O.S. 277.

(6) *Stowel* v. *Zouch* (*Lord*) (1569), Plowden 353; 42 Digest 635, *378*.

APPEAL by the plaintiff from a judgment of SINGLETON, J., dated Nov. 4, 1943, given at Newport (Mon.) Assizes. The facts are fully stated in the judgment of SCOTT, L.J.

Gilbert Paull, K.C., and *E. Ryder Richardson* for the appellant.
A. J. Long, K.C., and *A. A. Warren* for the respondents.

Scott, L.J.: I have the misfortune to be in a minority and in those circumstances I will ask Goddard, L.J., to deliver judgment first.

Goddard, L.J.: This is the judgment of myself and du Parcq, L.J. In our opinion, the judgment of Singleton, J., was right on all points. The evidence of both Addis and White showed that there is nothing improper in hauling a truck in need of repair by means of a horse along the haulage way during hours, provided a signal is given by a telephone communication or otherwise to the engine driver so that the latter may not send down a journey of trucks while the damaged vehicle is on the road, or that he may tell those in charge of the damaged vehicle to wait until the line is clear. We do not think that sect. 47 has any application to a truck that is on the haulage way in these circumstances. The danger only arises by reason either of a failure to communicate with the engine driver, or of a disregard of the communication by the engine driver who may send down a journey in spite of being warned that a truck is being hauled up, or by the man in charge of the truck disregarding the warning of the engine driver that a journey was coming or about to come down. In our opinion, the argument of counsel for the defendants that the section is not a traffic regulation is right; it is intended to deal with the condition or state of the haulage way. A truck left on or across the line, either negligently or deliberately, would, we think, fairly come within the meaning of obstruction as used in the section. It would then be as much an obstruction as a piece of coal or a baulk of timber. But a section which requires the way to be left clear of pieces of coal or other obstruction does not appear to us to be intended to deal with the case of a truck, or line of trucks, which is being legitimately moved along the rails, but owing to a failure to signal, or to a disregard of signals, causes a collision. The same conclusion would result from invoking the rule of construction known as the *ejusdem generis* rule, or as the rule *noscitur a sociis*, a rule which, no doubt, as Rigby, L.J, said in *Smelting Co. of Australia* v. *Inland Revenue Comrs.* (1), at p. 182:

> . . . ought to be applied with . . . caution; because it implies a departure from the natural meaning of words, in order to give them a meaning which may or may not have been the intention of the legislature.

But the presence of the words "pieces of coal" seems to us to indicate quite clearly the sort of obstruction at which the section was aimed, and we are bound to say that we do not think, if one speaks of a train being wrecked by an obstruction on the line, it would be thought to be an appropriate way of describing a collision between two trains moving in opposite directions on the same set of metals. On this point, therefore, we agree entirely with Singleton, J., but, if the section did apply to this state of facts, it is equally clear that sect. 102 (8) would afford no defence. If it were a breach of statutory duty, it is a breach of an absolute duty cast on the employer and no one can say that the breach was unavoidable.

The other point that arises is that it is submitted that the doctrine of common employment cannot arise in the case of any employment to which the Essential Work Order applies, inasmuch as there is no longer freedom of contract between master and servant. For this purpose there is no difference between the Order which applies to the coal mining industry and that dealing with other essential employment. In the present case the workman had not been directed to this particular employment; he had, in fact, been in the service of the defendants for many years and had never applied to leave it. This, in our opinion, is immaterial. The suggested reason for saying that the doctrine does not apply is equally applicable, as it seems to us, to a man who is ordered to work for a particular employer and to one who, being in the service of an employer, cannot leave without permission. It is perfectly true that it has been said in more than one of the older cases on the subject that, if a workman finds or thinks that he is exposed to risks from rash or unskilful fellow servants, he can leave the employment, but that, we think, is only an attempt to make appear reasonable a doctrine that most modern lawyers regard as irrational. It is, however, far too late now to pray in aid any of these supposed considerations. Whether one calls it a rule or a presumption, it is a rule or presumption of law and can be excluded by nothing less than an express agreement, see *per* SCRUTTON, L.J., in *Fanton* v. *Denville* (2), at p. 325, where he cites with approval a passage from SALMOND ON THE LAW OF TORTS, 9th Edn., at p. 107. Again, in *Radcliffe* v. *Ribble Motors* (3), LORD MACMILLAN said, at p. 234 ([1939] 1 All E.R. at p. 648):

> The assumed facts are . . . sheer fiction. Yet the rule of law persists . . . notwithstanding that its original ratio has long ceased to be regarded as tenable.

It is to be remembered that, when passing on more than one occasion legislation
A that has mitigated the doctrine, Parliament has refrained from abolishing it, and it is, therefore, the plain duty of the courts, however much they may regret that it ever became a rule, to apply it when the facts require it. It would be possible in this case to escape from the rule only were it to be held that the Essential Work Order destroyed the contract of service. In our opinion, it is impossible so to hold. The Order imposes certain conditions and restrictions
B on the contract. It makes it an offence for a man to refuse to enter into a contract of service with an employer to whom he is directed, or for an employer to refuse to employ a man whom he is directed to employ; equally it makes it an offence for a man to leave his employment, or, with certain exceptions, for an employer to discharge him without the permission of an official of the Ministry of Labour. But once a workman is working for an employer he must, in our opinion, be considered as working under a contract of service, and the ordinary
C terms of such a contract must apply thereto, except in so far as they are abrogated by the Order. The doctrine of common employment is a part of the law relating to the vicarious liability of a master for the acts of his servants; while he is liable for the injuries caused by the negligence of his servant, he is not liable if the injured person is a fellow servant, provided the employment is one which involves necessarily and naturally the exposure of one to the risk of negligence in another: see *Radcliffe* v. *Ribble Motors* (3). The reasons justifying the
D vicarious liability of a master to others for the negligent act of his servant are that the injury may be deemed to be caused either by the want of care in choosing competent servants or in the superintendence or control of their work. This presumption or rule is just as irrefutable as that of common employment. But, if it were held that, because the Essential Work Order restricts or even destroys freedom of contract, the doctrine of common employment no longer applied,
E we do not see why the vicarious responsibility of an employer to third parties should not also be ended. He could say, perhaps with absolute truth, that, had he been left free he would never have engaged the particular servant who has proved to be negligent or unskilful, or would have got rid of him before he had committed the particular act of negligence. In our opinion, SINGLETON, J., was right on this point also and we would dismiss the appeal.

F SCOTT, L.J.: This is an appeal by the plaintiff from a judgment of SINGLETON, J., at Newport (Mon.) Assizes, in an action in respect of the death of two men employed underground as repairers at the defendants' colliery, alleged to have been caused by a breach of the statutory duty imposed on the defendants by the Coal Mines Act, 1911, s. 47, or alternatively by the negligence of the defendants at common law. The defendants denied breach of statutory duty and to the negligence pleaded contributory negligence and common employ-
G ment. The two men and the fireman, one Mantle, who was in charge of the district, were all killed by being run into on the main haulage road by a journey or train of tubs, as they are called in some other parts of England and in the Coal Mines Regulations, or trams, as they are called in South Wales, running on rails, in circumstances which I will explain. SINGLETON, J., held that there was no breach of statutory duty; that the deaths were caused by the negligence of Mantle; that there was no contributory negligence; but that the defence of
H common employment succeeded. It is quite easy to follow the evidence and findings of fact on the plan, but less easy to describe the position in words. From the pit bottom there was a straight main haulage road, called Badham's Drift, running south south-west for nearly a mile on an average gradient downhill, from near the pit bottom, of a little more than 1 in 18. Throughout this length there was laid a narrow haulage railway on which the trams could be lowered by gravity down the incline, and pulled up again by a haulage engine near the pit bottom. About 300 yds. down the incline there was a road which diverged to the east known as No. 4, East Drift Road, and at that junction was

a telephone and in addition the usual signalling wires (see Coal Mines General Regulations, 1913, reg. 98). About 250 yds. further down a level road, called the Hydraulic Parting, diverged to the west. Both these other roads were also haulage roads with rails. The main haulage road was, I think, also a travelling road, *i.e.*, one with a 2 ft. wide clearance on one side to allow men to walk when trams are passing on the rails. The accident occurred about 5.40 a.m., near the end of the night shift which was due to finish at 6 a.m. About 5.30 a.m. Mantle, the fireman, ordered a labourer, called Addis, to take a tram with a bent axle, which had to go up to the surface for repair, to the pit bottom with a horse to draw it. That tram was near the junction with the main haulage road of a level turning west called Badham's Level, about half a mile further down Badham's Drift than the Hydraulic Parting. On the way Mantle ordered the two deceased men to come with them. On getting close to the Hydraulic haulage junction, Mantle sent Addis forward to see "whether there was a rope on the ground" (*i.e.*, the steel ropes used on the haulage system). If there was, it would mean that there was a journey of trams somewhere along or beyond that level which was or shortly would be coming up on its way to the pit bottom. On Addis reporting that there was no rope, Mantle told the party to go on up the main haulage road.

In the meantime, unknown to any of them, a journey of 14 trams, filled with rubbish, *i.e.*, broken stone, and two other trams at its tail, had been on its way to No. 4 East Drift (pulled up by a stationary haulage engine). On getting to the junction with the main road, Healey, the man in charge of that journey, had left his two extra trams just inside the East Drift (as they were to go to the pit bottom) and then (obviously by signals on the signal wires or by telephone) had had the 14 pulled up the main road so as to get them all past the points at the junction, had switched the points over, and then (again by signal or telephone) got the journey restarted in motion down the main road with a view to taking them to their destination somewhere along the Hydraulic Parting, where no doubt their contents were intended to be used for packing or dumped in the gob. It should be borne in mind that there was no lighting along Badham's Drift, and that the only light, other than the safety lamps of Mantle's party, would be Healey's one safety lamp at the top end of his journey of 14 trams. In short the view *up* the main road was in total darkness, anything coming down being quite invisible even when approaching quite near. On hearing that there was no rope on the ground Mantle, the fireman, whose primary duty was to ensure the safety of all in his district, and particularly of those presently under his orders, was guilty of a grave act of negligence. It was not till 6.15 that he could count on the haulage system being definitely out of action—that being the hour at which the roads were always left free for the night shift to walk outbye to the pit bottom. Till that hour he could not tell that a journey might not be coming down. Consequently it was his duty to telephone to the engine house at the pit bottom to ask whether the road could be kept free for him to send his damaged tram up with its horse and three men. He did not do so. He neither telephoned to ask, nor signalled that he was going to do it without asking. Not only could Addis see nothing ahead, but the noise made by the damaged tram, the horse and the four men was such as to make the descending journey of trams inaudible. The inevitable happened. The first that Addis, walking at the horse's head, knew of the 14 descending trams was the collision of the foremost one with the horse and the piling up of the following trams on top of each other, killing all three men who were walking behind the damaged tram. Addis fortunately was able to jump free and was unhurt.

Sect. 47 of the Act of 1911 is as follows:

> Every haulage road shall be kept clear as far as possible of pieces of coal and other obstruction.

The first question in the case is whether the horse and damaged tram, in that position, at that time, constituted an obstruction within the meaning of the section. That the journey of trams was obstructed in its lawful passage along the main haulage road cannot be gainsaid: but is that kind of obstruction within the meaning of the section? Singleton, J., held not. He thought the section only meant things left on the track like props or large lumps of coal. Much argument was addressed to us on the applicability to the wording of the section of the so-called *ejusdem generis* rule, almost as if it was a rule of substantive law, and as if the sole question upon the section was whether the rule applied or not. In my opinion, that rule has been stretched beyond its limits—elastic though it may be; and as a result it is almost as likely to mislead as to elucidate. I cannot see that it has any application to sect. 47. If one tries to apply it, one is at once met with the difficulty that, there being only one "species," *viz.*, pieces of coal, there is no basis for formulating a "*genus*." It may not be a very good specimen of the draftsman's art, but its meaning seems to me plain. I construe it "every haulage road shall as far as possible be kept clear of anything which will or may obstruct the working of the haulage system"—*e.g.*, pieces of coal. The reason they are specifically mentioned seems to me to lie in the fact—well known to anybody familiar with coal mines—that the jolting of trams filled with large coal to the top is liable occasionally to cause large pieces to fall out over the edges of a tram on to the track. But the stress of the imperative command of Parliament is upon the word "obstruction." The section is in the group dealing with safety and, in my opinion, it should be so interpreted, if it presents any ambiguity, as to promote safety. This interpretation, I think, accords with the principles enunciated by LORD BLACKBURN in *River Wear Comrs.* v. *Adamson* (4), at pp. 763-5, and by TINDAL, L.C.J., in *Sussex Peerage Case* (5), at p. 143:

> But if any doubt arises from the terms employed by the legislature, it has always been held a safe mean of collecting the intention, to call in aid the ground and cause of making the statute, and to have recourse to the preamble, which, according to DYER, C.J. (*Stowel* v. *Lord Zouch* (6)) is "a key to open the minds of the makers of the Act, and the mischiefs which they intended to redress."

GODDARD and DU PARCQ, L.JJ., do not agree with me. They think that the word obstruction must be construed as *ejusdem generis* with "pieces of coal"; but that narrow interpretation seems to me to ignore the indications, given by the Act and regulations, of what Parliament had in mind. The haulage road in question was, as is usual, a single line railway; and the essential need in the cause of safety was to prevent the passage of "blind" trains of trams (*i.e.*, with no human being walking at the head of the train) being obstructed by unseen and unexpected obstacles. Having regard to the construction put on the section by my brethren, I, of course, concede that its language is not free from ambiguity; but equally I cannot think that it is clear in their sense; and, if it is ambiguous, I venture to think that my "safety" interpretation is more consonant with the principle than theirs. I cannot think that the "penal" principle of interpretation as used by counsel for the defendants has any application to sect. 47.

If, then, the section be construed as forbidding "obstructions" in general, the only question of interpretation which remains is whether at the time and place of the accident the horse and damaged tram constituted an "obstruction." It cannot be gainsaid that the duty of the fireman was to keep the line clear, or, conversely, to take all possible steps to prevent its being not clear—*i.e.*, obstructed. He ought to have telephoned to ask whether the line up to the pit bottom would be clear for the damaged tram, but did not. As he could not with safety send the gang forward without that assurance, he committed a grave breach of duty in ordering the men to take the horse and tram forward, thereby obstructing the descent of the on-coming journey of 14 heavily laden trams full of stone. He thereby committed two breaches of duty, one of omission, the other of commission. If he had ordered the tram to any point above the junction with the Hydraulic Parting—however little above—and then left it there, calling his men and horse off, can it be doubted that it would have been an obstruction within the section? If so, what difference does it make on the issue of interpretation that the tram was moving and not stationary?

On the other issues in the appeal I agree with my brethren, but for the above reasons I have come to the conclusion, respectfully differing from them, that there was a breach by the defendant company of their statutory duty, and consequently that the defence of common employment does not apply.

I cannot, however, refrain from drawing attention to the unjust paradox of the defence of common employment as the law is to-day in regard to such common law negligence by the dead fireman as there was in this case. Under the Coal Mines Act, 1911, s. 14, and the Coal Mines General Regulations, 1913, regs. 49-62, it was the fireman's duty, throughout the "district" of the mine assigned to him, to see to the safety of every workman under his charge: and in this he was in truth the *alter ego* of the company. It was his negligence in this very respect which cost the lives of these two men. Yet the case law binds this court to say that, however much he was in command of the district for safety purposes, he was a fellow servant in common employment with them, so that no action for mere negligence at common law can lie against the company which appointed his command. I call it an unjust paradox because the men were under a statutory duty to obey their fireman's orders. It was his duty under reg. 58 to stop the use of the damaged tram (because, like the other things there mentioned, it was part of the "apparatus" of the mine); and I think it follows that he was entitled to order the men under him to take it to the pit bottom in order that it might go up to the surface for repair. But, also, it was his duty to use the telephone (reg. 103); it was his duty to give the sound signals up the road, under reg. 98, to say something was coming up. It seems to me wrong that the common law should deprive the men thus working under him, or their dependants, of all legal remedy because, forsooth, they were in "common employment" with the very man whose orders they were bound to obey. The case in short raises in a peculiarly direct and startling form the old question of legislative reform which still calls for consideration.

The appeal should, in my view, be allowed, the judgment below set aside and a new trial ordered for the assessment of damages, but the order will be as directed by Goddard and du Parcq, L.JJ.

Appeal dismissed with costs. Leave to appeal to the House of Lords.

Solicitors: *Theodore Goddard & Co.*, agents for *T. S. Edwards & Son*, Newport, Mon. (for the appellant); *A. J. Prosser*, Cardiff (for the respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

AUSTIN *v.* GREENGRASS

[King's Bench Division (Viscount Caldecote, L.C.J., Macnaghten and Cassels, JJ.), **March 16, 1944.**]

Landlord and Tenant—Rent restriction—Standard rent—Statement in rent book—First letting of part of house—No apportionment—Whether offence if standard rent not stated.

The respondent let the ground floor of her house at a rent of 17*s.* 6*d.* per week. This part of the premises had never been let before and there had been no apportionment of the standard rent of the premises. In the rent book the respondent stated that the standard rent of the whole house was £78 per annum, the tenant paying the rates. An information was laid against the respondent under the Rent Restrictions Regulations, 1940, alleging that the rent book did not contain a notice in the prescribed form stating what the standard rent of the ground floor was:—

Held: the offence had been committed although there had been no determination of the standard rent of the premises let.

[**EDITORIAL NOTE.** Until there has been an apportionment, no one can be sure what the standard rent of a part of a house is. It seems impossible, therefore, to make the required entry in the rent book. Further, until the premises are actually let, a county court judge would probably be right in refusing to apportion the rent on the ground that he was being asked to adjudicate upon a hypothetical case. The Divisional Court suggests that a provisional entry should be made in the rent book and an application for apportionment made by the landlord without delay. This is hardly in compliance with the regulations and it seems a case for a revision of the Regulations.

As to Entries in Rent Book, see HALSBURY, Hailsham Edn., Vol. 20, p. 328, para. 390.]

Appeal by way of case stated from the decision of a metropolitan magistrate given at the Clerkenwell Police Court. An information was laid against the respondent under the Rent and Mortgage Interest Restrictions Acts, 1920-1939, and the Rent Restrictions Regulations, 1940, for that she, in May, 1943, let premises at a weekly rent and used a rent book which did not conform to the prescribed requirements of the Regulations. The further facts are fully stated in the judgment of the court delivered by Macnaghten, J.

H. G. Garland for the appellant.
B. de H. Pereira for the respondent.

MACNAGHTEN, J. [delivering the judgment of the court]: The appellant, an officer of the St. Pancras Borough Council, laid an information against the respondent alleging that the respondent had let the ground floor of her house and with reference to that letting had used a rent book which did not conform with the requirements of the statute by setting out therein the standard rent of the premises let.

The respondent had let the ground floor at a rent of 17*s.* 6*d.* per week and had inserted in the rent book a statement that the standard rent of the whole house was £78 per annum, the tenant paying the rates. There was no statement as to what the standard rent of the ground floor was. The ground floor had not been separately let before and there had never been any application to apportion a part of the standard rent of £78 to it. On these facts the magistrate was of opinion that until, as provided by the Acts, an application had been made to the county court to determine the standard rent of the ground floor, there was no standard rent of those premises and no offence had been committed by not stating the standard rent of that part of the premises in the rent book. He was further of opinion that the obligation lay on the party complaining, who, he said, was the tenant, to apply for a determination of the standard rent. If there was a standard rent of the premises, then, he said, it was unknown to the respondent and the requirement to state it in the rent book did not apply to her. There was no dispute that the ground floor was a separate dwellinghouse within the meaning of that term in the Acts.

In our opinion the decision of the magistrate was erroneous. When the ground floor was separately let it became a dwellinghouse within the meaning of the Rent Acts and had a standard rent. It is true that the standard rent could only be determined by an application to the county court but, when so determined, the decision of the court would relate back to date when the tenancy commenced. If the rent paid by the tenant proved to be in excess of the permitted rent, the tenant would be entitled to recover the excess. The magistrate ought to have found that the ground floor had had a standard rent since the commencement of the tenancy.

The magistrate considered it irrelevant to decide on whom lay the obligation of applying for an apportionment, but that, if it was relevant, it was for the tenant to apply. In this he omitted to consider that the person preferring the information was not the tenant, but an officer of the local authority in the exercise of powers conferred by statute. The question in this case is not whether there is an obligation on the respondent to apply for an apportionment, but whether there is an obligation on her to state the standard rent of the particular premises let in the rent book. There clearly was such an obligation imposed upon her. She was bound to comply with it and could do so without difficulty by applying to the appropriate court for an apportionment. It is true that the obligation could not be met until an apportionment had been made and it was also true that a county court judge might refuse to entertain an application to fix the standard rent of a particular part of the house until an agreement for the letting of that part had been made. If the tenant required immediate possession, the difficulty could be met by inserting in the rent book a statement that the standard rent of the whole house was so much and that an application was to be made immediately for an apportionment and that, as soon as such apportionment had been made, the apportioned standard rent of the ground floor would be inserted. It could be added that the rent agreed as payable was a provisional rent to be adjusted as soon as the standard rent was ascertained. The case must, accordingly, be remitted to the magistrate with this expression of our opinion for him to adjudicate accordingly.

Appeal allowed with costs.

Solicitors: *W. T. Ricketts & Son* (for the appellant); *Walter A. Jennings* (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

REVILLE, LTD. *v.* PRUDENTIAL ASSURANCE CO., LTD.

[House of Lords (Viscount Simon, L.C., Lord Atkin, Lord Thankerton, Lord Russell of Killowen and Lord Porter), **March 1, 2, 6, 7, April 3, 1944.**]

Emergency Legislation—War damage—Notice of retention—Reduction of rent—Part of premises capable of beneficial enjoyment—Whether tenant entitled to reduction of rent as from date of damage or from date of service of notice—Landlord and Tenant (War Damage) Act, 1939 (c. 72), *ss.* 10 (1) (*b*), (*c*), 15 (5)—*Landlord and Tenant (War Damage) (Amendment) Act,* 1941 (*c.* 41), *s.* 2 (5), *Sched.*

The appellants are the holders of a multiple ground lease for a term of 99 years at a rental of £2,000 per annum. The premises suffered war damage in 1940, but part remained capable of beneficial enjoyment. After the Landlord and Tenant (War Damage) (Amendment) Act, 1941, came into operation, the appellants served on the respondents, who were the landlords, a notice of retention in respect of the premises. The parties agreed that the rent payable in respect of the part of the premises which was capable of beneficial enjoyment was £1,600 per annum. The appellants contended that they were entitled to the reduction of the rent as from the date when the damage occurred. The respondents contended that, although they made their original application both under sect. 15 and sect. 10 of the Act they were entitled to abandon their application under sect. 15 and to rely solely on sect. 10 :—

Held : (i) the appellants were entitled under the Acts to a reduction of rent only from the date of the service of the notice of retention. The agreement between the parties made this the proper date but it may be that, where there is no such agreement, a later date ought to be taken.

(ii) although it is open to a plaintiff in the county court to abandon part of his claim in an action, it is not open to him in an application where the duty of the court is to make an order fair to both parties to base his application on one section to the exclusion of any other.

Decision of the Court of Appeal ([1943] 1 All E.R. 573) *affirmed.*

[**EDITORIAL NOTE.** The main point in this case is purely one of the construction of the relevant provisions of the Landlord and Tenant (War Damage) Acts, and upon this it is decided that the reduction of rent can operate only from the date of the service of the notice of retention and that it cannot take effect from the date on which the war damage occurred. This part of the decision, however, is based upon the particular facts of this case. The agreement between the parties prevented any later date being taken, and it may be—the point is left open—that the earliest date is the date of the application to the court or the date of the order of the court. Incidentally, the House of Lords affirms a subsidiary matter which is of some importance. A plaintiff may abandon part of his claim and in the county court he may be forced to do so because some part of the claim is beyond the jurisdiction of the court. This principle or practice cannot, however, be extended to an application such as the present so as to restrict it to the provisions of one particular section of the Acts to the exclusion of other sections which are relevant to the issue. The duty of the court upon such an application is to do justice between the parties having regard to all the relevant provisions of the Acts and the applicant cannot base his application solely on the provisions of one particular section or subsection and thus prevent the court from taking into consideration the other relevant provisions.

As to the Landlord and Tenant (War Damage) Acts, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, p. 982, and Vol. 34, p. 156.]

Appeal by the tenants from a decision of the Court of Appeal, given on April 13, 1943 and reported [1943] 1 All E.R. 573, where the relevant sections of the Acts are set out. The facts are fully stated in the opinion of Viscount Simon, L.C.

M. Turner-Samuels and *K. J. Joseph* (for *J. Turner-Samuels* on war service) for the appellants.

A. T. Denning, K.C., and *Gilbert Dare* for the respondents.

Viscount Simon, L.C. : My Lords, on ultimate analysis, the matter upon which this appeal turns is the proper construction of the proviso in sect. 15 (5) of the Landlord and Tenant (War Damage) Act, 1939, as set out in the Schedule to the amending Act of 1941, but in order to reach a correct result it is necessary to examine with care many sections of this complicated legislation.

By a lease dated Mar. 25, 1907, the respondents (who are the landlords) let to the predecessor of the appellants (whom I will call the tenants) premises known as 297, Oxford St., and 15, Hanover Sq., for 99 years from Mar. 25, 1904, at a rent of £2,000 per annum. The lease was a "ground lease" and also a "multiple lease" within the definitions in sect. 24 of the 1939 Act. In Sept., and again in Dec. 1940, the premises suffered war damage by enemy action. At that time the 1939 Act applied to the lease to the extent that the tenants by sect. 1 were relieved from any liability to make good the war damage which would otherwise have rested upon them under the repairing covenants in the lease; but, inasmuch as the lease was a "ground lease," the tenants were not under the 1939 Act entitled to serve a notice of retention (see sect. 13 (2)), and they did not apply for leave to disclaim under sect. 13 (3). The rent, therefore, continued payable in full notwithstanding the war damage, but none of it was in fact paid.

The amending Act of 1941 was passed on Aug. 7, 1941, and by sect. 10 the Act of 1939 was applied to ground leases in like manner as it applied to other leases. Accordingly, the tenants became entitled, in certain circumstances, under sect. 4 of the 1939 Act, to serve either a notice of disclaimer (which would operate as a surrender) or a notice of retention (under which the tenants would retain the lease on the terms that they were to render the premises fit as soon as practicable, but would in the meantime be relieved of rent from the date of serving the notice until the date on which the premises were rendered fit). It is particularly to be observed that the liability for the covenanted rent continued unaffected from the date of the war damage until the service of the notice, whether of disclaimer or retention. Moreover, there is no period prescribed in the Acts within which the tenants are bound to exercise their election either to disclaim or retain, though the landlords can bring them to a decision by serving a notice on them to elect (sect. 4 (3) of Act of 1939).

In the present case no notice was served by either party, until the tenants signed a notice of retention which was received by the landlords on Nov. 21, 1941. The validity of such a notice depends on the premises comprised in the lease being "unfit by reason of war damage" (sect. 4 (1) of Act of 1939). Inasmuch as the lease was a "multiple lease," it was open to either party, within one month from the service of the notice, to apply to the court, under sect. 15 of the 1939 Act as modified in the Schedule of the Act of 1941, to determine whether the tenants should be allowed to exercise the right of retention, either as respects the lease as a whole, or as respects one or more of the separate tenements therein, or should not be allowed to exercise that right at all. Accordingly, on Dec. 18, 1941—just within one month from the notice of retention—the landlords made application under sect. 15 to the Westminster County Court to determine whether the tenants should be allowed to exercise the right of retention which they had claimed, either as respects the lease as a whole or as respects any tenenent comprised in it, and, alternatively, under sect. 10 (1) (*c*) of the Act of 1939 to fix a rent which the tenants should pay because part of the premises was capable of beneficial occupation.

Before the landlords' application came on to be heard before the county court, there was correspondence between the parties which established an agreement that the appropriate rent for the part of the premises capable of beneficial occupation until the war damage was made good was £1,600 per annum—*i.e.*, a reduction of £400 per annum from the rent reserved by the lease. The only remaining question was from what date the reduced rent should apply. The tenants contended that the reduced rent should apply from the date of the war damage: the landlords contended that the full rent was payable until service of the notice of retention, *i.e.*, Nov. 21, 1941, but that, inasmuch as they were succeeding in their claim that it would not be equitable to allow the tenants to exercise the right of retention, since most of the premises were capable of beneficial occupation, the reduced rent of £1,600 should run from Nov. 21.

At the hearing before His Honour Judge SIR GERALD HURST, K.C., an unfortunate complication was introduced by the landlords announcing that they withdrew their application under sect. 15 and took their stand only on sect. 10. The county court judge thought that he was bound to permit this, treating the withdrawal as being an exercise of the right conferred by Ord. XV, r. 6, of the County Court Rules. At the same time, acting under sect. 10, he ordered a reduced rent of £1,600 from Nov. 21, 1941. As the judgment of the Court of

Appeal delivered by du Parcq, L.J., points out, this view of Ord. XV, r. 6, is a mistake. That rule has nothing to do with the application then before the county court judge; it is a rule which refers to actions and to the rights of a plaintiff to abandon part of his claim in an action. We must deal with the present appeal on the assumption that the tenants were entitled to urge the county court judge to act under sect. 15 and to exercise such discretion as he had under the proviso to subsect. (5) in their favour. If, therefore, this discretion left the county court judge with any power to fix a reduced rent for any earlier period, the case must go back to the county court judge. A

I agree, however, with the Court of Appeal, for the reasons set out by du Parcq, L.J., that the county court judge had no discretion to go back earlier than the date of service of the notice. A proviso should, if possible, be read as operating within the ambit of the main clause which it is introduced to qualify. Here the main provision in subsect. (5) has to do with the nullifying of a notice of disclaimer, notice of retention, or notice to elect and the court has power to direct that such a notice shall "cease to have effect". But the effect of serving a notice of retention (to take the example involved in this case) is to stop liability for rent under the lease "in respect of the period beginning with the date when the notice was served or is deemed to have been served"; the liability for rent before that period remains the same whether the notice continues to have effect or not. Again, under sect. 10 (1) (*b*) the most favourable order which the tenants can get from the court is an order that no rent shall be payable "in respect of the period beginning with the date when the notice was served." Moreover, there is nothing whatever in the legislation to provide for the return of rent already paid, or to cancel the liability for rent previously accrued, so that the inference is strong that the proviso is not intended to go back to an earlier period when rent was payable and, it may be, paid in full, but gives the court a discretion to order a reduced rent as from a date not earlier than that of service of the notice which it has decided should "cease to have effect." (These last words seem to me to suggest the possibility that the order for reduced rent in the proviso might have as its starting point the date of the court's direction, and not the date of the service of the notice which is being nullified, but no such point appears to have been taken below, and I mention it only to reserve it.) B C D

I thus find myself in agreement with the conclusion reached by the Court of Appeal and I move that this appeal be dismissed with costs. E

My noble and learned friend Lord Atkin authorises me to say that his view agrees with the opinion which I have expressed.

Lord Thankerton: My Lords, I concur. I have had the opportunity of considering the opinion of my noble and learned friend Lord Russell of Killowen and he has so precisely expressed my views that I am content to agree with his opinion and to refrain from restating them. F

Lord Russell of Killowen [read by Lord Thankerton]: My Lords, in this case the tenant of a multiple lease at a yearly rent of £2,000, served on the landlord on Nov. 21, 1941, a notice of retention under the Landlord and Tenant (War Damage) Act, 1939, s. 4; and the only question for our determination is whether, if the court had thought fit to exercise the power conferred upon it by the proviso to subsect. (5) of the modified sect. 15 of that Act, it could order that the rent reserved by the lease should be reduced as from a date earlier than the date of the service of the notice of retention. G

That this is the only question is the result of an arrangement come to between the parties to the effect that a reduced rent of £1,600 per annum should be payable as from the service of the notice. That the reduced rent should be payable from that date was common ground between the parties. The appellant, however, claimed in addition that the reduced rent should date back to and be payable from the date when the war damage was inflicted, viz., in Sept., 1940. These facts appear from the correspondence, and in particular from a letter which the appellants' solicitors wrote to the respondents' solicitors on July 1, 1942, in which they state that their clients (I now quote the letter): H

> . . . will claim that the proviso to subsect. (5) applies to the facts of the case, and that it is equitable having regard to the extent of the war damage suffered by the land that the rent reserved by the lease shall until the war damage is made good, be reduced to the extent of £400 as from the date of the said war damage.

The effect of this claim would be that rent at the reduced rate would be payable throughout the period mentioned, and that the tenant's liability for the full rent up to the date of the service of the notice would be modified to the extent indicated.

I feel no doubt that the court has no power under the proviso to reduce the rent as from the date of the war damage. The lease is to have " effect " subject to the modifications specified in sect. 10 of the Act of 1939 ; the liability under the lease for the full rent up to the service of the notice remains in force. There are no words in the proviso (or elsewhere) purporting to destroy the landlord's vested right to that rent, or enabling that rent (if already paid) to be recovered by the tenant in the event of a reduction being ordered. Such a provision, applicable to different circumstances, is however to be found in express terms in sect. 13 of the amending Act of 1941.

Further, the proviso is a qualification of subsect. (5) and must be read in that light, and not as an independent or substantive enactment. So read, the position is that subsect. (5) gives the court a power which, if exercised, restores the tenant's liability to pay the full rent during the period of exemption referred to in sect. 10 (1) (*b*) of the Act of 1939. Whether the liability is restored in respect of the whole of that period, or only in respect of the time subsequent to the court's order, is a question which we need not determine. In either event, however, it is a power the exercise of which restores the tenant's liability to pay the full rent only as from the date of service of the notice, or as from some later date. The proviso, if read as it should be read, merely as a proviso to subsect. (5), only gives a power to mitigate that liability. To construe the proviso as conferring a power to mitigate a different and larger liability, *viz.*, the tenant's liability for rent in respect of a time antecedent to that period, is to treat it not as a proviso, but as a substantive enactment.

The result is that in no event can the court under the proviso reduce the rent reserved by the lease as from a date earlier than the service of the notice of retention.

Whether the court can, under the proviso, reduce the rent as from the date of that service does not arise on this appeal. As at present advised, my opinion is that, upon the true construction of the proviso, the reduced rent can only run from the date of the order made, or it might be from the date of the application, in which case the tenant's freedom from rent might continue until the reduced rent commenced to run. But I would prefer to keep the matter open and to confine our decision to the particular circumstances of this case, by holding that whatever be the true construction of the proviso, the reduction of rent thereunder cannot relate back to a date earlier than the date of the service of the notice of retention.

A contention was advanced by counsel for the appellants that, if the court could not under the proviso order the reduced rent to run as from the date of the war damage, it could do so indirectly by making such an increased reduction during the period over which it had control as would in its opinion compensate the tenant and do justice between the parties. I cannot adopt this view. If for no other reason, because, in view of the fact that the period of reduction is a period of uncertain duration, it would be impossible for the court to determine by what amount the reduction should be increased.

I would dismiss this appeal.

LORD PORTER [read by LORD MACMILLAN] ; My Lords, the salient facts in the present case can be shortly set out in so far as they are required to explain the conclusions which I have reached. The appellants are lessees of certain premises. In Sept. and Dec., 1940, those premises suffered war damage. At that time the Landlord and Tenant (War Damage) Act, 1939, was in force. That Act, by sect. 1, excused the tenants from any immediate obligation to repair, and in fact the appellants took no steps at that time to make the premises tenantable. The lease on which they were held was a ground lease as well as a multiple one within the meaning attached to those expressions in the Act, with the result that at that time no notice could be given by the tenants except a notice to disclaim under sect. 13, and that only by leave of the court.

Early in 1941 the premises were requisitioned by the Crown, who proceeded to make them, or the major part of them, fit for habitation. Whilst this work was in progress the Landlord and Tenant (War Damage) Act, 1941, was passed, whereby it became possible under sect. 10 for a tenant to give a notice of retention in respect of a ground lease as an alternative to a notice of disclaimer which had previously been his only remedy. The appellants, however, did not at once give such notice, but awaited, it seems, the completion of the repairs which the Government had undertaken. By Nov. the repairs, so far as they were then to be carried out, had been finished, only one floor being left in its damaged condition. In these circumstances, on Nov. 19, 1941, the appellants gave notice of retention of the whole of the premises, and this notice was received by the respondents on Nov. 21.

On Dec. 18, just before the expiration of the month allowed to them to contest the right of the appellants, under sect. 6 of the Act of 1939, as modified by the Schedule to the Act of 1941, to have it deemed that the premises were unfit, the respondents applied under that section to the Westminster County Court for an order or declaration that the appellants should not be allowed to exercise the right of retention either in respect of the lease as a whole or as respects one or more of the separate tenements, and for directions that the land comprised in the lease should not be deemed to be unfit for the purpose of the Acts and that the notice of retention should cease to have effect. Alternatively, the respondents applied for an order or declaration under sect. 10 (1) (c) of the earlier Act that the premises, other than the floor referred to above, were on Nov. 21, 1941, and continued to be capable of beneficial occupation and for payment from that date of the full rent of £2,000 per annum.

Following upon this application negotiations took place between the parties and their surveyors, and eventually it was agreed that the rent should be fixed at £1,600 (instead of the £2,000 for which the lease provided) as from Nov. 21, 1941. In spite of the vigorous argument of counsel for the appellants, I can have no doubt but that this was the effect of the correspondence between the parties. What remained in dispute, however, was whether that diminution should take effect from the time when the notice of retention was given or should be antedated to the moment at which the war damage occurred, or possibly whether some other or further allowance should be granted to the tenants in respect of the period between Sept., 1940, and Oct., 1941. So far as concerns the period after the latter date, I cannot doubt that the parties were in complete accord, and that the appellants are bound, and so was the county court judge, by the agreement which they had reached.

The negotiations between the parties took some time to complete, and the respondents' application did not come before the county court until Oct. 9, 1942. On that occasion the respondents' counsel sought to withdraw the application under sect. 15 and to rest his case solely on sect. 10. To this withdrawal the county court judge acceded, holding that under Ord. 15, r. 6 of the County Court Rules the respondents were entitled as of right to take that course and, in effect, that he had no discretion in the matter.

On appeal, however, the Court of Appeal held that his decision was wrong, and in your Lordships' House the respondents' counsel did not seek to uphold the view of the county court judge. He admitted that at best the judge had a discretion whether he would allow the respondents to withdraw and that, unless the case were to be sent back on this point, he must argue it as if the county court judge had exercised his discretion in favour of the appellants and had dealt with the application made under sect. 15. Your Lordships, I understand, agree that this concession was rightly and necessarily made and that the effect of sect. 15 must be taken into consideration.

Having regard to the position so reached, it becomes unnecessary to decide whether the appellants were entitled to insist upon the application under sect. 15 being heard or whether the county court judge had a discretion to hear it or not. Your Lordships, therefore, have to determine the matter on the basis that the application under sect. 15 was a living issue.

My Lords, in these circumstances I agree with the Court of Appeal that it is necessary to review the general structure of the Acts in order to ascertain their true meaning. In the case of a non-multiple lease I think it is plain that rent remains payable in full until notice of retention or disclaimer is given, subject, however, to the qualification that where notice of disclaimer is given the court is empowered under sect. 9 (1) to substitute some other date (if there is reason for doing so) as from which the lease is to be determined and the obligation to pay rent is to cease. Subject to this qualification, not only is the date prescribed at which rent ceases to be due, *i.e.*, on the service of the notice, but so also is the date when it again becomes payable, *viz.*, when the premises cease to be unfit.

The only qualifications upon this provision which I can see are (i) that if, after the notice of retention but before the premises are rendered fit, it can be shown that part of the premises can be beneficially occupied, the court is empowered to fix an appropriate rent payable "at such times and in respect of such period as the court shall fix"; and (ii) that, if the tenant who by reason of his notice is under a duty to make the premises fit as soon as reasonably practicable neglects to do so, the court has the like power of fixing an appropriate rent in respect of the period after the premises ought to have been repaired. All these provisions, however, are subject to the parties' right as set out in sect. 6 to have it determined whether or not the premises were really unfit at the time when the notice was given. If this right is exercised and the premises are declared not to have been unfit, full rent is payable so long as the lease endures. If, however, the right is not exercised the premises are "deemed to have been unfit."

These provisions deal with the case of single leases. When, however, multiple leases come in question other provisions apply. In their case the court is given not only the alternative of deciding whether they are fit or unfit in whole or in part, but also, without having to make up its mind whether they are fit or unfit, of deciding whether it is equitable that they should be deemed to be unfit and what rent should be payable in that event.

These powers are given to the county court by sect. 15 of the original Act, as amended by the Schedule to the Act of 1941. The amended section in effect gives the court the choice of three courses. (i) To determine whether the tenant shall be entitled to disclaim or retain the lease as a whole, in which case any notice previously given is to stand. (ii) To determine whether the tenant shall be entitled to disclaim or retain part of the premises contained in the lease and to retain or disclaim the other part, in which case any earlier notice is to be discharged and a fresh notice may be given immediately. (iii) If not satisfied that it is equitable to allow the tenant to exercise any of the rights set out above in (i) and (ii), to direct that the land comprised in the lease shall not be deemed to be unfit. In the last-mentioned case the section goes on to say that "the court shall direct that any notice of retention . . . relating thereto" (*i.e.*, to the premises) "shall cease to have effect." It was under this last provision that the appellants desired the county court judge to exercise his jurisdiction and to declare that the notice of retention given on Nov. 21, 1941, should cease to have effect.

It is to be observed that, in all the alternative remedies given under sect. 15, the question is not, as it is under sect. 10, whether the premises were in fact fit or unfit, but whether they shall be deemed to be unfit or not unfit, and whether having regard to the equitable considerations set out in the section, the tenant should be allowed to exercise one or other of the various advantages given by the Acts. The final alternative, however, is subject to the proviso upon which the dispute in the present case primarily turns, which provides as follows:

> Provided that the court may, if, having regard to the extent of the war damage suffered by the land it considers it equitable to do so, order that the rent reserved by the lease shall, until the war damage is made good, be reduced to such extent as may be specified.

The appellants maintain that this wording enables the county court judge to reduce the rent from the date of war damage. In the respondents' contention the earliest date from which it could possibly do so would be the date of the notice of retention. For their purpose it was unnecessary to argue whether some later moment should not be chosen.

In terms the proviso does not state the date as from which the rent shall be reduced, and it differs from the provisions of sect. 10 in that the reduction continues until the war damage is made good, not until the premises are, or some portion of them is, made fit. This latter change is, I think, necessarily made because the question under sect. 15 is not whether the premises are fit or unfit, but whether they shall be deemed not to be unfit. It is impossible to stipulate a time by which premises deemed to be not unfit shall be made fit, but it is possible to ascertain when the war damage has been made good. The proviso is in very wide terms, and, if it were a substantive enactment and made alone it might be held to enable the court to reduce the rent as from any moment, though, having regard to the reference to making good the war damage, no earlier date than its occurrence could, I think, be chosen. But the proviso does not stand alone. It is a qualification upon sect. 15 (5) and must be so construed.

Sect. 10 (1) (*b*) provides that no rent shall be payable in respect of the premises by the tenant from the date when the notice of retention is served, subject to the right of the court on the application of the landlord to direct the payment of some rent where part of the premises, but not the whole, has been made capable of beneficial occupation. Plainly the power of the court under the last part of that section is limited to a time after the notice of retention is given. Before that date the rent was payable in full and no necessity existed for directing the payment of some less sum.

Sect. 15 only interferes with the provision that rent shall cease when notice of retention is given to the extent that it enables any person interested to apply to the court to determine whether the tenant should be entitled to exercise the right of retention or not. On this application, under the terms of subsect. (5), the court, if not satisfied that it is equitable to allow the tenant to exercise the right of retention, shall direct that the land shall not be deemed to be unfit, and that any notice of retention shall *cease* to have effect. It does not say that the notice is of no effect, as was said in sect. 6. Indeed, the use of the word "cease" indicates that the notice must at one time have been effective, but at some later time is to cease to be so. Exactly when it is to cease to have effect is not specified. It may be on the date of the court's order, or possibly it may be ante-dated to the time of the application. I do not find it necessary to suggest when that moment should be. One thing, I think, is clear, that at earliest it could not be before the date of the service of the notice.

So long as there was an effective notice, no rent was payable, and during that period there could be no reduction of rent. Nor do I think that the court could order a reduction before the notice of retention was given. The whole scheme of the Act appears to turn upon the giving of some notice. Except for the provision exempting a tenant from his obligation to repair, the Act does not begin to work until one or other of the notices, which it permits, is given. The tenant has his option. He can lie, by taking advantage of his freedom from the duty to repair, or he can give notice either to disclaim or retain the lease. In the latter case he may escape the payment of further rent, but in case he gives notice of retention he comes under an immediate obligation to repair as soon as reasonably practicable. On the other hand, he can avoid that responsibility, but only by continuing to pay the rent in full.

Sect. 15, it is true, modifies in some degree the provisions of sect. 10, but only to the extent of adapting its terms to multiple leases. Under either section no rent is payable whilst the notice of retention is in force. If the notice were of no effect because the premises never were unfit, the full rent would be payable throughout the term. If, on the other hand, they were at one time unfit, but had again been made fit, rent would again become payable in full and the notice cease to have effect from that moment. So when under the amended sect. 15 the land is deemed not to be unfit, rent is payable from the moment the notice of retention ceases to have effect. That liability is, of course, subject to any agreement between the parties as to the period over which it is payable and the amount to be paid. If, however, there be no agreement, it is subject to the right of the court to fix the sum which is to be paid from some date which, as I have given reason to show, cannot be earlier than the date of the notice of retention, and may well be later.

It follows that, in this case the county court judge could in no event have ante-dated the reduction in rent to a period before the notice of retention. After that date the parties have come to an agreement. The appellants are, therefore, wrong in their contention, and the appeal should, in my opinion, be dismissed.

Appeal dismissed.

Solicitors: *Cohen & Cohen* (for the appellants); *C. Howe Browne* (for the respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

Applied. HORTON *v.* LONDON GRAVING DOCK CO., LTD. [1950] 1 All E.R. 180.

BOWATER *v.* THE MAYOR, ALDERMEN AND BURGESSES OF THE BOROUGH OF ROWLEY REGIS.

[COURT OF APPEAL (Scott, Goddard and du Parcq, L.JJ.), **March 14, 15, 27, 1944.**]

Master and Servant—Servant provided with unmanageable horse—Injured by horse running away—Volenti non fit injuria—Whether risk incidental to employment.

The plaintiff had been employed by the defendants for 12 years to go round the streets and park collecting leaves and rubbish. For this purpose he was provided with a horse and cart. On the material occasion the plaintiff was ordered to take a certain horse which was known to be restive and had run away on previous occasions. The plaintiff protested against having to take the horse, but eventually carried out the order. Whilst the plaintiff was so engaged, the horse ran away and the plaintiff was thrown out of the cart and injured. The plaintiff brought an action against the defendants alleging that they had failed in their duty to provide a horse which was safe and suitable for the work. The defendants pleaded (i) no negligence on their part; (ii) contributory negligence by the plaintiff; (iii) *volenti non fit injuria*, alleging that the plaintiff had merely encountered the kind of risk which he had accepted as part of his employment:—

HELD: (i) the defendants had been negligent.

(ii) there was no contributory negligence on the part of the plaintiff.

(iii) it was no part of the plaintiff's employment to manage unruly horses and he had not accepted the risk.

[**EDITORIAL NOTE.** That the doctrine of *volenti non fit injuria* may apply as between master and servant strict proof must be given that the servant expressly undertook the risk. It is not enough to show that he protested against using the animal or plant offered to him and finally did so. It must be shown that he expressly admitted that the employer should not be liable in case of accident.

AS TO VOLENTI NON FIT INJURIA, see HALSBURY, Hailsham Edn., Vol. 22, pp. 176-179, paras. 296, 297; and FOR CASES, see DIGEST, Vol. 36, pp. 92-97, Nos. 608-647.]

Cases referred to:

*(1) *Yarmouth (Earl)* v. *France* (1887), 19 Q.B.D. 647; 36 Digest 82, *548*; 57 L.J.Q.B. 7.

*(2) *Smith* v. *Baker & Sons*, [1891] A.C. 325; 36 Digest 95, *633*; 60 L.J.Q.B. 683; 65 L.T. 467.

(3) *Monaghan* v. *Rhodes (W.H.) & Son*, [1920] 1 K.B. 487; 34 Digest 205, *1682*; 89 L.J.K.B. 379; 122 L.T. 537.

APPEAL by the plaintiff from a decision of SINGLETON, J., dated Dec. 8, 1943. The facts are fully set out in the judgment of DU PARCQ, L.J.

John Morris, K.C., and *N. R. Fox-Andrews* for the plaintiff.

S. R. Edgedale and *W. B. Franklin* for the defendants.

SCOTT, L.J.: I have read the judgments of my brethren and agree with their conclusions and with the reasoning by which they reach them. I would add, however, that not only would it have been wrong for us to allow the respondents now to rely on the pleaded defence of no negligence when they had abandoned it at the trial, but also, as DU PARCQ, L.J., says, the facts of the case preclude the possibility of that defence succeeding; for there was clearly *prima facie* evidence of negligence on the part of the respondent corporation, and their counsel elected to call no witnesses.

In regard to the doctrine *volenti non fit injuria*, I would add one reflection of a general kind. That general maxim has to be applied with especially careful regard to the varying facts of human affairs and human nature in any particular case, just because it is concerned with the intangible factors of mind and will. For the purpose of the rule, if it be a rule, a man cannot be said to be truly "willing," unless he is in a position to choose freely; and freedom of choice predicates, not only full knowledge of the circumstances upon which the exercise of choice is conditioned, in order that he may be able to choose wisely, but the absence from his mind of any feeling of constraint, in order that nothing shall interfere with the freedom of his will. Without purporting to lay down any rule of universal application, I venture to doubt whether the maxim can very often apply in circumstances of an injury to a servant by the negligence of his master. When the servant is engaged specifically for the performance of a dangerous duty and the presence of the danger is a mutually recognised element in the bargain for remuneration, the servant obviously undertakes the risk for the sake of higher pay. A good illustration is the task of the housebreaker. We have all of us watched his performance during the war on bomb-shattered buildings in the course of demolition and marvelled at the dangers. The task of a horsebreaker is similar. But in contracts of employment where A the service is hazardous and for that reason highly paid, it is not easy to imagine a circumstance in which the hazard causing the hurt to the servant is also attributable to the negligence of the master; and unless it is, the servant who is injured suffers no "injuria" in the legal sense of an actionable wrong, which is the condition of the maxim. I agree with the order proposed by GODDARD, L.J.

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GODDARD, L.J.: In the action out of which this appeal arises the plaintiff founded his case entirely on the allegation that the defendants, his employers, failed in their duty to provide him with a horse safe and suitable for the work which he had to perform. This consisted in going round the streets and the park picking up the leaves and rubbish which had been swept up by the street sweepers and putting them into a corporation cart. He also apparently had to take part in the grooming and care of the horses in the stable. His case was C that the horse which caused the accident was and was known to be a bolter and, therefore, unsafe to be used in such work. By their defence the defendants denied the alleged breach of duty, and also set up contributory negligence and further alleged that the plaintiff voluntarily incurred the risk of the alleged injury. At the trial it is clear beyond question that the defendants not only did not dispute but insisted on the bad character of the horse. The plaintiff proved that it had bolted on at least two previous occasions and that another D carter of long service with the defendants had refused to take him out again; that he himself had protested against being required to take him out on the road, and that after the first day he reported to the foreman that he had not found him very safe. So far from challenging any of this evidence the defendants' counsel sought to show in cross-examination that the horse's disposition was indeed notorious; that he was regarded as a devil and had bolted on two occasions before the accident in question. He suggested to the plaintiff that E the truth was that he thought that, though another carter, aged 67, could not control him, he with his greater experience, and only being 59, would be able to do so. Thus the issue fought was not whether the horse was one with which it was safe to work, but that the plaintiff voluntarily incurred the risk of working with such an animal.

The defendants called no evidence, feeling, I suppose, that they could not F blacken the horse's character more than the plaintiff's witnesses had done, so the court was not informed as to how the borough surveyor thought it consistent with his duty either to the plaintiff or the public to use this horse on the streets and in the park of all places where children might be expected to be playing. It is true that, on the day in question, a one-armed man accompanied the plaintiff as his mate, but whether for the purpose of holding the horse while the plaintiff was picking up the rubbish or of assisting in the latter operation G does not appear. Though SINGLETON, J., appears not to have been altogether satisfied that the defendants were negligent, he said in terms that he did not decide the case on that ground as it was not really argued before him.

On the appeal counsel for the defendants, who did not appear in the case below, sought to uphold the judgment on the ground that no negligence was proved. He appealed to the court's knowledge of the disposition of four-year-olds, saying that horses of that age were the equivalent of boys of twelve, though H he did not add that at that age boys are often mischievous young rascals. But judges have no judicial knowledge of the habits of horses, not even if they have been stewards of the Pegasus Club. Had the defendants desired to dispute negligence and to say that this was just the sort of animal one would expect to find between the shafts of a municipal dust cart, they could have called witnesses. They did not, and it would be quite wrong to allow them in this court to rely on a defence, which, though pleaded, was not persisted in at the trial and is quite inconsistent with the case upon which they relied. Their whole case was *volenti non fit injuria*, one which counsel for the defendants frankly admitted he felt was difficult to support after the elaborate review of the authorities by counsel for the plaintiff in the course of his argument. It is only fair to the trial judge to say that many of the cases cited to us were not before him; indeed, I gather from his judgment that, had he not pressed for some citation of authority and had not an adjournment fortunately intervened, none would have been cited, counsel on either side feeling, I suppose, that the facts were so clear in A his favour that authority was superfluous.

The maxim *volenti non fit injuria* is one which in the case of master and servant is to be applied with extreme caution. Indeed, I would say that it can hardly ever be applicable where the act to which the plaintiff is said to be "*volens*" arises out of his ordinary duty, unless the work for which the plaintiff is engaged is one in which danger is necessarily involved. Thus a man in an explosives factory must take the risk of an explosion occurring in spite of the observance B and provision of all statutory regulations and safeguards. A horse-breaker must take the risk of being thrown or injured by a restive or unbroken horse; it is an ordinary risk of his employment. But a man whose occupation is not one of a nature inherently dangerous but who is asked or required to undertake a risky operation is in a different position. To rely on this doctrine the master must show that the workman undertook that the risk should be on him. It is not enough that, whether under protest or not, he obeyed an order or complied C with a request which he might have declined as one which he was not bound either to obey or to comply with. It must be shown that he agreed that what risk there was should lie on him. I do not mean that it must necessarily be shown that he contracted to take the risk, as that would involve consideration, though a simple case of showing that a workman did take a risk upon himself would be that he was paid extra for so doing, and in some occupations "danger D money" is often paid.

This, in my opinion, is the result of *Yarmouth* v. *France* (1), *Smith* v. *Baker* (2), and *Monaghan* v. *Rhodes* (3), and the further citation of authority, in support of what I think is now a well-settled principle, is unnecessary. Though the question in the last resort is one of fact, I find myself unable to agree with SINGLETON, J., on the evidence in this case. I venture to think he approached the case from a wrong angle. A corporation carter or dustman is not like a E horse-breaker because he is also a horse-keeper. It is no part of his duty to break or tame the horse which draws the dust cart. Nor is it right to inquire into the mental processes that may lead him to do what he is told or to consider what degree of appreciation of the risk was apparent to him. As LORD ESHER, M.R., said in *Yarmouth* v. *France* (1), that would be to say that for the same accident an unintelligent man might recover while a more intelligent one would not. For this maxim or doctrine to apply it must be shown that a servant who F is asked or required to use dangerous plant is a volunteer in the fullest sense; that, knowing of the danger, he expressly or impliedly said that he would do the job at his own risk and not at that of his master. The evidence in this case fell far short of that and, in my opinion, the plaintiff was entitled to recover.

The appeal is allowed with costs and the case must go down for a new trial on damages only, unless the parties will agree to this court assessing the damages. G If there is to be a new trial the defendants may, if they desire, make a new payment into court within 21 days. If the plaintiff recovers or accepts more than was paid into court on the first trial he is to have the costs of the first trial, and any incurred up to the date of the further payment into court if he accepts the subsequent payment, otherwise he will have the costs of the first trial only down to the payment into court. The costs of the new trial will be dealt with by the judge who tries it.

H DU PARCQ, L.J.: The plaintiff, John William Bowater, was in 1941 a man of 59 years of age, and was working for the defendant corporation as a carter. His usual duty was to drive a cart in the wake of road sweepers, so that the sweepings might be collected and carried away. One day the foreman instructed him to take out a horse which had been driven on his previous outings by the plaintiff's colleague, William Payne. Payne was then 67 years of age. His experience of the horse had been unhappy. At first the animal had been quiet and well-behaved—so quiet that Payne had left him standing with no one to control him. "Suddenly he was off," Payne says, "like a shot out of a gun."

His precipitate course continued for about a mile, and by the time he stopped the cart had been smashed to pieces. The next day Payne was on his guard. The horse, he says, "had another go," but Payne stuck to him and held him back, so that he only succeeded in crossing the road. On the third day it was only after protesting that he would never take the horse out again that Payne did in fact take him, for the last time. The animal made another attempt to run away (I do not say "bolt," because counsel for the defendants assured us that that term of art was inapplicable to this animal's escapades, and I take it from him that it is so), but Payne stuck to him and pulled him up in 200 or 300 yards. This incident ended Payne's association with the horse.

The defendants' foreman knew of these adventures. So did the plaintiff, who had heard all about them from Payne. The plaintiff told the foreman that he did not like the idea of taking out the horse. "I am no better man than anybody else," he said; "if one man can't manage him another can't." The foreman's answer was: "The boss says you are to take him to the park." The boss was the borough surveyor. The plaintiff said no more. He obeyed the order. What he thought does not seem to me to be a matter of much importance. He was certainly reluctant to attempt to manage the horse which Payne had found unmanageable.

In these circumstances it was contended by the defendants' counsel at the trial that the plaintiff had willingly assumed whatever risk was associated with the task allotted him. I so translate the latin in which the learned pleader had preferred to clothe his plea: *Volenti non fit injuria.* Singleton, J., thought that the plea was made out. His interpretation of the facts was that the plaintiff had not, as was submitted on his behalf, consented under protest, but that he had merely grumbled before entering upon work "which, after all," said Singleton, J., "was his work as an experienced horseman to do." By this I understand Singleton, J., to mean that it was implicit in the plaintiff's contract of employment that he should be prepared to deal with such recalcitrant horses as the one with which we are here concerned.

With great respect to Singleton, J., I cannot persuade myself that the evidence justifies this view. The words "experienced horseman" are perhaps ambiguous. It is true that for about 12 years the plaintiff had driven horses for the defendant corporation, and in that sense he may perhaps be called an "experienced horseman." There is no evidence, however, that the horses usually selected to draw refuse carts upon the highways or in the pleasances of Rowley Regis were mettlesome or intractable animals, or that it was a term, express or implied, of the plaintiff's engagement that he should be prepared to train or break young and unruly horses. The inference which I draw from the evidence is that the horse in question possesses qualities which, be they good or bad, make him a striking exception to the common run of cart-horses with which a carter to the Mayor, Aldermen and Burgesses of Rowley Regis would become familiar. At the trial counsel for the defendants suggested, no doubt on instructions, that the corporation's employees thought the horse a devil, and he may well have been right. No evidence was called on behalf of the defendants, so that we do not know in what language the surveyor and the foreman would have expressed their opinion of the horse.

As I differ from the view of Singleton, J., that the plaintiff was only being called upon to do what he had already contracted to do, it will be necessary to consider whether there is any other ground on which it can properly be said that he willingly assumed whatever risk there was, although it must be added that counsel for the defendants did not suggest that any such ground existed. He sought to support the decision of Singleton, J., by contending that no negligence on the part of the defendants had been proved, and it will be convenient to deal at once with that contention.

The case was so conducted by counsel for the defendants at the trial (who was not, of course, Mr. Edgedale), that the question of negligence, as Singleton, J., says in his judgment, was "not really argued." The judge also said that he was not satisfied that the defendants were guilty of negligence, but did not decide the case on that ground. In the circumstances we should be doing an injustice to the plaintiff if we allowed the defendants to seek a decision in their favour in this court on a point which they withdrew from the area of controversy at the trial. I will add, however, that, on the undisputed evidence, I am

satisfied that the defendants were negligent in ordering the plaintiff to drive this horse, or (to state the facts in another way), in providing the plaintiff with a horse which was dangerously unfitted for the particular task which was to be performed. Having regard to all that the evidence tells us of the plaintiff on the one hand and of the horse on the other, I am satisfied that an employer acting with reasonable care would not have ordered this reluctant servant to take charge of the horse, which he avowed himself to be incapable of controlling.
A Counsel for the defendants was concerned to defend the character of the horse against any imputation of vice or ferocity. I am prepared to believe that the animal possesses all the nobility of character which is the proper attribute of his species. But the noblest of animals may be ill-fitted for a life of inactivity and humdrum tasks. So it may have been with this one, whether or not his vagaries are to be ascribed (as counsel for the defendants suggested that they should be) to the inexperience and the impetuosity of youth.

B For about a month the plaintiff had no great difficulty with the horse, though he was "a little bad at times—jumpy." After about 4 weeks, possibly because the plaintiff's care was slightly relaxed, though there is certainly no evidence of contributory negligence, the horse, upset apparently at the sight of some boys playing cricket, "ran speedily" as SINGLETON, J., puts it "in the opposite direction." The plaintiff was thrown out of the cart and injured.

For the reasons which I have given I am of opinion that the plaintiff's injuries
C were due to the defendants' negligence, and I cannot agree with the view of SINGLETON, J., that the plaintiff was encountering only the kind of risk which he had accepted as part of his regular employment. Little more need be said about the plea of *volenti non fit injuria*. In my opinion, there is nothing in the facts of this case to show that the plaintiff was "*volens*" according to the true meaning of the maxim, as it has been interpreted in decisions which are
D binding upon us. I will content myself with the citation of one passage from a speech by LORD HERSCHELL in the House of Lords, in *Smith* v. *Baker* (2), at p. 365, which, in my judgment, may properly be applied to the facts of this case:

> . . . where a servant has been subjected to risk owing to a breach of duty on the part of his employer, the mere fact that he continues his work, even though he knows of the risk and does not remonstrate, does not preclude his recovering in respect of the
> E breach of duty, by reason of the doctrine *volenti non fit injuria*, which in my opinion has no application to such a case.

The fact that in this case the plaintiff did remonstrate makes his case so much stronger.

For these reasons I agree that the appeal should be allowed and I concur in the order proposed by GODDARD, L.J.

F *Appeal allowed with costs. New trial ordered on the question of damages.*

Solicitors: *W. H. Thompson* (for the appellant); *William Charles Crocker* (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

G *Distinguished.* BAKER *v.* TURNER.
[1950] 1 All E.R. 834.

SUN LIFE ASSURANCE CO. OF CANADA *v.* JERVIS

[HOUSE OF LORDS (Viscount Simon, L.C., Lord Atkin, Lord Thankerton, Lord Russell of Killowen and Lord Porter), **March 7, 8, 1944.**]

H *Practice—Appeal—Appeal to House of Lords—Leave granted by Court of Appeal on such terms that respondent had no interest in result—No living issue to be tried.*

In allowing leave to appeal to the House of Lords the Court of Appeal granted leave on condition that the defendants undertook to pay the costs as between solicitor and client in the House of Lords in any event and not to ask for the return of any money ordered to be paid by the order:—

HELD: the effect of the order was to make it a matter of complete indifference to the respondent whether the appellant won or lost and there was no live issue to be tried in the appeal. It is an essential quality of an appeal fit to be disposed of by the House of Lords that there exist between the parties a matter in actual controversy which the House undertakes to decide as a living issue.

[**EDITORIAL NOTE.** The courts have always refused to decide a hypothetical case and have insisted that there must be an actual conflict between the parties. In some cases where a declaratory judgment has been sought, this principle may have been observed more in the letter than in the spirit but even such cases have been A dismissed because there was no living issue in the case. The House of Lords have here found that the terms upon which leave to appeal have been granted had destroyed any living issue between the parties and the decision is of importance more from the point of view of what terms are proper to be imposed on granting leave to appeal than otherwise.

AS TO EXERCISE OF JURISDICTION OF HOUSE OF LORDS, see HALSBURY, Hailsham Edn., Vol. 8, pp. 542, 543, para. 1202; and FOR CASES, see DIGEST, Vol. 36, p. 261, Nos. 32-46.] B

Cases referred to:

*(1) *Bloor* v. *Liverpool Derricking and Carrying Co., Ltd.*, [1936] 3 All E.R. 399; Digest Supp.

*(2) *Doyle* v. *White City Stadium, Ltd.*, [1935] 1 K.B. 110; Digest Supp.; 104 L.J.K.B. 140; 152 L.T. 32.

APPLICATION by the appellant for leave to withdraw the appeal. The facts C are fully set out in the opinion of VISCOUNT SIMON, L.C. The proceedings in the Court of Appeal are reported [1943] 2 All E.R. 425.

D. N. Pritt, K.C., *G. O. Slade, K.C.*, and *A. L. Gordon* for the appellant.

C. L. Henderson, K.C., and *T. N. Winning* for the respondent.

VISCOUNT SIMON, L.C.: My Lords, in my opinion the House should decline to hear this appeal on the ground that there is no issue before us to be decided D between the parties.

The action was brought by the respondent to settle his rights under an endowment policy of life assurance issued to him by the appellant in Dec., 1929. The respondent had received from the appellant, before he insured with it, a document which purported to describe the benefits which he would receive, but which, according to the Court of Appeal, held out as results to flow from the insurance benefits greater than the policy itself provided. The respondent's E action was for rectification of the policy to make its terms equivalent to the above-mentioned document, and the Court of Appeal decided (SCOTT and GODDARD, L.JJ., LUXMOORE, L.J., dissenting) that the policy should be rectified and that an additional sum was due to the respondent. The appellant applied to the Court of Appeal for leave to appeal to this House, and the Court of Appeal granted leave on terms which were included in the court's order and which are as follows: F

> On the defendants undertaking to pay the costs as between solicitor and client in the House of Lords in any event and not to ask for the return of any money ordered to be paid by this order, it is ordered that the said defendants be at liberty to lodge a petition of appeal to the House of Lords.

The difficulty is that the terms thus put on the appellant by the Court of Appeal are such as make it a matter of complete indifference to the respondent whether G the appellant wins or loses; the respondent will be in exactly the same position in either case. He has nothing to fight for, because he has already got everything that he can possibly get, however the appeal turns out, and cannot be deprived of it. I do not think that it would be a proper exercise of the authority which this House possesses to hear appeals if it occupies time in this case in deciding an academic question, the answer to which cannot affect the respondent in any way. If the House undertook to do so, it would not be deciding an existing H *lis* between the parties who are before it, but would merely be expressing its view on a legal conundrum which the appellant hopes to get decided in its favour without in any way affecting the position between the parties.

What is sometimes called a "friendly action" is not necessarily open to this objection, either in the first court or on appeal, for the respective parties in such an action are arguing for different results and the winner gains something which he would not gain if he lost. But the objection here is that, if the appeal fails, the respondent gains nothing at all from his success.

No doubt the appellant company is concerned to get, if it can, a favourable decision from this House because it fears that other cases may arise under similar documents in which others who have taken out policies of endowment assurance with it will rely on the decision of the Court of Appeal. But, if the appellant desires to have the view of the House of Lords on the issue upon which the Court of Appeal has pronounced, its proper and more convenient course is to await a further claim, and to bring that claim, if necessary, up to the House of Lords with a party on the record whose interest it is to resist the appeal. The research which has been given to the matter does not discover any previous decision in which the House of Lords has undertaken, on the petition of an unsuccessful appellant, to review the decision below when the opposite party has been finally settled with, and I think it is an essential quality of an appeal fit to be disposed of by this House that there should exist between the parties a matter in actual controversy which the House undertakes to decide as a living issue.

This decision is by no means designed to discourage, in suitable cases, the putting of an unsuccessful litigant " on terms " as a condition of his getting leave to appeal from the Court of Appeal to this House. Terms requiring that, in view of the position of the successful party, the appellant should undertake to ask for no costs in this House, or even should undertake to meet the costs of both sides in any event may be perfectly proper. Again, cases may sometimes arise where the term is imposed that the respondent shall keep at any rate a portion of his damages whatever the result of the appeal. But what is objectionable is that the terms for leave to appeal should be so framed as to take away from the respondent any interest in the result of the appeal whatever.

To avoid possible misunderstanding I had better add that a stricter rule has been applied in the case of appeals to the Court of Appeal. In that case the appeal is (generally speaking) as of right, and when that is the case the Court of Appeal has laid it down that it is improper for the judge of first instance to compel persons to pay moneys in any event, which moneys it may subsequently be held by a higher court they were under no legal duty to pay at all : see *Bloor* v. *Liverpool Derricking and Carrying Co., Ltd.* (1), per Slesser, L.J., at p. 406, following *Doyle* v. *White City Stadium, Ltd.* (2). However that may be, those were cases where the defeated party was entitled to appeal as of right, whereas appeals to this House are by leave, and, therefore, conditions may within limits be put upon the defeated party who seeks to appeal to the House of Lords.

The statute of 1934, which provides that there shall be no appeal to this House unless leave is given either by the Court of Appeal or by the House itself, does not in terms assert that, whatever conditions are imposed by the Court of Appeal when giving leave, the House of Lords must hear the case, and there is nothing contrary to the statute in holding that the House should not hear argument on this appeal, having regard to the conditions imposed by the Court of Appeal, which have deprived the matter before us of the quality of a live issue in this litigation. It is not necessary to lay down a rule for all cases ; it is enough to say that, in my opinion, if the appellant had not applied to withdraw this appeal, this appeal would have to be dismissed. As it is, I move that the appellant's application be granted, and leave be given for this appeal to be withdrawn.

The appellant will, of course, pay the costs in this House as between solicitor and client in accordance with its undertaking.

Lord Atkin : My Lords, I agree.

Lord Thankerton : My Lords, I also agree.

Lord Russell of Killowen : My Lords, I also agree.

Lord Porter : My Lords, I do also.

Leave given for appeal to be withdrawn.

Solicitors : *Freshfields, Leese & Munns* (for the appellants) ; *Maude & Tunnicliffe*, agents for *James Young*, Grimsby (for the respondent).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

MAURAY v. INLAND REVENUE COMMISSIONERS.

[Court of Appeal (Lord Greene, M.R., MacKinnon and Luxmoore, L.JJ.), **March 7, April 4, 1944.**]

Income Tax—Disposition in favour of child—Interest liable to be diminished by the birth of further children who shall survive the settlor or by exercise of power of appointment—Whether interest for a period less than life of child—Finance Act, 1922, (*c.* 17), *s.* 20 (1) (*c*).

By a settlement dated Aug. 5, 1932, it was provided that one-third of the income of the settled fund should be held, during the life of the settlor's wife, upon trust for such of his children as he should appoint and, until and subject to such appointment, for the benefit of his daughter J. on attaining 21 years of age or marrying under that age. After the death of the wife the whole of the trust fund was to be held on trust for the children or remoter issue of the settlor as he should appoint and, until and subject to such appointment, in trust for all or any of the children and remoter issue who should be living at the settlor's death. J., who was born on Mar. 18, 1923, was the only child of the settlor and at all material times was an infant and unmarried and both she and her mother were still alive. At all material times the settlor had not made any appointment under the settlement. It was contended by the Crown that the one-third share in the income was applicable for the benefit of J. for a period less than her life and must, therefore, be deemed to be income of the settlor in accordance with the Finance Act, 1922, s. 20 (1) (*c*) :—

Held : the section applies only where in the year of assessment the income can then be said to be payable to or applicable for the benefit of the child for some period less than the life of the child, and it does not apply where the interest will cease to be payable to or applicable for the benefit of the child on the happening of some uncertain event.

Decision of Macnaghten, J. ([1943] 2 All E.R. 473), *affirmed.*

[**EDITORIAL NOTE** The judgment herein does something to clarify the position as to what is an interest for a period less than the life of a child. The Act itself says that no notice is to be taken of the usual forfeiture clause. It is now clear that no notice is to be taken of the possible exercise of a power of appointment or the birth of further issue. Two statements in the judgment are of special importance: (i) the interest is for a period not less than the life of the child if it will not cease during the lifetime of the child except upon the happening of some uncertain event; (ii) the burden upon the Crown is to establish affirmatively, as matters stand in the year of assessment, that the income is, and not may be, payable or applicable for some period less than the life of the child. The matter is apparently to be taken to the House of Lords, and, if these statements are affirmed, the avoidence of sur-tax will, it seems, be given a new lease of life.

As to Dispositions for Less than Life of Child, see HALSBURY, Hailsham Edn., Vol. 17, pp. 269, 270, para. 538 ; and for Cases, see DIGEST, Supp., Income Tax, No. 575b.]

Cases referred to :

*(1) *Wiggins* v. *Watson's Trustees*, [1934] A.C. 264 ; Digest Supp. ; 102 L.J.K.B. 464 ; 148 L.T. 482 ; 17 Tax Cas. 728 ; *affg.* [1933] 1 K.B. 245.

(2) *Levitt* v. *Inland Revenue Comrs.*, [1932] S.C. 629 ; Digest Supp. ; 17 Tax Cas. 719.

(3) *Whigham* v. *Inland Revenue Comrs.*, [1941] 2 K.B. 18 ; [1941] 2 All E.R. 524.

Appeal by the Crown from a decision of Macnaghten, J., discharging an assessment to sur-tax made under the Finance Act, 1920, s. 20 (1) (*c*); and reported [1943] 2 All E.R. 473. The facts are fully stated in the judgment of Lord Greene, M.R.

The Solicitor-General (*Sir David Maxwell-Fyfe, K.C.*), *J. H. Stamp* and *Reginald P. Hills* for the Crown.

J. S. Scrimgeour for the taxpayer.

The Solicitor-General : J.'s interest in one-third of the fund was liable to be cut down during the life of the settlor's wife by the birth of another child or an exercise of the settlor's power of appointment so as to reduce J.'s interest during that period to less than one-third ; and, after the death of the wife, by the existence of three more children of the settlor, or by an exercise of his power of appointment so as to reduce J.'s interest to less than one-third. Therefore, J. cannot be said to have an interest in one-third of the fund for her life. The decision in *Wiggins*' case (1) does not apply to the present case, it only applies where a life interest is liable to be defeated by the exercise of a power of revocation. [Counsel referred to *Wiggins*' case (1), *Levitt* v. *Inland Revenue Comrs.* (2) and *Whigham* v. *Inland Revenue Comrs.* (3).]

Stamp followed on the same side.

Scrimgeour: The court must consider the nature of the child's interest in the year of assessment and must not inquire into powers, etc., which are A extraneous. This case is covered by *Wiggins*' case (1). The interest given to the child is a life interest, and the fact that such an interest may be cut short by the happening of an event does not prevent the limitation while it lasts and is not set aside from being for the life of the child. It is to be distinguished from a limitation until the arrival of a date which is not a life interest.

The Solicitor-General in reply.

LORD GREENE, M.R.: The judgment I am about to read is the judgment B of LUXMOORE, L.J., and myself.

The Finance Act, 1922, s. 20 (1), so far as is relevant to the present appeal, provides as follows:

> Any income . . . (c) which by virtue or in consequence of any disposition made, directly or indirectly, by any person after Apr. 5, 1914, is payable to or applicable for the benefit of a child of that person for some period less than the life of the child; C shall . . . be deemed for the purposes of the enactments relating to income tax (including super-tax) to be the income of the person, . . . if living, by whom the disposition was made . . . and not to be for those purposes the income of any other person.

This appeal relates to two assessments to sur-tax made upon the respondent for the fiscal years 1938-9 and 1939-40. These assessments were based upon the view that one-third of the income arising during those years under a settlement D made by the respondent on Aug. 5, 1932, must for the purposes of sur-tax be deemed to be the income of the respondent by virtue of the statutory provision above quoted. The Special Commissioners upheld the assessments, but their decision was overruled on appeal by MACNAGHTEN, J. The Crown is now appealing.

The respondent has only had one child, namely, a daughter, Joan, who was born on Mar. 18, 1923, and was accordingly sixteen years old by the end of the E first year of assessment. The wife of the respondent was alive during both years. No appointment had been made by the respondent under the powers contained in the settlement.

The beneficial trusts of the settlement so far as relevant are as follows. The wife of the respondent has a protected life interest in two-thirds of the income. During the life of the wife the remaining one-third is to be held upon protective trusts for the benefit of such of the respondent's children as he shall by deed F or will appoint "and until and subject to any such appointment for the benefit of the settlor's daughter Joan . . . on her attaining the age of 21 years or marriage under that age" with such consent as is there mentioned. On the death of the wife the whole of the fund is to be held for the children or remoter issue of the respondent as he shall by deed or will appoint "and in default of and subject to any such appointment in trust for all or any the children G or child of the settlor who shall be living at his death and the issue then living of any then deceased child" attaining 21 or marrying in equal shares *per stirpes*.

In order to complete the picture as to the applicability of income it is necessary to refer to the provisions of the Trustee Act, 1925, s. 31. It is not disputed that income applicable for the benefit of a child by virtue of those provisions is to be treated as so applicable "by virtue or in consequence of" the disposition contained in the settlement for the purposes of the Finance Act, 1922, s. 20 (1). H The effect of the Trustee Act, 1925, s. 31, is that so long as Joan remains the only child the one-third of the income of the fund during the life of the wife is applicable for her benefit until she attains 21 or marries with the necessary consent. As soon as she attains 21 or so marries, the income is payable to her under the terms of the settlement itself during the life of the wife. If another child is born and the respondent exercises his power of appointment so as to give (let us suppose) one-half of this income to Joan and one-half to the other child, thereafter one-half of the one-third of the income will be applicable for the benefit of each of the two children under the section.

Similarly, after the death of the wife, if Joan remains the only child, the whole of the income will be applicable for her benefit during her infancy and thereafter the whole of the income will be payable to her by virtue of sect. 31 (1) (ii). If another child is born and the respondent does not exercise his power of appointment, the income applicable for Joan's benefit will be limited to one-half of the total income, that is, to more than the one-third now in question: if two children are born, it will be one-third; only if three children are born will it be less than the one-third.

In like manner, if Joan is the only child living at the death of the respondent and the power of appointment has not been exercised in favour of any issue of hers, she will be entitled, if she attains 21 or marries, to the whole of the capital.

The result can be summed up as follows. In the years of assessment the one-third of the income was applicable for Joan's benefit and would remain so applicable during her infancy. On her attaining 21 it would be payable to her during the rest of the life of the respondent's wife. On her death she would become entitled to the whole of the capital. But these interests were liable to be cut down or defeated as follows: (i) during the life of the wife by the birth of another child and an exercise of the respondent's power of appointment is such a way as to reduce Joan's interest during that period to less than one-third; (ii) after the death of the wife (*a*) by the existence of at least three more children of the settlor, (*b*) by an exercise by the settlor of his power of appointment over the whole fund under which another child or other children of the respondent or the issue of another such child or other such children or of Joan herself took an interest or interests in more than two-thirds of the income of the settled fund so as to reduce Joan's interest to less than one-third.

In these circumstances it is said on behalf of the Crown that the one-third of the income of the trust fund in respect of which the assessments now in question were raised was applicable for the benefit of Joan for some period less then her life in that, if any of the events just mentioned were to happen at some future date, Joan's interest would be reduced to less than one-third or destroyed altogether, as the case might be. The possibility of one or other of these events happening is, it was argued, sufficient to bring the provisions of the Finance Act, 1922, above quoted, into operation.

In our opinion, this argument rests on a misconception as to the true meaning of those provisions. They can only come into operation in respect of a particular assessment. In other words, the Crown by means of an assessment is asserting that the income in the particular year to which the assessment relates is income of which it can be truly said at the time that it is "payable to or applicable for the benefit of" the child for some period less than the life of the child. In the years to which these assessments relate, it was impossible to support this assertion. Whether the income would or would not continue to be payable to or applicable for the benefit of Joan for the whole of the rest of her life depended on quite unpredictable events. All that could be said of it was that the income might or might not continue to be so applicable according to circumstances. This, however, is not sufficient to discharge the burden imposed upon the Crown by the section, which is to establish affirmatively that the income is—not that it may be—payable or applicable for some period less than the life of the child. In applying the section what has to be considered is the effect of the settlement in the light of circumstances as they exist at the relevant time. If it can be said that the terms of the settlement will at some future date so operate as to cut down or destroy the interest of the child the section will apply as to part or the whole of the income as the case may be. If, on the other hand, all that can be said is that, if the circumstances existing at the time continue to exist undisturbed by some extraneous event which may or may not happen (such as the exercise of a power of appointment or the birth of another child or, as in the present case, three other children) the income will be payable to or applicable for the benefit of the child for the whole of its life and will only cease to be so payable or applicable if and when such an extraneous event does happen, the subsection has, in our opinion, no application.

We may illustrate the way in which we think the section works by taking a simple example. A settlor settles property upon trust to pay the income equally among all his children for the time being living. He has one child only when it is sought to assess him under the section. The assessment cannot be supported for the reasons which we have already given. Thereafter another child is born. The position then will be that thereafter one-half of the income will be payable to the elder child and one-half to the younger. In respect of neither of these moieties will it be possible to say that it is payable to the child entitled to it for some period less than the life of that child. Unless and until a third child is born the two children will continue to enjoy their respective moieties of the income. And so on with subsequent children. To hold otherwise would mean that the only course which a father could take without subjecting himself to the operation of the section would be to make a separate settlement of a defined amount for each child. This, as it appears to us, would be to give to the section an operation far beyond the mischief which it was obviously designed to remedy and is not to be extracted from its language.

The conclusion to which we have come appears to us to be entirely consistent with the decision in *Watson's Trustees* v. *Wiggins* (1), subject to one point to which we will refer in a moment. In that case the interest of the child was liable to be defeated in the event of the exercise of a power of revocation contained in the settlement which was exercisable by the settlor with certain consents. Unless and until this power was exercised the income belonged to the child. It was held that the income was not brought within these provisions of the section by reason of the existence of this power of revocation. In the House of Lords LORD BUCKMASTER said, at p. 271 :

> . . . it appears to me that it is impossible to say that it is for a period less than the life of the child merely because there is a means by which the actual estate that is conferred may be terminated and cut short. The limitation is for the life of the child, subject to a power which enables the limitation itself to be set aside, but that does not prevent the limitation while it lasts and is not set aside being for the life of the child.

But before us great reliance was placed by counsel for the Crown upon a *dictum* of ROMER, L.J. (as he then was), which is to be found at p. 258. He said that, if the direction in that case had been to pay the income to the child during his life or until the power of revocation was exercised, he thought he should agree that the infant was not entitled by virtue or in consequence of the instrument during his life. With all respect, we cannot agree with this very tentative expression of opinion. Even if the language had been as supposed, it would still have been the case that in the year of assessment the child would unquestionably continue to enjoy the income by virtue or in consequence of the settlement until such time (if ever) as its interest was defeated by the exercise of the power of revocation. In any case, the language in the present case is not " until " but " until and subject to," and we can see no ground for not giving full force to the words " subject to."

The appeal must be dismissed with costs.

MACKINNON, L.J. : I had written a judgment of my own, but having heard the judgment of LORD GREENE, M.R., I should be only repeating in different language what he has said if I were to read it. In those circumstances it is sufficient to say that I entirely agree.

Appeal dismissed with costs. Leave to appeal to the House of Lords granted.

Solicitors : *Solicitor of Inland Revenue* (for the Crown) ; *Rye & Eyre* (for the taxpayer).

[*Reported by* R. L. ZIAR, ESQ., *Barrister-at-Law.*]

A.-G. *v.* ULVERSTON URBAN DISTRICT COUNCIL.

[CHANCERY DIVISION (Simonds, J.), **February 22, 1944.**]

Local Government—Appointment of officer—Appointment of councillor as clerk to council in honorary capacity on his undertaking to resign from council—" Paid office "—Local Government Act, 1933 (c. 51), *s.* 122.

The office of clerk to the respondent council became vacant and the council resolved to advertise that it was intended to make a war-time appointment at a certain salary. One of the applicants was Jackson, a member of the council, who offered his services in an honorary capacity and stated that he was prepared to resign his position of councillor. At a special meeting of the council a resolution was passed that Councillor Jackson be appointed to the office on the terms set out in his application. It was contended on behalf of the Attorney-General that this amounted to an appointment to a paid office within the meaning of the Local Government Act, 1933, s. 122, and that Jackson was, therefore, disqualified :—

HELD : notwithstanding that the councillor in question agreed to act in an honorary capacity, the appointment was an appointment to a paid office within the meaning of the Act, and in the circumstances of this case A
was void.

[**EDITORIAL NOTE.** The parties here no doubt thought that they had *bona fide* complied with the requirements of the section, but it is held that the material requirement is that a councillor shall not be appointed to a "paid office" and the office here undertaken was a "paid office" within the section.

AS TO APPOINTMENT OF OFFICERS TO URBAN DISTRICT COUNCIL, see HALSBURY, Hailsham Edn., Vol. 21, pp. 155, 156, para. 282 ; and FOR CASES, see DIGEST, Vol. 33, B
pp. 38, 39, Nos. 209-213.]

MOTION FOR JUDGMENT by the Attorney-General asking for a declaration that an appointment to the office of clerk to the respondent council was invalid under the Local Government Act, 1933, s. 122. The facts are fully set out in the judgment.

F. M. Landau for the plaintiff.

The council did not appear. C

SIMONDS, J. : This matter comes before the court on motion for judgment by the plaintiff. The matter is one of some difficulty, and I should have been glad to have the assistance of counsel for the defendants. The Local Government Act, 1933, s. 122, provides as follows :

> A person shall, so long as he is, and for twelve months after he ceases to be, a member D
> of a local authority, be disqualified for being appointed by that authority to any paid office, other than to the office of chairman, mayor or sheriff.

The question is whether the present case is within the mischief of that section. The action is brought at the relation of three members of the defendant council claiming a declaration that the appointment by the council of Frank Jackson, a member of the council, to be its clerk is invalid and for the appropriate injunction. On June 18, 1943, the General Purposes Committee of the council E
resolved to advertise for a clerk to the council, in succession to Poole who had died, as a war-time appointment at a salary of £450 per annum. On July 12, 1943, Jackson wrote a letter making an application for the appointment, stating that he knew that owing to the Local Government Act, 1933, s. 122, he was debarred from being appointed to any paid office under the council unless he had ceased to be a member of the council for over twelve months, but that the section F
did not prevent the council from considering his application and, if they should so think fit, from appointing him to the position in an honorary capacity, the question of payment of staff to be a subject of arrangement. He was prepared to resign his position as councillor immediately.

On July 29, 1943, at a special meeting of the council a resolution was passed that Councillor Frank Jackson be appointed clerk to the council on the terms set out in his application. The question is : Has he been appointed to a paid G
office ? In my judgment, the office to which he has been appointed is a paid office, and he has been appointed to a paid office in the meaning of the section notwithstanding that he agrees to act in an honorary capacity. The case is by no means an easy case, but, in my opinion, the facts bring it within the mischief of the statute. I shall make the declaration of invalidity asked for and grant an injunction accordingly.

Order accordingly. H

Solicitors : *Burton, Yeates & Hart*, agents for *Hart, Jackson & Sons*, Ulverston (for the plaintiff).

[*Reported by* R. L. ZIAR, ESQ., *Barrister-at-Law.*]

J. LYONS AND CO., LTD. *v.* THE ATTORNEY-GENERAL.

[CHANCERY DIVISION (Uthwatt, J.), **March 2, 29, 1944.**]

Emergency Legislation—War damage—Insurance—Lamps and fitments used for lighting premises generally and not for trade purposes—Whether "land" within the Act—War Damage Act, 1943 (*c.* 21), *s.* 103—*Rating and Valuation Act,* 1925 (*c.* 90), *s.* 24—*Plant and Machinery* (*Valuation for Rating*) *Order,* 1927 (*S.R. & O.,* 1927, *No.* 480), *Sched., class* 1 (*b*).

The plaintiff company were the occupiers of certain premises used by them as a tea-shop. The premises were fitted with a number of lamps and fitments which were destroyed by enemy action in 1941. Certain of these lamps were fitted into sockets of holders of various types and the wire holding the sockets emerged from the ceiling. The lamps were used for lighting the premises generally and not in connection with any manufacturing operation or trade process; the wattage varied from 60 to 150. It was contended by the company that the lamps in question were "land" within the meaning of the War Damage Act, 1943, s. 103:—

HELD: the lamps and fitments in question were not "land" within the meaning of s. 103 of the Act.

[**EDITORIAL NOTE.** The question here is purely one of construction and is the meaning of the word "land" in the War Damage Act. That Act has separate and very different insurances against war damage to land and to chattels, and it was here necessary to determine under which head the lamps in question were insured. The definition incorporates the definition of plant and machinery in the Rating and Valuation Act, 1925, so that the question is whether these lamps are plant or machinery. They are held not to fall within the definition.]

Cases referred to:

(1) *Townley Mill Co.* (1919), *Ltd.* v. *Oldham Assessment Committee,* [1937] A.C. 419; [1937] 1 All E.R. 11; Digest Supp.; 106 L.J.K.B. 140; 156 L.T. 81.

*(2) *Yarmouth* (*Earl*) v. *France* (1887), 19 Q.B. 647; 36 Digest 82, *548*; 57 L.J.Q.B. 7.

ACTION to recover compensation under the War Damage Act, 1943. The facts are fully set out in the judgment.

H. Wynn-Parry, K.C., and *T. Sophian* for the plaintiff company.

The Attorney-General (*Rt. Hon. Sir Donald B. Somervell, K.C.*) and *H. O. Danckwerts* for the defendant.

UTHWATT, J.: The question now at issue in these proceedings is whether certain electric lamps, the sockets into which the lamps were fitted and the cords connecting the lamps with the electric wiring of the premises of 9-11, Cranbrook Road, Ilford, are "land" within the meaning of the War Damage Act, 1943, s. 103. The premises in question were at all material times occupied by J. Lyons & Co., Ltd., and used by them as a tea-shop. The ground-floor consisted of a cafe, with a counter for the display of goods and a service bar; the first floor of a kitchen, store-room and toilet room; and the second floor of an office for the manageress, a waitresses' dressing-room and a W.C. The premises were wired for electricity, which was supplied by the Ilford Borough Council.

There were 26 lamps on the ground-floor, two on the first floor and one on the second floor. Of the lamps on the ground-floor nine—namely, six counter-lamps, two lamps directly over the service bar and a window-lamp—may stand in a different position from the other lamps, by reason that they may be connected with the needs of the particular trade carried on upon the premises. No evidence was, indeed, given as to the particular purposes served by any of these nine lamps. As a decision on the general position of lamps used for lighting business premises of the kind here in question was desired, it was agreed at the hearing that the six counter lamps should be excluded from consideration. This agreement did not extend to the remaining three lamps, as to which no particular point was taken in argument; but in the state of the evidence I propose to exclude them also from consideration.

The remaining lamps may be regarded only as lighting the premises generally, none of them being on the premises for the purposes of, or used in connection with any manufacturing operations or trade processes. All the lamps in question were fitted into sockets of holders of various types, the wiring holding the sockets emerging in all cases in the ceilings. The wattages of the lamps varied from 60 to 150.

The lamps and the fitments in question were destroyed as a result of enemy action in 1941; and, if they constitute " land " within the meaning of sect. 103, compensation is payable in respect of them under the War Damage Act, 1943, Pt. I.

" Land " is, for the purpose of the War Damage Act, 1943, defined in sect. 103. The effect of the definition is that " land " includes any building or works situate over or under the land other than plant and machinery not expressly included by the terms of the section as part of the land. The plant and machinery so included in the case of the premises under consideration is the plant and machinery which, on the footing that the land was a hereditament to which the Rating and Valuation Act, 1925, s. 24, applied would, under the provisions of that section, and the Plant and Machinery (Valuation for Rating) Order, 1927, be deemed, for the purposes of the making or revision of valuation lists under Pt. I of that Act, to be part of the land.

The contention of the company is limited to the proposition that the lamps and the fitments are " plant " which would be so deemed to be part of the land; and it was not contended that, if they were not plant, they formed part of the building or works. In the result, therefore, the only questions at issue are the construction and the application to the facts of the case of sect. 24 of the Act of 1925 and the Order of 1927 as they would be construed and applied for rating purposes.

The leading provision in sect. 24 is subsect. (1) (*a*):

> . . . all such plant or machinery in or on the hereditaments as belongs to any of the classes specified in Sched. III shall be deemed to be a part of the hereditament . . .

For the purpose of enabling all persons concerned to have precise information as to what plant or machinery fall within the classes specified in Sched. III, the Minister was empowered by Order to confirm, with or without modification, a Statement setting out in detail all the machinery and plant appearing to a committee set up by him to fall within those classes; and the Statement so confirmed was to have effect as if it were substituted for Sched. III: see subsects. (3), (4) and (5). The Order of 1927 was made pursuant to this power. The classes (following the classes set out in Sched. III to the Act) are set out in the Schedule to the Order under the heading " Classes of machinery and plant deemed to be part of the hereditament."

Clause 1 (b) (omitting the proviso, which is irrelevant as none of the lamps in question are used for manufacturing operations or trade processes) is the relevant clause. It runs as follows:

> Machinery and plant specified in paras. (*a*) to (*h*) of the Schedule to this class (together with the appliances and structures accessory thereto specified in para. (2) of the Schedule of Accessories) which is used or intended to be used mainly or exclusively in connection with heating, cooling, ventilating, lighting, draining or supplying of water to the land or buildings of which the hereditament consists, or the protecting of the hereditament from fire . . .

Para. (*c*) of the Schedule to Class 1 (*b*) is headed " Lighting." It includes:

> (i) Gas pressure regulators; gas burners. (ii) Plug-sockets and other outlets; electric lamps.

Para. (2) of the Schedule of Accessories covers under its general words the fitments of the character here in question.

Two questions are raised. The first question is whether, as a matter of construction, it is sufficient, as contended by the company, that electric lamps are in terms specified in the Schedule to the Order, or, as is contended by the Attorney-General, it is only electric lamps which are machinery or plant, or a component part of machinery or plant, that under the section form part of the hereditament. The second question is whether, assuming the company fail in their first contention, these particular lamps are plant within the meaning of the section. Both questions lie within a small compass.

In considering these questions, it is to be borne in mind that sect. 24 of the Act applies to all hereditaments (except those valued on a profits or similar basis). The section is not confined to factories, for machinery or plant may well be found in private houses or business premises: see *Townley Mill Co.'s* case (1), at pp. 432 and 441. Secondly, it is not necessary under the section that the machinery or plant should be a fixture or in any way annexed to the hereditament.

The section is expressed to apply to plant or machinery "on" as well as "in the hereditament."

Upon the first question, I am of opinion that the contention of the company is not correct. The general structure of the section is that such machinery or plant in or on the land as falls within the terms of Sched. III or any substituted statement is to be deemed part of the hereditament; not that such articles as fall within those terms are machinery or plant. Sect. 24 (1) (*a*) is clear in its terms. It is plant or machinery which belongs to the classes specified in Sched. III —now replaced by the substituted Statement—that are to be taken into account. There must be plant or machinery to begin with; and next it must fall within one or other of the specified classes. The language used in subsects. (2), (3) and (7) bears out this interpretation of subsect. (1). When it comes to specifying classes, the words used may or may not be, when taken by themselves, appropriate only to machinery or plant. In so far as they are appropriate to articles, whether or not machinery or plant, the effect of the section is to confine their application to machinery or plant. As regards the substituted statement, I have already quoted the relevant part. Class 1 (*b*) is not composed of the articles specified in paras. (*a*) to (*h*) used or intended to be used for certain specified purposes; but is composed of "machinery and plant" specified in the paragraphs so used or intended to be used. I see nothing in the terms of the substituted statement to warrant the inference that all articles falling within categories (*a*) to (*h*) are, given the condition as to use or intended use, in all circumstances to be regarded as machinery and plant. In most cases there can be no question that articles falling within the descriptions appearing in the Schedule to Class 1 (*b*) are in fact plant or machinery; but there are other cases, of which the electric lamps and pumps may be taken as examples, where the description given may apply to an article which only in certain circumstances can properly be described as plant. In those cases the necessity arises for determining as a matter of fact whether the particular articles merit the appellation "plant."

The question then arises whether lamps and the fitments in question in this particular building are "plant"—they obviously are not machinery. The word "plant" is not defined in the Act. I do not think that the use throughout sect. 24 of the Act of the word "plant" as part of the phrase "plant or machinery," and "machinery and plant," has the effect of confining the meaning of the word to such plant as is used for mechanical operations or processes.

Next, I find it unnecessary, for the purposes of a decision in this case, to enter upon the question whether any particular limitation should be placed on the general sense borne by the word by reason that the Act in which it appears is a rating Act. I propose to assume that no such limitation should be placed. Nor do I think it necessary to attempt a general definition of the word "plant." No definition of "plant" would include the lamps and fitments here under consideration if they were found in a private house supplied with electricity by public suppliers. If these articles are plant, it can only be by reason that they are found on premises exclusively devoted to trade purposes. Trade plant alone need be considered.

Confining my attention to trade plant, I am content to accept the general description in *Yarmouth* v. *France* (2), that "plant" includes whatever apparatus or instruments are used by a business man in carrying on his business. The term does not include stock-in-trade, nor does it include the place in which the business is carried on. Whether any particular article more properly falls within "plant" as thus understood, or in some other category, depends on all the circumstances of the case.

In the present case, the question at issue may, I think, be put thus: Are the lamps and fitments properly to be regarded as part of the setting in which the business is carried on, or as part of the apparatus used for carrying on the business? In this case the lamps and their fitments are owned by a caterer and used in premises exclusively devoted to catering purposes. But the presence of lamps in this building is not dictated by the nature of the particular trade there carried on, or by the fact that it is for trade purposes that the building is used. Lamps are required to enable the building to be used where natural light is insufficient. The actual lamps themselves, so far as the evidence goes, present no special feature either in construction, purpose or position and, being supplied with electricity from public suppliers, they form no part of an electric lighting plant in or on the hereditament.

In my opinion, these lamps are not, in these circumstances, properly described as "plant," but are part of the general setting in which the business is carried on. They would not, I think, in any catalogue of this trader's assets, fall under the heading "machinery and plant"; and I hold that the lamps and these fitments in question are not machinery or plant for the purposes of the War Damage Act, 1943, s. 103.

Judgment accordingly. No order as to costs.

Solicitors: *Bartlett & Gluckstein* (for the plaintiff company); *Treasury Solicitor* (for the defendant).

[*Reported by* R. L. Ziar, Esq., *Barrister-at-Law.*]

Re HILLIER, DAUNCEY *v.* FINCH AND ATTORNEY-GENERAL.

[Chancery Division (Vaisey, J.) **February 9, 1944.**]

Charities—Charitable purposes—Gift for the sick and wounded—Validity.

By her will, the testatrix directed: "I wish my furniture to be sold and proceeds to go to the sick and wounded, and after all debts are paid what moneys are left should go to the same cause." It was contended, on behalf of the first defendant, that the gifts did not disclose a charitable purpose:—

Held: since, upon the true construction of the will, the object of the gifts was to provide for the relief and help of suffering and helpless persons, they were for a purpose which was beneficial to the community and were, therefore, valid charitable gifts.

[**EDITORIAL NOTE.** The first class of charitable gifts is gifts for the relief of poverty. When, however, the other classes of charitable gifts are considered, it is not necessary that the gift shall benefit the poor only and it is no objection that the rich may also benefit. It has been said, however, that a gift from which the poor are excluded may not be a good charitable gift.

As to Nature of Charitable Gifts, see HALSBURY, Hailsham Edn., Vol. 4, pp. 107-111, paras. 143-146; and for Cases, see DIGEST, Vol. 8, p. 245, Nos. 40-50.]

Cases referred to:

(1) *Verge* v. *Somerville*, [1924] A.C. 496; Digest Supp.; 93 L.J.P.C. 173; 131 L.T. 107.

(2) *Income Tax Special Purposes Comrs.* v. *Pemsel*, [1891] A.C. 531; 8 Digest 241, *1*; 61 L.J.Q.B. 265; 65 L.T. 621.

*(3) *Re Roadley, Iveson* v. *Wakefield*, [1930] 1 Ch. 524; Digest Supp.; 99 L.J.Ch. 232; 144 L.T. 64.

(4) *Re Chaplin, Neame* v. *A.-G.*, [1933] Ch. 115; Digest Supp.; 102 L.J.Ch. 56; 148 L.T. 190.

Adjourned Summons to determine, *inter alia*, whether gifts contained in the will of the testatrix were valid charitable bequests. The facts are sufficiently stated in the judgment.

Sir Norman Touche for the plaintiff, the executor.

E. M. Winterbotham for the first defendant, the next-of-kin.

H. O. Danckwerts for the second defendant, the Attorney-General.

Vaisey, J.: In this case I have to decide whether or not a gift, partly residuary, in the will of the testatrix, Annie Hillier, is a good charitable gift. The will of the testatrix, which appears to be home-drawn, is dated Feb. 4, 1943. The testatrix, after revoking former wills and appointing the plaintiff, Alfred Ernest Dauncey, whom she describes as Ernest Dauncey, to be her executor and directing the payment of her debts, bequeaths to the plaintiff certain savings certificates, identified by particular numbers, the motive or purpose of which she indicates by saying that it is "for his kindness during the bombing." Then follows a pecuniary legacy to the sister of the testatrix, who is the first of the two defendants to the summons, and another pecuniary legacy to a Mrs. Hulton; "for her kindness when I was in hospital" are the words used to indicate the motive for that gift.

The testatrix then proceeds in these words:

> I wish my furniture, what is left of it, to be sold and proceeds to go to the sick and wounded, and after all debts are paid what moneys are left should go to the same cause.

There follow words in brackets: "(funeral expenses and anything else to be paid)"; and then comes another pecuniary legacy, a bequest to the sister of a piece of furniture "and anything else she would like." Those words, in my judgment, indicate the right of the sister to select, if she so desires, some other piece of furniture in addition to that which was described. Finally there is a legacy to the Selly Oak Hospital of a sum of £50.

The testatrix died five days after the date of her will—that is, on Feb. 9, 1943—and that will was in due course proved by the plaintiff. There remains, subject to the gift which I have mentioned (that is, the direction that the properties are to go to the sick and wounded) a sum, I am told, of some £1,100. Now, the words "to go to the sick and wounded" are, of course, inartistic, but some light is thrown upon their meaning by the subsequent direction that the residuary moneys were to go "to the same cause," and, therefore, both gifts—that is, the proceeds of the furniture and any moneys which are left—are considered by the testatrix as having been given by her to a cause, which, in my judgment, means or indicates that she is thinking of the sick and wounded as what is colloquially called a "good cause"—that is, the kind of thing for which the charitable and benevolent instincts of the public might be properly appealed to.

I have been reminded, and I am grateful for the reminder, that it is very important in these cases, which raise the issue of whether or not a good charitable purpose is disclosed, not to enlarge the area of what the court has considered to be in the true sense charity, and that it is very important not to take one case as justifying a little further progress in enlarging the boundaries of what is charitable, thereby creating a sort of expanding area to which, if the same process is continued, there are no visible bounds. But in my view we start with this proposition, that it is not necessary, in order to find a good charitable purpose, to have any limit by reference to the question of poverty, and for that proposition there are some useful observations in the judgment of the Privy Council delivered by Lord Wrenbury in *Verge* v. *Somerville* (1). That proposition, that it is not necessary to confine the beneficiaries of a charitable gift to the poor to the exclusion of the rich, was, of course, well-established long before the date of that case; but the question, as Lord Wrenbury put it, at p. 499, was this:

> . . . Is it necessary to find . . . that the class [of beneficiary] is confined to poor persons, to the exclusion of persons not poor? Is poverty a necessary element?

Lord Wrenbury comes to the very definite conclusion that poverty is not a necessary element in such cases, and, at p. 503, he calls attention to the fact that the fourth heading in the well-known enumerations to be found in *Pemsel's* case (2), at p. 583, does not contain the word "poor," and Lord Macnaghten, in that case, does not say "beneficial to the poorer members of the community." Lord Wrenbury asks this question:

> Did he [Lord Macnaghten] mean his words to be read as confined to the poor?

Trusts for the advancement of education, for the advancement of religion and for other purposes beneficial to the community, "are not the less charitable in the eye of the law because incidentally they benefit the rich as well as the poor." It seems to me that the charitable element in a purpose is to be found, if it is permissible to endeavour to have a comprehensive description of it, in the notion of rendering assistance to those persons who are in dire want of it, or to meet some form of human need—need which would appeal to the benevolent feelings of mankind and not necessarily that which has its origin in the lack of money.

The sick and wounded are undoubtedly a class of the community and may be regarded as a class of the community which is in need of assistance, and I am fortified in the conclusion to which I have come that this gift is a good charitable gift by the decision of Bennett, J., in *Re Roadley* (3). There the gift was "in payment of the expenses and maintenance of patients" in two named hospitals; but Bennett, J., at p. 56 held on two grounds, of which only the first is relevant for my purpose, that the gift was a good charitable gift because it was:

> . . . a trust for the relief of a form of helplessness, which excites the compassion and sympathy of mankind and so appeals to their benevolence, and is analogous to the purposes set out in the preamble to the Statute of Elizabeth.

Bennett, J., calls attention to the first item in the list in that preamble. It is the "relief of aged, impotent and poor people," and he, as I understand it, regards that as referring to persons in need of help through their age or through their ill-health or through their poverty; and, therefore, the class of sick and wounded to whom the testatrix may be considered as referring in this will are in my judgment a class of impotent people whose helplessness it is a proper object of charity to relieve.

There is also a decision of Maugham, J., as he then was, in *Re Chaplin* (4), where there was a trust to provide a home of rest for persons who were in need of rest by reason of strain and stress caused or partly caused by the conditions in which they lived; and Maugham, J., said, following two earlier cases, that that was in his view, and he held that it was, a good charitable trust, because it was a trust for assisting and alleviating the helplessness of persons in need of a particular kind of help—that is to say, in that case, the provision of somewhere where they might find needed rest.

Counsel on behalf of the first defendant, the testatrix's sister, is here, so to speak, in a representative capacity, because the evidence appears to indicate that there are other next of kin of the testatrix whose existence at the moment is not proved and who have been lost sight of by the first defendant. He has said everything that is possible to be said on behalf of his client and of the class of which she is a member, and I have given, I hope, full weight to the submissions which he has made. It seems to me, however, that in the case of a gift for the benefit of the sick and wounded, which I take to be the class of persons who are suffering from their sickness or their wounds, or from both, it would be very surprising for the ordinary man—and I think it would be also very surprising to those who are familiar with the legal definition of "charity"—to be told that such a gift as that is not charitable because not strictly within the preamble to the Statute of Elizabeth. I think in the first place that it is good under that preamble, but I also think that it is clearly within the fourth heading of "charity" laid down in *Pemsel's* case (2), because it seems to me to be quite clearly a provision for some purpose—not the relief of poverty, not the advancement of education, not the advancement of religion, but for some purpose other than those—which is beneficial to the community. I think it is beneficial to the community because it provides for the relief of persons who need relief and to aid the helplessness of those who require and look for help from their fellow creatures.

I shall, therefore, declare, in answer to the first question in the summons, that the provisions of the will that the proceeds of the sale of the furniture are to go to the sick and wounded, and that certain moneys to go to the same cause are good, valid, charitable gifts.

Declaration accordingly.

Solicitors: *Lane-Claypon & O'Kelly*, agents for *Evershed & Tomkinson*, Birmingham (for the plaintiff); *Sharpe, Pritchard & Co.* (for the first defendant); *Treasury Solicitor* (for the Attorney-General).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

JEWELOWSKI *v.* PROPP.

[KING'S BENCH DIVISION (Lewis, J.), **February 8, 1944.**]

Damages—Duty to minimise loss—Plaintiff not required to expend money—Plaintiff induced by fraudulent misrepresentation to advance money on debenture—Plaintiff bought assets of company on winding up and sold at profit—Profit not to be taken into account in calculating damage for misrepresentation.

A The court found that the plaintiff was induced by fraudulent misrepresentations made by the defendant to advance £1,000 to a company on a debenture. Subsequently, the company was wound up and the plaintiff received £257 16*s.* 2*d.* in respect of his debenture. Apart from this, plaintiff bought the assets of the company from the receiver for £350 and later sold them for £950. The plaintiff claimed as damages £742 3*s.* 10*d.*, being £1,000 less £257 16*s.* 2*d.* On behalf of the defendant it was contended B that it was the plaintiff's duty to minimise the damages and that, therefore, the £600 profit which the plaintiff made by acquiring the assets for £350 and selling them for £950 should be deducted from the damages claimed :—

HELD : where a plaintiff is entitled to damages for fraudulent misrepresentation, he cannot be called upon to expend money to minimise those damages. It was not proper, therefore, to take into account the purchase C and sale of the assets and the amount of the damages recoverable was £742 3*s.* 10*d.*

[**EDITORIAL NOTE.** The plaintiff is always under a duty to minimise his damages, but it is said that there is no authority which goes so far as to say that he shall expend money upon a purchase which may prove a good bargain in that the goods can be resold at a substantial profit. There must be an element of risk in such a transaction D and it does not seem proper that for the purpose of minimising the damages, a plaintiff ought to be bound to incur such a risk, and, where he has done so and has been fortunate enough to make a profit, the defendant is not entitled to have that profit brought into account. It would seem that the only sums which must be brought into account are those which arise from something which the plaintiff was under a duty to do, as for example, in case of wrongful dismissal, to seek further employment.

AS TO DUTY OF PLAINTIFF TO MITIGATE LOSS, see HALSBURY, Hailsham Edn., Vol. 10, pp. 113-115, paras. 143, 144 ; and FOR CASES, see DIGEST, Vol. 17, pp. 124-128, E Nos. 324-361.]

ACTION to recover damages for fraudulent misrepresentation. The court found that the plaintiff was induced by fraudulent misrepresentations made by the defendant to advance £1,000 to a company on a debenture. Subsequently the company was wound up and the plaintiff received £257 16*s.* 2*d.* in respect of his debenture. Apart from this the plaintiff bought from the F receiver the assets of the company for £350 and subsequently sold them for £950. The question arose whether the £600 profit which the plaintiff had thereby made should be taken into account in assessing the damages to which he was entitled for the fraudulent misrepresentation.

T. F. Davis for the plaintiff.

D. A. Scott Cairns for the defendant.

G LEWIS, J. : The plaintiff, in his statement of claim, although he does not say so in terms, sets out the fact that he has lost his £1,000 and has only recovered £257 16*s.* 2*d.*, and, therefore, he appears to be claiming as damages the difference between those two sums, which is £742 3*s.* 10*d.* But, it is said by counsel for the defendant, on the assumption that the defendant has to pay damages for fraudulent misrepresentation, the measure of damages should not be £742 3*s.* 10*d.*, but something considerably less, and the reason why he says H that is this. The total amount which was collected by the receiver and manager, after he had paid the expenses, only permitted the transfer to the plaintiff of the sum of £257 16*s.* 2*d.* In order to obtain that amount he had to sell the assets and he found somebody who gave him £350 for the machinery and, I think, the stock, or whatever assets he could sell, and, if the position was that the £350 had been paid by an outsider, the question which now arises as to the measure of damages would not arise, but the fact is that the person who expended the £350 in purchasing the machinery was the plaintiff, and, therefore, in order to enable the plaintiff to obtain anything on his debenture, he had to expend further money, namely, £350, in buying the assets. The plaintiff made a very good bargain as far as the £350 is concerned, because it transpired that he was able to sell what he bought for the two sums of £400 and £650. I am not quite sure I have got in my mind, or even on my note, what the £400 and the £650 actually represented, but one sum was for the machinery and the other for the stock. Before he could get his £650 for the machinery, £100 had to be paid to the landlord, so that the net result of expending £350 was to put £950 (£400 and £650, less £100, namely, £550) in his pocket. He was able to make £950 by A his investment of £350, and the position, looked at merely as a matter of arithmetic, is this: The plaintiff was induced by the fraudulent misrepresentations of the defendant to advance £1,000 to the company. After the receiver and manager was appointed the plaintiff expended a further £350, making a total expenditure of £1,350, and the money which came back to him was £257 16*s.* 2*d.* and £950, making a total of £1,207 16*s.* 2*d.* That would make on that calculation a net loss of £142 3*s.* 10*d.*, and counsel for the defendant B says that is the amount of damages recoverable.

It is the plaintiff's duty, says counsel for the defendant, to minimise his damages, and counsel argued and said quite properly that in a case of wrongful dismissal the injured person cannot sit down and twiddle his thumbs and claim damages from the person who has wrongfully dismissed him. He must seek employment elsewhere, and, if he obtains it elsewhere, he must reduce the C damages claimed from the person who has to pay, and the duty of a person to minimise his damages is a proposition which is well known and cannot be controverted. But, says counsel for the plaintiff, that does not mean a person has to expend money.

The argument as I followed it is this: The plaintiff must be looked upon, for the purpose of the purchase of the assets, as an outsider and not at all connected with his claim for £1,000 damages for false and fraudulent misrepresentation, D and because the plaintiff had the good fortune or business astuteness to realise that by the expenditure of £350 he would make a good bargain, that has not to be taken into consideration when the damages are assessed. The damages which the defendant has to pay are for fraudulent misrepresentation. I confess it is a question of some difficulty. I think I can see both sides of the question and I have to make up my mind whether the damages are to be £142 3*s.* 10*d.* or the sum of £742 3*s.* 10*d.* That is the question I have to decide, and I confess I E have not been assisted by any authority—probably because there is no reported authority which would assist me on this matter. As I have already said, I have been greatly assisted by counsel in this case, and I am quite sure, if there was any authority that could help me on the matter, they would have cited it.

It seems to me it is really a question of applying the principle of the duty of the plaintiff to minimise his damages, and giving the matter the best consideration I can, it seems to me that the argument of counsel for the plaintiff is right, F namely, that a person cannot be called upon, when he has a claim for damages for fraudulent misrepresentation, to expend money in order to minimise those damages. It seems to me that such a rule would be going very far beyond the rule that a plaintiff has got to minimise his damages. The position is that the only money which the plaintiff got for his investment of £1,000 was £257 16*s.* 2*d.*, and, because he saw an opportunity of purchasing the assets and making something out of it, it does not seem to me that the money he made out of that G transaction should be put against the damages he claims in this action.

I, therefore, think there must be judgment for the plaintiff for the sum of £742 3*s.* 10*d.*, with costs.

Judgment for the plaintiff accordingly.

Solicitors: *Bulcraig & Davis* (for the plaintiff); *Albert M. Oppenheimer* (for the defendant). H

[*Reported by* P. J. JOHNSON, ESQ., *Barrister-at-Law.*]

R. *v.* PHILIP JACOBS, HENRY SIMON CARR AND WILLIAM LONGTON FAIRHURST.

[Court of Criminal Appeal (Humphreys, Stable and Cassels, JJ.), **March 13, 1944.**]

Emergency Legislation—Maximum prices—Sale of price-controlled goods at prices in excess of controlled price—Seller posing as manufacturer's agent—Prices of Goods Act, 1939 (*c.* 118), *ss.* 1, 10 (1) (3) (5), 15—*Goods and Services* (*Price Control*) *Act,* 1941 (*c.* 31), *s.* 4—*Price-Controlled Goods* (*Restriction of Resale*) (*No.* 2) *Order,* 1942 (*S.R. & O.,* 1942, *No.* 958).

Criminal Law—Conspiracy to contravene provisions of statute—Plea of ignorance—Prices of Goods Act, 1939 (*c.* 118), *ss.* 1, 10 (1) (3) (5), 15.

The appellants, two of whom were directors and the third the manager of a company owning chemists' shops, purchased a quantity of price-controlled articles at prices greatly in excess of the controlled price from a fourth man who posed as a manufacturer's agent. Together with the latter, the appellants were charged *inter alia* with conspiring to contravene the provisions of the Prices of Goods Act, 1939, by re-selling price-controlled goods at a price in excess of the permitted price. The defence was that the three appellants were ignorant of the maximum price of the goods in which they had dealt. In his summing up the trial judge directed the jury that, if they were satisfied that the appellants were engaged in the sale concerned it was not necessary, in order to find them guilty of the crime charged, to find that they knew the correct maximum price of the articles sold :—

Held : it was not necessary for the prosecution to prove that the appellants knew the maximum permitted price of the articles sold. Ignorance of the law was no excuse and it was the duty of the appellants to know the maximum price.

[**EDITORIAL NOTE.** The appellants were charged with a conspiracy to contravene the provisions of a statute placing a maximum selling price on goods. In the case of such a charge the prosecution have not to show that the accused had any knowledge of what the maximum permitted price was. All that the prosecution has to prove is a sale at a price above the maximum.

For the Prices of Goods Act, 1939, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, p. 1242.]

Case referred to :

(1) *R.* v. *Seward* (1834), 1 Ad. & El. 706 ; 14 Digest 118, *880* ; 3 Nev. & M.K.B. 557 ; 2 Nev. & M.M.C. 318 ; 3 L.J.M.C. 103.

Appeal against a conviction before Wrottesley, J., at Liverpool Assizes. The grounds of appeal alleged that the judge misdirected the jury as to the essential matters to be proved and that there was no case proper to be left to a jury. The facts are fully stated in the judgment of the court delivered by Humphreys, J.

John Flowers, K.C., and *A. E. Baucher* for the appellants Jacobs and Carr.

Neville J. Laski, K.C., and *A. E. Baucher* for the appellant Fairhurst.

J. C. Jolly, K.C., and *R. H. Blundell* for the Crown.

Humphreys, J. [delivering the judgment of the court] : The facts are simple and were not in dispute. The appellants Jacobs and Carr are directors of Carris, Ltd., a company owning several chemist's shops in Liverpool. The appellant Fairhurst at the material time was employed as buyer to the company. In May, 1943, Fairhurst was approached by a man named Mulholland, posing as a manufacturer's agent, to buy various price-controlled articles at prices greatly in excess of the controlled price. All three appellants agreed to accept the offer and the goods were in fact bought, paid for, and delivered. The goods so bought included over 300 gross of razor blades at 42*s.* per gross, the controlled price of those goods at that date being 15*s.* per gross. An inspector of the Board of Trade learned of the transaction and a prosecution of the four persons concerned was decided upon and instituted by the Director of Public Prosecutions. It was not disputed that the transaction involved Mulholland in a breach of the Prices of Goods Act, 1939, s. 1, which reads as follows :

> It shall be unlawful for any person to sell, agree to sell or offer to sell, any price-regulated goods in the course of any business at a price which exceeds the permitted price, that is to say the basic price together with the amount of any permitted increase.

Nor was it disputed that Mulholland was guilty of an offence against the Price-Controlled Goods (Restrictions of Resale) (No. 2) Order, 1942, in that he re-sold otherwise than by retail price-controlled goods bought by him in his business, not being goods bought from an importer or manufacturer. That Order is designed to limit the number of middlemen in transactions in price-controlled goods, and his knowledge of it no doubt explains Mulholland's statement to the appellants that he was a manufacturer's agent, which was untrue.

The indictment contained 8 counts, of which 4 only are material to this appeal. Count 6 charged Mulholland with the offence created by sect. 1 of the 1939 Act and the three appellants with aiding and abetting in that unlawful sale. Count 7 charged Mulholland with the offence of re-selling otherwise than by retail contrary to the Order of 1942, and similarly charged the appellants with aiding and abetting. To both those counts Mulholland pleaded guilty. The appellants pleaded not guilty to the whole indictment. Count 1 charged all four persons with a conspiracy to contravene the provisions of the Prices of Goods Act, 1939, by re-selling price-regulated goods in the course of a business at a price in excess of the permitted price. Count 2 charged a similar conspiracy to contravene the above-mentioned Order of 1942 and the Goods and Services (Price Control) Act, 1941, under which the Order was made, by re-selling price-controlled goods in contravention thereof. To these counts all four persons pleaded not guilty.

At the close of the case for the prosecution, a submission was made that the accused could not be convicted upon counts 1 or 6 unless it was proved that they knew that the price they were paying was above the permitted price. As to count 6, the appellants relied almost entirely upon the language of sect. 10 (5) of the 1939 Act. The side-note of that section reads as follows :

> Right of buyer to avoid prohibited transaction, or to recover excess price.

The section is solely concerned with the civil rights of parties who have been parties to a transaction which is an offence against sect. 1 of the Act. Subsect. (1) of that section is as follows :

> Where a prosecution has been instituted in respect of a sale of, or an agreement or offer to sell, any price-regulated goods in the course of any business at a particular price, and the person charged has been found guilty, then (*a*) if the prosecution was in respect of a sale or agreement, the buyer under that sale or agreement . . . shall have the following rights, exercisable, subject as hereinafter provided, at his option.

It then goes on to provide that he shall have the right to treat the sale as avoided and to recover from the seller as money received by him for the use of the buyer any amount paid by the buyer as consideration. Then it deals with the rights of third parties. By subsect. (3) the buyer shall have the right to affirm the sale, but to recover the extent of any loss sustained by him by reason of the contravention. Then follows subsect. (5) :

> The rights conferred by this section shall not be exercisable by a person who is himself liable to punishment by reason of his having aided, abetted, counselled or procured, the contravention in question.

It was submitted that the subsection must be read as indicating that there are two classes of buyers, those who buy without aiding and abetting, and those who buy by aiding and abetting, the latter being those who knew and the former those who did not know the controlled price of goods, the buyers in the former category only being awarded the rights conferred by the section. Wrottesley, J., accepted that contention as to count 6 and withdrew that count from the jury, and, apparently by general agreement, count 7 shared the same fate. As to counts 1 and 2, Wrottesley, J., declined to stop the case, and in summing up the case to the jury he directed them as follows :

> I must remind you that the prosecution in this case do not set out to prove that these men knew what the price was or ought to have been ; they do not set out to prove that. All they set out to prove is that in fact a sale at what I will call a wrong price took place and that these four men were all in it, were all engaged in it and knew of it. If that is so, if you are satisfied that they were engaged in the sale and forwarding it and bringing it about, it is not necessary that you should find, in order that they should be guilty of this crime charged, that they knew exactly what the right price was or that the price in question was the wrong one. It is not necessary that every member of the conspiracy should know that. The offence is to sell at the wrong price, and in so far

as they all agreed to do that, or any of them agreed to do that, they are guilty of that with which they are charged by the prosecution.

The jury having convicted all the accused on counts 1 and 2, we have been invited to hold that that direction was wrong. Reliance was again placed upon sect. 10 and also upon sect. 15. Sect. 15 is as follows :

> The illegality by virtue of this Act of any transaction shall not prejudice any rights acquired by any person other than a person who is guilty of a contravention of this Act in respect of the transaction, or who is liable to punishment by reason of his having aided, abetted, counselled or procured, such a contravention.

That section appears to be directed to the rights of third parties and does not really carry the matter any further. Counsel for the appellants also relied strongly upon the ruling of WROTTESLEY, J., as to the law of aiding and abetting. As to the correctness of that ruling this court is not called upon to express an opinion. We desire, however, to guard ourselves against being supposed to assent to the proposition that a person who aids and abets another in the commission of an offence not involving any *mens rea* in the principal cannot be convicted in the absence of proof of *mens rea* on his own part. In our judgment, however, any difficulty which may be created by the language of sect. 10 can have no relevance to the consideration of the offence charged in count 1 of this indictment. That count does not charge any offence against this or any other statute, nor does it even involve the proposition that any such offence has been committed. It charges a common law misdemeanour, the accepted definition of which for centuries before 1834 was " an agreement between two or more persons to do an unlawful act," sometimes expressed as " an agreement for accomplishing an unlawful end." The antithesis introduced by LORD DENMAN in *R.* v. *Seward* (1), at p. 713, decided in that year, " or . . . a lawful purpose by unlawful means," was not intended to alter the definition of criminal conspiracy and in any event does not assist the present appellants.

The unlawful act alleged to be the subject of the agreement in this case is the selling of price-regulated goods at a price in excess of the permitted price. There can be no question that the appellants did agree with Mulholland that they should buy and he should sell razor blades at 42*s.* per gross. What then is the answer ? It appears to be that they did not know the terms of the Orders regulating the prices of the goods in which they dealt. But *ignorantia juris neminem excusat.* Counsel for Jacobs and Carr insisted that his clients were innocent buyers. It would, we think, be more accurate to describe them as buyers ignorant of the matters which it was their bounden duty to know and about which the slightest inquiry would have resulted in their enlightenment. In our judgment, the common law was correctly interpreted by WROTTESLEY, J., in his direction to the jury. Counsel for Fairhurst felt himself unable to argue to the contrary, but submitted that the language of this statute indicated an intention to override the common law. It is no doubt true that Parliament can do anything, but the court finds nothing in this statute indicating any such revolutionary tendency. The conviction on count 1 is upheld. Both counsel stated that they drew no distinction between counts 1 and 2, and any further discussion as to count 2 would be merely academic since the only penalty imposed was an order that Jacobs and Carr should each pay half the costs of the prosecution which have not been increased by the insertion of count 2. The conviction, therefore, on that count also will stand, but we think it right to say that, if count 2 had stood alone we should have required further argument as to the proof of the illegality of the agreement. The appeals are dismissed.

Appeals dismissed.

Solicitors : *S. B. Levin*, Liverpool (for the appellants Jacobs and Carr) ; *Ernest B. Kendall & Rigby*, Liverpool (for the appellant Fairhurst) ; *Director of Public Prosecutions* (for the Crown).

[*Reported by* R. BOSWELL, ESQ., *Barrister-at-Law.*]

CLYDE HIGGS *v.* G. N. WRIGHTSON (H.M. INSPECTOR OF TAXES).

[King's Bench Division (Macnaghten, J.), **March 22, 1944.**]

Income tax—Profits from trade and trade receipts—Farmer—Ploughing grant made by Government for ploughing up pasture land—Agriculture Development Act, 1939 (*c.* 48)—*Agriculture* (*Miscellaneous War Provisions*) *Act,* 1940 (*c.* 50).

The appellant was the owner of agricultural land where for a number of years he had carried on the business of dairy farming. During the war he ploughed up a number of acres which previously had been used for pasture, and in respect of this received from the Government a "ploughing grant" under the Agriculture Development Act, 1939, as amended by the Agriculture (Miscellaneous War Provisions) Act, 1940. The question to be determined by the court was whether the "ploughing grant" was, for the purposes of income tax, a capital or revenue receipt :—

Held : the ploughing grant was a trade receipt and must be accounted for as income.

[**EDITORIAL NOTE.** The practice of making Government grants is more or less a new one and it seems clear that, where such a grant is made as a grant towards the expenses of certain work done, such a grant must be brought into the accounts as a trade receipt.

As to Whether Compensation a Trade Receipt, see HALSBURY, Hailsham Edn., Vol. 17, pp. 125-128, paras. 235-240 ; and for Cases, see DIGEST, Vol. 28, pp. 42-49, Nos. 215-252.]

Appeal by the taxpayer from a decision of the Special Commissioners that a "ploughing grant" received by the appellant under the Agricultural Development Act, 1939, Pt. IV, was a receipt in the computation of his farming profits for the year in question. The facts are fully set out in the judgment.

F. Grant, K.C., and *J. W. P. Clements* for the appellant.

The Solicitor-General (*Sir David Maxwell Fyfe, K.C.*), and *Reginald P. Hills* for the respondent.

Macnaghten, J. : This is an appeal from a decision of the Special Commissioners with reference to an estimated assessment to income tax in the sum of £5,000 for the year 1942-3 under Case I of Sched. D in respect of the appellant's profits as a farmer.

The appellant is the owner of agricultural land in the county of Warwick, where he has for some time past carried on the business of dairy farming on an extensive scale. Before the war the area of his farm was no less than 1,700 acres, of which 714 acres were in permanent pasture, and since the war began he has increased the acreage of his farm. The only question at issue on this appeal is whether a "ploughing grant" of £662 made to him under the Agricultural Development Act, 1939, Pt. IV, ought to be included as a revenue receipt in the computation of the appellant's farming profits. By sect. 27 of that Act as amended by the Agriculture (Miscellaneous War Provisions) Act, 1940, the Minister of Agriculture may make grants in respect of the ploughing up of grass land and the bringing of the land into a state of cleanliness and fertility on the conditions set out in subsect. (2). That subsection provides that a grant at the rate of £1 for each half-acre ploughed (which is referred to in the Act as a "ploughing grant") may be made only in respect of land as to which, on application being made for the grant, the applicant shows to the satisfaction of the Minister (*a*) that the land has been ploughed up ; (*b*) that at the time when the ploughing was begun the land had been under grass for a period of seven years or more ; (*c*) that after the ploughing up the land has been, or is being, or will be dealt with in such a manner, "whether by fallowing, direct re-seeding, sowing or otherwise" as is, in the opinion of the Minister, "calculated to bring the land into a state of cleanliness and fertility" ; and (*d*) that the land was capable of "being substantially improved in respect of fitness for re-seeding or re-introduction into a suitable rotation, by being ploughed up and dealt with as aforesaid," and would be capable of producing satisfactory arable crops for harvesting in the year in which it was ploughed up or the next following year or was capable of being substantially improved by being re-seeded to grass and has been, or will be, so re-seeded in accordance with the regulations made by the Minister.

Those were the conditions on which the Minister was able to make the grant of £662 to the appellant in respect of 331 acres of old pasture which he had ploughed up in the previous year.

Before the Special Commissioners and this court the appellant contended that the £662 was a capital receipt and ought not to be included in the computation of the profits of his farm. It was said on his behalf that the ploughing up of the land effects either a capital improvement or a capital depreciation, and that in the case of the 331 acres which he ploughed it did in fact effect a capital depreciation; but whether the ploughing is beneficial or prejudicial to the land, in either case the ploughing grant should be regarded as a capital receipt. In view of the provisions of the Act, it seems a bold thing to assert that the ploughing up is prejudicial to the land since under the Act the applicant can only obtain the grant by satisfying the Minister that the land was capable of being substantially improved by being ploughed up.

Since the amount of the grant depends on the area ploughed, it would seem to be a grant towards the expense of the ploughing and the subsequent operations mentioned in sect. 27 and, in my opinion, the contention put forward on behalf of the appellant that it should be regarded as a capital receipt is rendered quite untenable by reason of the provisions of sect. 29 (1). That subsection provides that:

> A ploughing grant to be made in respect of any land shall be made to the person at whose expense the land has been ploughed up, and has been or is being or is to be dealt with as aforesaid, or, if one or more of those operations has been or is being or is to be carried out at the expense of one person and one or more of them at the expense of another person shall be divided among them in such proportions as the appropriate Minister may direct.

Under the Act it is entirely at the option of the farmer whether he plough up his land or not. The complaint of the appellant really is that, if that had remained the position of affairs, he would never have applied for the ploughing grant, but would rather have kept his land in permanent pasture. But, as counsel for the appellant has fairly admitted, the fact that the appellant has been compelled under the Defence Regulations to do that which he would not have done if he could have helped it, cannot affect the true construction of the Agricultural Development Act, 1939.

Two other points were put forward in support of this contention that the ploughing grant should be regarded as a capital receipt. One was that, in the case of a dairy farmer who has not the implements required for ploughing, the grant ought to be regarded as a contribution towards the capital expenses which he, as a dairy farmer, would have to incur in buying tractors, ploughs, harrows and the various implements required in the case of an arable farmer, as well, possibly, as the erection of buildings for storing his implements in winter time. There is nothing in the Act to support that view, which seems to me fantastic.

Then there is a third point which I still cannot understand, although counsel for the appellant has done his best to explain it to me, and I have done my best to understand it. A tenant farmer is entitled under the Agricultural Holdings Act when he gives up his tenancy to claim compensation from the landlord in respect of certain improvements that he has effected. If the tenant by ploughing and re-seeding his land effected such an improvement he could claim compensation, and the compensation received by the tenant would be a capital receipt.

Sect. 30 (2) of the Act of 1939 provides that, in assessing the compensation, if the valuer thinks that the improvement was due wholly or in part to the operations by virtue of which the land became eligible for the grant, it is to be taken into account as if it had been a benefit allowed to the tenant in consideration of his executing the improvement, and the compensation shall be reduced to such extent as the valuer may consider proper. This subsection merely provides, as it seems to me, that the tenant is not to receive compensation for improvements attributable to the grant. To claim compensation the tenant must show that he effected the improvement. If it were effected not at his expense but at the expense of somebody else, whether it is the landlord or the Government, the tenant could not claim compensation.

I think the decision of the Special Commissioners that the £662 which the appellant received by way of a ploughing grant under the Agricultural Development Act, 1939, Pt. IV, must be included as a receipt in the computation of his farming profits for the year in question was right.

Therefore the appeal fails and must be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Ellis & Fairbairn* (for the appellant); *Solicitor of Inland Revenue* (for the respondent).

[*Reported by* R. Boswell, Esq., *Barrister-at-Law.*

WALDER *v.* THE MAYOR, ALDERMEN AND BURGESSES OF THE BOROUGH OF HAMMERSMITH.

[King's Bench Division (Humphreys, J.), **February 23, 1944.**]

Negligence—Children—Allurement—Electric cable placed on ground—Child electrocuted while playing in air-raid shelter—Licensee or trespasser.

The defendants were the local authority responsible for the erection and maintenance of an air-raid shelter on a public green. In order to prevent damage to the shelter by children or mischievous persons, the entrance was enclosed by a wooden palisade with a door, the handle of which was protected by a case with a glass front. A boy aged 11 was electrocuted inside the entrance to the shelter through interfering with an electric cable connected with ventilating fans inside the shelter. The cable was properly insulated but was laid on the surface of the ground. The accident had occurred owing to the boy cutting the cable, apparently with a pair of pliers. On the day of the accident the glass over the handle of the door leading to the shelter was broken as there had been an air-raid on the previous night and it had not been possible to replace the glass that day. It was contended on behalf of the plaintiff, the father of the boy, that the defendants were guilty of negligence in that they had placed a dangerous object on a public green which was used as a children's playground, that it was an allurement to children and that they had failed to take proper precautions to protect children. There was evidence that children found playing in the shelter had constantly been turned away:—

Held: there was ample evidence to show that, in going inside the palisade the child was a trespasser, and the defendants had, therefore, no duty towards him, and the plaintiff had no cause of action against him.

[**EDITORIAL NOTE.** The subject of allurement of children is a familiar one but the present case is of importance as it considers the duty of local authorities in wartime in connection with air-raid shelters. Such shelters must be available to the public at all times, but it has been found essential to keep them closed both against children and adults. The clash of these two duties of the local authority is here dealt with.

As to Allurement of Children, see HALSBURY, Hailsham Edn., Vol. 23, pp. 584-586, para. 836; and for Cases, see DIGEST, Vol. 36, pp. 68-72, Nos. 433-472.]

Cases referred to:

*(1) *Hardy* v. *Central London Ry. Co.*, [1920] 3 K.B. 459; 36 Digest 71, *457*; 89 L.J.K.B. 1187; 124 L.T. 136.

*(2) *Addie, R. & Sons (Collieries)* v. *Dumbreck*, [1929] A.C. 358; Digest Supp.; 98 L.J.P.C. 119; 140 L.T. 650.

*(3) *Excelsior Wire Rope Co., Ltd.* v. *Callan*, [1930] A.C. 404; Digest Supp.; 99 L.J.K.B. 380; 142 L.T. 531.

Action for damages on the ground of negligence. The action was brought only under the Law Reform (Miscellaneous Provisions) Act, 1934, by the father of a boy aged 11, who was killed in an accident on Jan. 19, 1943. Damages were claimed on the ground of negligence. The plaintiff claimed that the defendants were negligent in that (i) they negligently placed near an air-raid shelter, on Shepherd's Bush Green, an electric cable, and in consequence thereof a child was electrocuted; (ii) they failed to exercise proper supervision; (iii) they failed adequately to fence or guard the said electric cable, and they added:

> Shepherd's Bush Green is and was frequented by children and the said shelter and the said cable were objects of allurement to children and the defendants failed to take proper precautions to protect children. At all material times Shepherd's Bush Green was a playground for children and the defendants, their servants or agents, left the said electric cable accessible to children.

The facts are fully stated in the judgment.

G. Russell Vick, K.C., and *I. F. Reuben* for the plaintiff.
H. J. Astell Burt for the defendants.

HUMPHREYS, J.: A little boy of 11 was playing with a friend, a little boy of 10, who was in fact called as a witness, on Shepherd's Bush Green, a public open space of which the London County Council, acting through their Parks and Open Spaces Committee, have the management. There is no doubt at all that children are entitled to and always have used that open space for the purpose of playing games. When the war came it was necessary to construct air-raid shelters and that duty fell upon the defendants. One of the many places in the borough where they decided to erect underground shelters was Shepherd's Bush Green. The defendants had full statutory authority to erect shelters on Shepherd's Bush Green for the public. There is some evidence that at first children used to play in the shelters, although they had the playground. It was found that damage was caused and the borough council decided to enclose the entrance to the shelters and at the material time the centre shelter of the three on Shepherd's Bush Green had round it a palisade of wood with a door. The only way to get into that, apart from breaking down the fence, was to go through that door. The door was provided with a handle of such a nature that it could easily be turned and the door opened by anybody who could get at the handle. The handle itself was enclosed in a case with a glass front, very much like what one sees in a fire alarm. There are also keys to these doors. The keys are not handed to the public but are held either by the police or the local air-raid warden.

What happened was that on the afternoon of Jan. 19, at about 5.40 p.m., these two little boys were playing on Shepherd's Bush Green and one of them, the deceased boy, probably saw on the ground a little pair of pliers—I say that is probably so because if they had been his own property or brought from his home we should probably have had some evidence about it. He probably picked them up and probably also about the same time saw there was on the surface of the ground inside the entrance to the air-raid shelter a long piece, something like 30ft. of rubber tubing, and that little boy was minded to use his new toy, the pliers, to cut the rubber tubing. That is the sort of thing that grown-up people would not like to guarantee that they themselves would not have been guilty of at the same age. The boy undoubtedly made up his mind to cut that tubing and, although he did not know it, there was wire inside.

On the afternoon of this accident the door was open since there had been air raids in that part of London on the two previous nights. There is no question at all that the glass over the handle on that gate had been broken so that the gate could be opened by any person just turning the handle. That having been done it was, of course, the duty of the borough council to see that the glass was replaced. But these public authorities are not bound to do everything the instant the duty arises, particularly in these days of shortage of labour. It would be quite impossible in the case of the 60 or so shelters which they have under their power, of which the evidence was, I think, that over 40 had the glass broken on that Sunday night. They started to mend those as quickly as they could, but by Tuesday evening their workmen had not been able to get round to this particular place at Shepherd's Bush Green, and so it was that, although the air-raid shelter warden had done her duty in being there on that evening and shutting the gate when she left, probably some other person had opened the gate. At all events the evidence is very clear that the gate was not closed and there was nothing to prevent the little lad going in, as he did, through the gate and into the place where this attractive piece of black india-rubber tubing was to be found, of which there were 30ft. lying on top of the ground. In fact, that was a cable of electrified wire which was used for the purpose of running two ventilating fans. It is one of the tragedies of this particular case and this unfortunate happening that many people might have done precisely what this boy did and beyond getting a shock would have suffered no particular damage. The voltage carried on that cable was 230 volts, which is the voltage supplied to a private house through an ordinary electric cable as most people know, and there was expert evidence given in this case that most electricians have at some time or other received a shock from a 230-volt cable without any injury at all, but this poor little chap as soon as he cut the wire, was killed.

According to the medical evidence the shock caused his heart to stop and the boy died.

Those are the facts and upon those facts the question is what is the law. As I understand it, the law in regard to children who go upon property of other people and there receive injury is this. One has to ascertain whether the child in question belonged to one, and if so which, category of persons who are described as (i) invitees, that is, people who have some business with the proprietor of the particular place; (ii) licensees, that is, people who, although they have no actual invitation to go there, are there by leave and licence of the owner or a person in a similar position; and (iii) trespassers. Trespassers have no rights of action against the owner of the place on which they have trespassed unless they can show that the owner of the place has maliciously, or at least recklessly and with a recklessness amounting to malice in law, injured them, which almost amounts to proving an intention. That is, of course, totally foreign to the facts in this case. The defendants say they did not do anything which was wrong in the matter. If the child was a licensee, that is to say, if the borough council either explicitly or impliedly by their conduct allowed the child to go to this place which was enclosed, then a duty would fall upon the borough council in regard to children which would not fall upon them in regard to adults, because it has always been held in this country that one must draw a great distinction between the responsibility of any person towards children who are allowed to use such a place as distinct from that owed to ordinary adult persons. That duty, however, does not arise unless and until it is shown and found by the court that the child in question was not a trespasser, because, as I have said, a trespasser has no right at all. A trespasser has no right to say: "Oh well, you had on your premises a pond which people might walk into" or "You had some obstruction which a person might run against," because the answer would be: "I did not ask you to go there and you had no right to go there. I have no duty to see that you were safe in being there." Therefore, the answer of the borough council in this case was that the little boy was a trespasser. The argument on the other side was: No, he was not a trespasser, because first of all, he had never been told that he was not to use this shelter or go inside the palisade. That argument, I think, arises from a misapprehension of the law. The question is not whether the particular individual appreciated that he was a trespasser, but whether he was in fact a trespasser, and in law a person is not a trespasser if he is there as a result of some custom or habit of the owner of the premises which can be reasonably said to give him licence to go there. The defendants in this case have called a body of evidence to show that they had taken every step reasonably in their power to prevent anybody, including children and evilly disposed persons (that is to say, grown-up people who in fact sometimes go into these places and do damage) from going into these shelters except at such times as everybody is lawfully entitled to use them. The evidence for the defendants included one of the technical assistants employed by the borough council who said that there were about 120 air-raid shelters in the borough and in 49 of them the glass was broken on the night of Monday, Jan. 18, and it would take 2 or 3 days to replace all those broken. He said that he appreciated and represented to the borough council that children would go into such a place if the gate was left open, and that is why they had this very excellent device to prevent people going in, because nobody could go in without breaking the glass. He said that wilful damage was often done and it was to prevent such things as that and to prevent children going there that these locks were put on. The shelter warden said she was there that afternoon and she found the place open because the glass had been broken and she shut the door about 4.30. She said she often had trouble with children trying to get into this place; sometimes they would actually climb over the palisade, sometimes they would break the glass and sometimes they actually pulled down the fencing. There are children who are no doubt not only childlike but extremely mischievous, and they do what counsel for the defendants quite rightly described as wilful damage. A shelter cleaner said he had often been troubled with children who tried to get into the shelters and both witnesses said that on several occasions they turned them away and when they could get their names and addresses they forwarded them to the council so that the council could communicate with their parents. A park keeper of the London

County Council was called. He said he had been on duty on this green, which included these three shelters, for 8 hours a day for the last 4 years, but the accident occurred when he was not there. He agreed with the other witnesses that the children were a great nuisance and always tried to get into this place and he said that on other occasions he had seen children attempting to do so. He had told the children that they were not to do what they sometimes were doing. I am quite satisfied on the evidence that the borough council have not been in the least degree negligent in the efforts they made to prevent children from trespassing upon this enclosed property.

In addition to the evidence called for the defendants there was evidence which is really not in dispute given by a gentleman with 40 years' experience in the electrical industry, who said that the particular cable which was used was the best that could be devised, thoroughly well made and the wires quite properly insulated, and that no complaint could be made about it at all. I myself should be disposed to hold, if it is necessary, that leaving such a cable as this on the surface of the ground, when it could easily have been put 6 inches below the ground, so that it would not be attractive to people, would be a negligent act. It was an unsafe way to leave a thing of that sort with 30 ft. of it on the surface at a place where people are walking backwards and forwards and where at times, indeed, all people are perfectly entitled and, indeed, told to go. I think it was an unnecessary thing to do and not called for by any exigency, and I think the borough council have really appreciated that was so by the steps they have taken since this unfortunate accident to deal with this cable in another way. That, however, does not obviate the difficulty that the plaintiff in this case is under, namely, that these children were, as is argued, trespassers.

There were one or two cases which have been cited to me on this question. The first is *Hardy* v. *Central London Ry. Co.* (1), which is a case of this nature. In the stations of the Central London Railway there are escalators, with a moving band on which you can put your hand. What happened was that the staircase being open to the street anybody could, if they liked, go and use that escalator although they were not supposed to; they could not be prevented. A ticket collector was stationed at the bottom of the staircase and there were people stationed at the top of the staircase to prevent children in the neighbourhood from playing on the staircase by running up and down. They were stopped when anybody saw them, but still, at times, nobody being quick enough to catch them, they did get on to the moving stairway. The evidence was that the railway policeman always drove the children away when he saw them. On the evening of the accident two children were there. The policeman drove the children away but when he was gone they returned and with them was a little boy of 5½ years of age in charge of an older boy. The older boy, finding the policeman had gone away, placed his hand on the rubber band which worked the staircase round a wheel and then the little boy placed his hand in such a position that it was caught by the moving band and seriously injured. Upon those facts BANKES, L.J., held that the judge who had decided the case and had held that the child was in the position of a licensee was wrong. BANKES, L.J., said, at pp. 464, 465:

> That depends entirely upon the evidence, as to which, as I have said, there was no real conflict. The evidence established clearly that numbers of children had been for a long time in the habit of playing upon the escalator whenever they got the opportunity, and generally in the evening. The evidence established equally clearly that the railway company's employees warned the children off whenever they saw them. The employees particularly referred to were a female ticket collector who was stationed at the bottom of the escalator, a female booking clerk in the booking office, and a railway policeman whose duties took him into the booking hall about once every half-hour. The warnings off given by these persons were ineffective in this sense only, that they did not prevent the children returning as soon as they thought that the policeman was safely out of the way, or the ticket collector or booking clerk so occupied as to be unable to do anything except warn them off again. The evidence seems to show that the children always went away when told to do so. If this is the true view of the evidence, the finding of the learned judge appears to me to lay a wider duty upon the owner or occupier of premises towards children frequenting those premises than the law has hitherto recognised.

Then BANKES, L.J., dealt with the previous authorities and held that the railway company had done all that they could do. There is no duty cast upon the owner of property in such circumstances to insure that nobody will trespass, all they can do is to take reasonable steps to make it clear to everybody that they are trespassers, and, if after that people choose to trespass, it cannot be said there is any negligence on the part of the owner of the property. Warrington, L.J., agreed and I want to cite a few words in the judgment of Scrutton, L.J., who, after stating the facts, said, at pp. 472, 473 :

> On this evidence the judge has found that "the child was there with the licence of the company." I am unable to take that view. The evidence seems clear that, whenever servants of the company saw the children, they either drove them away or told them to go away, and that the children waited till the policeman had gone to another part of the station. The judge has apparently found the children licensees, because, there being an object attractive to children on the company's premises, the company have not taken every step they could to keep trespassing children off, such as putting barriers at the top of the stairs. This seems to me a very dangerous proposition for landowners. Many of them have objects attractive to children on their land : apple trees, streams and other infantile joys. Must they, besides warning off the children whenever they see them, erect such fences or walls that no child can get through ? No one can walk London streets without seeing that children delight to cling on to omnibuses and trams when the collector is inside collecting fares, though he turns them off as soon as he returns. . . . . I cannot understand a use of language which describes such persons as there by my leave and licence, because I do not go to the expense and trouble of always stopping them from infringing my rights, though I very frequently do so. In my opinion, the plaintiff was a trespasser . . . .

That case has been considered and approved in the House of Lords and that judgment of Scrutton, L.J., has been approved in *Addie & Sons* (*Collieries*) v. *Dumbreck* (2). In that case Lord Dunedin, giving his opinion in the House of Lords, referred to the passages which I have mentioned and said that that was the matter which a judge trying any case had to consider, and he said in the plainest terms that in the case of a trespasser the doctrine as to the allurement to children of such things as wheels and moving staircases did not arise at all, but only when the child was a licensee did that question arise. Lord Dunedin said, at p. 376 :

> The truth is that in cases of trespass there can be no difference in the case of children and adults, because if there is no duty to take care that cannot vary according to who is the trespasser. It is quite otherwise in the case of licensees, because there you are brought into contact with what is known as trap and allurement.

The other members of the House of Lords agreed and in that case, although there was on the premises of the colliery company something that was dangerous and at the same time attractive to children, and at the time of the accident that thing was insufficiently protected, nevertheless when an accident occurred owing to that thing, which was a wheel being set in motion by the colliery owner without taking precaution to avoid accident to persons who went into the field, it was held that the boy who was injured in that accident was a trespasser, principally upon the evidence called by the colliery company to the effect that they had always prevented children, when they saw them, from going near that dangerous thing.

The only other case to which it is necessary for me to refer in this line of cases, which it is said have caused trouble to those who write about the law, is *Excelsior Wire Rope Co.* v. *Callan* (3), also in the House of Lords. It was said by counsel for the defendants in the present case that that case was troublesome because it suggested that Lord Dunedin had gone back upon his definition of three classes of persons and had added a fourth. I may be quite wrong about it, but I do not take that view myself. I think *Excelsior Wire Rope Co.* v. *Callan* (3) is quite clear and we have to consider it with the decisions to which I have already referred. That case was decided on the fact that it did not matter whether the child who had been injured was a trespasser or not and their Lordships said, in terms, that there was such carelessness amounting to recklessness on the part of the owners of the property, the persons responsible for the land, as would have given a good cause of action even to a trespasser. Some of their Lordships thought the children in that case were trespassers and some thought they were not, but, as I say, it did not matter because, on the facts of the case, the House of Lords took the view that in any event the reckless conduct of the defendants was the cause of the accident.

In the present case, although I sympathise with the unfortunate father of this little boy, it appears to me to be quite impossible for me to hold that the Hammersmith Borough Council had by their negligence caused the accident

which unfortunately ended in the death of the little boy. It appears to me they have done everything in their power as a reasonable body of persons to prevent children from going into a place which was even better protected than the place in the *Central London Ry. Co.* case (1) was, because this actually was protected and even a boy of 11 would know perfectly well that he is not entitled to go inside a palisade which is erected for the purpose of preventing him from going in. One of the two boys did know and clearly said so in evidence; he
A would not go in because his mother had told him not to. The other little boy had the misfortune to pick up a pair of pliers and was very anxious to use them on the first thing he came across, but, in spite of the fact that I think there might be some difficulty in the way of the borough council if some person lawfully on the premises had injured himself by unexpectedly tripping over the cable which was lying on the ground, I cannot hold other than that this child was, in the circumstances, a trespasser on that ground. There must be judgment
B for the defendants.

Judgment for the defendants with costs.

Solicitors: *Bryan O'Connor & Co.* (for the plaintiff); *W. H. Warhurst,* Town Hall, Hammersmith (for the defendants).

[*Reported by* P. J. JOHNSON, ESQ., *Barrister-at-Law.*]

C KNUPFFER *v.* LONDON EXPRESS NEWSPAPER, LTD.

[HOUSE OF LORDS (Viscount Simon, L.C., Lord Atkin, Lord Thankerton, Lord Russell of Killowen and Lord Porter), **January 31, February 1, 2, April 3, 1944.**]

Libel—Words referring to a group—Whether individual member can claim damages for defamation—No reference to individual member.

D The respondents published an article in a newspaper from a correspondent abroad adversely commenting on the activities of an association of certain Russian political refugees called Mlado Russ or Young Russia in terms which, it was admitted, would have been defamatory if written of a named individual. The association had a very large membership in other countries but that of the branch in the United Kingdom was only some 24 members. The appellant who resided in London was the active head of the United Kingdom
E branch of the association and it was contended that the article reflected upon him personally. The respondents contended that the article was an attack on the general character and activities of the association and not on the appellant. There was in fact no reference in the article to the appellant nor to the branch of the association in the United Kingdom:—

HELD: when defamatory words are written or spoken of a class of persons it is not open to a member of that class to say that the words were
F spoken of him unless there was something to show that the words about the class refer to him as an individual. In this case there was nothing to show that the words referred to the appellant as an individual and his claim, therefore, failed.

Decision of Court of Appeal ([1942] 2 All E.R. 555) *affirmed.*

[**EDITORIAL NOTE.** In the lower courts there was a considerable discussion
G based on the decision in *Hulton* v. *Jones* [1910] A.C. 20. It was said that, after witnesses had said that they had read the article as referring to the plaintiff and the trial judge had accepted that evidence, the court could not hold that the words could not refer to the plaintiff. This aspect of the case is passed over almost in silence by the House of Lords, though it seems that their Lordships were not satisfied with the precise terms in which the question to the witnesses was framed. Whether an individual member of a group can complain of defamatory matter written about the group is to be decided by asking two questions. The first is one of law and is whether the words are capable
H of referring to the plaintiff. The second is one of fact and is whether reasonable people who know the plaintiff think the words refer to him. There is no particular rule governing the case except the primary rule in all cases of defamation that the plaintiff must show that the words complained of were published of himself.

AS TO DEFAMATION OF A CLASS OF PERSONS, see HALSBURY, Hailsham Edn., Vol. 20, p. 389, para. 469; and FOR CASES, see DIGEST, Vol. 32, p. 16, Nos. 66-73].

Cases referred to:

(1) *O'Brien* v. *Eason,* (1913) 47 I.L.T. 266.

*(2) *Eastwood* v. *Holmes* (1858), 1 F. & F. 347; 32 Digest 16, *72.*

*(3) *Browne* v. *Thomson & Co.,* [1912] S.C. 359; 32 Digest 16, *66iii.*

*(4) *Le Fanu* v. *Malcolmson* (1848), 1 H.L.C. 637 ; 32 Digest 12, *34* ; 13 L.T.O.S. 61.
(5) *Foxcroft* v. *Lacy* (1620), Hobart 89 ; 32 Digest 16, *66*.

Appeal by the plaintiff from a decision of the Court of Appeal (MacKinnon and Goddard, L.JJ.) given on Oct. 30, 1942, and reported [1942] 2 All E.R. 555. The facts are fully stated in the opinion of Viscount Simon, L.C.

A. G. Macmillan for the appellant.

Serjeant A. M. Sullivan, K.C., and *G. O. Slade, K.C.*, for the respondents.

Viscount Simon, L.C. : My Lords, it is an essential element of the cause A
of action for defamation that the words complained of should be published " of the plaintiff." If the words are not so published, the plaintiff is not defamed and cannot have any right to ask that the defendant should be held responsible to him in respect of them. In the case now before us the trial judge, Stable, J., decided that the words of the libel did refer to the plaintiff. The Court of Appeal, consisting of MacKinnon and Goddard, L.JJ., decided that the words could not be regarded as referring to the plaintiff, and consequently allowed the B
appeal and dismissed the action. This is the issue which we now have to decide.

The defendants printed and published in their newspaper on July 1, 1941, the words following, which are set out in the statement of claim :

> But the quislings on whom Hitler flatters himself he can build a pro-German movement within the Soviet Union are an emigré group called Mlado Russ or Young Russia
>
> They are a minute body professing a pure Fascist ideology who have long sought a suitable fuehrer—I know with what success. Established in France and the United C
> States they claim to have secret agents able to enter or leave the Soviet Union at will.
>
> Hitler intends to nominate a puppet fuehrer from their ranks to replace the Soviet national leaders of the Kremlin, and establish a reactionary totalitarian serf state on the German and Italian model.
>
> The proposed line of operation is the seducing of Red Army officers from their allegiance to their country and with their aid destroying trade unions, co-operatives, collective farms, and the Soviet Parliamentary system with a ruthless massacre of all the present leaders, great and small, of the Russian people. D
>
> The vast majority of Russian emigrés repudiate these people, but Hitler is accustomed to find instruments among the despised dregs of every community. He intends Ukrainian pogroms as a starting point for general anarchy in Russia.

In these words there is no specific mention of the plaintiff from beginning to end, and the only countries in which it is stated that this group of émigrés is established are France and the United States. Evidence was given at the trial that the plaintiff had joined the Young Russia Party in 1928, that in 1935 he E
became assistant representative of the Young Russia Movement in Great Britain, and that in 1938 he was appointed representative of the Movement in Great Britain and head of the British branch of the Movement. The headquarters of the Movement were in Paris until June, 1940, when they were removed to America.

These facts standing alone, however, do not justify the conclusion that the F
words complained of are capable of being read as a defamation of the plaintiff. The words make allegations of a defamatory character about a body of persons—some thousands in number—who belong to a society whose members are to be found in many countries. In *O'Brien* v. *Eason* (1), Holmes and Cherry, L.JJ., ruled that, where comments of an alleged defamatory character were made upon an association called the Ancient Order of Hibernians, an individual member of the Order who was not named nor in any way referred to could not G
maintain an action of libel. They referred to a well-known *dictum* of Willes, J., uttered more than 50 years before in *Eastwood* v. *Holmes* (2), at p. 349 :

> If a man wrote that all lawyers were thieves, no particular lawyer could sue him unless there is something to point to the particular individual . . .

Where the plaintiff is not named, the test which decides whether the words used refer to him is the question whether the words are such as would reasonably lead persons acquainted with the plaintiff to believe that he was the person referred H
to. There are cases in which the language used in reference to a limited class may be reasonably understood to refer to every member of the class, in which case every member may have a cause of action. A good example is *Browne* v. *Thomson & Co.* (3), where a newspaper article stated that in Queenstown instructions were issued " by the Roman Catholic religious authorities that all Protestant shop assistants were to be discharged," and where 7 pursuers who averred that they were the sole persons who exercised religious authority in name and on behalf of the Roman Catholic Church in Queenstown were held

entitled to sue for libel as being individually defamed. Lord President Dunedin in that case said, at p. 363 :

> I think it is quite evident that if a certain set of people are accused of having done something, and if such accusation is libellous, it is possible for the individuals in that set of people to show that they have been damnified, and it is right that they should have an opportunity of recovering damages as individuals.

In the present case, however, the appellant rejected the view that every member of the Young Russia Group could bring his own action on the words complained A of, and relied on his own prominence or representative character in the Movement as establishing that the words referred to himself. There is, however, nothing in the words which refers to one member of the group rather than another. *Le Fanu* v. *Malcolmson* (4) was, it is true, a decision of this House in which Lord Cottenham, L.C., and Lord Campbell held that the verdict of a jury awarding damages to the owners of a factory in the county of Waterford against B the proprietor of a newspaper published in that county could be upheld, notwithstanding that the letter-press in the course of denouncing the alleged cruelty with which factory operatives were treated did not specifically refer to the plaintiff's factory. It appears, however, that in that case there were circumstances, such as the location of the factory, which enabled the jurors to identify the plaintiff's factory as the factory pointed at, and the Lord Chancellor observed at p. 664 :

> C If a party can publish a libel so framed as to describe individuals though not naming them, and not specifically describing them by any express form of words, but still so describing them that it is known who they are, as the jurors have found it to be here, and if those who must be acquainted with the circumstances connected with the party described may also come to the same conclusion, and may have no doubt that the writer of the libel intended to mean those individuals, it would be opening a very wide door to defamation, if parties suffering all the inconvenience of being libelled were not D permitted to have that protection which the law affords.

It will be observed that *Le Fanu* v. *Malcolmson* (4) was a case where there were facts pointing to the particular factory which was meant to be referred to, though the article spoke in more general terms of a factory in Waterford. In the present case the statement complained of is not made concerning a particular individual, whether named or unnamed, but concerning a group of people spread over several countries and including considerable numbers. No facts were E proved in evidence which could identify the plaintiff as the person individually referred to. Witnesses called for the appellant were asked the carefully framed question, " To whom did your mind go when you read that article ? " and they not unnaturally replied by pointing to the appellant himself. But that is because they happened to know the appellant as the leading member of the society in this country, and not because there is anything in the article itself which ought to suggest even to his friends that he is referred to as an individual.

F There are two questions involved in the attempt to identify the appellant as the person defamed. The first question is a question of law—can the article, having regard to its language, be regarded as capable of referring to the appellant? The second question is a question of fact, namely, does the article in fact lead reasonable people, who know the appellant, to the conclusion that it does refer to him ? Unless the first question can be answered in favour of the appellant, G the second question does not arise, and where the trial judge went wrong was in treating evidence to support the identification in fact as governing the matter, when the first question is necessarily, as a matter of law, to be answered in the negative.

I move that this appeal be dismissed.

Lord Atkin [read by Lord Thankerton] : My Lords, I have read the opinion about to be delivered by my noble friend Lord Porter, and agree H with it and with the proposed motion that the appeal be dismissed. I add a few words, however, for I wish to emphasise the point that the judgments in the Court of Appeal appear to over-elaborate the law of libel as applicable to this case. I venture to think that it is a mistake to lay down a rule as to libel on a class, and then qualify it with exceptions. The only relevant rule is that in order to be actionable the defamatory words must be understood to be published of and concerning the plaintiff. It is irrelevant that the words are published of two or more persons if they are proved to be published of him : and it is irrelevant that the two or more persons are called by some generic or class name.

There can be no law that a defamatory statement made of a firm, or trustees, or the tenants of a particular building is not actionable, if the words would reasonably be understood as published of each member of the firm or each trustee or each tenant. The reason why a libel published of a large or indeterminate number of persons described by some general name generally fails to be actionable is the difficulty of establishing that the plaintiff was in fact included in the defamatory statement: for the habit of making unfounded generalisations is ingrained in ill-educated or vulgar minds: or the words are occasionally A intended to be a facetious exaggeration. Even in such cases words may be used which enable the plaintiff to prove that the words complained of were intended to be published of each member of the group, or at any rate of himself. Too much attention has been paid, I venture to think, in the textbooks and elsewhere to the decision of WILLES, J., in 1858, in *Eastwood* v. *Holmes* (2). It is a *nisi prius* decision in which the judge non-suited the plaintiff both because he thought there was no evidence that the words were published of the plaintiff and for B other reasons, and so far as the first ground is concerned, it appears to me on the facts to be of doubtful correctness. His words, "It only reflects on a class of persons," are irrelevant unless they mean it does not reflect on the plaintiff: and his instance "All lawyers are thieves" is an excellent instance of the vulgar generalisations to which I referred. It will be as well for the future for lawyers to concentrate on the question whether the words were published of the plaintiff rather than on the question whether they were spoken of a class. I agree that C in the present case the words complained of are apparently an unfounded generalisation conveying imputations of disgraceful conduct, but not such as could reasonably be understood to be spoken of the plaintiff.

It becomes unnecessary to deal with the question of excessive damages. I content myself by saying that, if the libel had been published of the plaintiff, while the damages awarded are possibly too high, I do not find myself in any D degree in accord with the estimate of the damages suggested by the Court of Appeal.

LORD THANKERTON: My Lords, I concur in the opinions which have just been delivered.

LORD RUSSELL OF KILLOWEN [read by LORD THANKERTON]: My Lords, I agree that this appeal fails.

The crucial question in these cases in which an individual plaintiff sues in E respect of defamation of a class or group of individuals is whether on their true construction the defamatory words were published of and concerning the individual plaintiff. Unless this can be answered in the affirmative, he has no cause of action. It is not, I think, the case of a defined primary rule, with defined exceptions to the rule. I would rather say that in every case it is the question indicated above.

When the construction of the matter complained of comes under consideration, F there may be something in the defamatory matter, or in the circumstances in which it is published, which indicates, and enables a jury to find, that particular individuals are defamed, although they are not named. *Le Fanu* v. *Malcolmson* (4) is an instance of this. Or the class or group can be identified, and is such that each member thereof is necessarily defamed. *Browne* v. *Thomson* (3) is an instance of this. A body of trustees or directors would furnish another G instance in which defamation of the body involves defamation of each member thereof.

The present case, however, is far removed from these considerations. The newspaper article makes allegations about a body of persons, some thousands in number, established in France and the United States of America. It makes no reference of any kind to the plaintiff or even to England. There is nothing in it which would enable anyone to identify any person as being a member of the H body. All that can be said is that a person who read it and who knew that the plaintiff was a member of the body would know that he was one of the numerous individuals from whose ranks Hitler hoped at some time to nominate a puppet fuehrer in Russia. Nothing more than that. That is really all that I can attribute as the meaning of the answers given by the plaintiff's friends to the carefully worded and stereotyped question of the plaintiff's counsel, viz.: "To whom did your mind go when you read that article?"

In my opinion, it is impossible to construe the article in any way which would justify the view that it contained defamatory matter published of and concerning the plaintiff.

LORD PORTER [read by LORD MACMILLAN]: My Lords, this case raises once again the question which is commonly expressed in the form: "Can an individual sue in respect of words which are defamatory of a body or class of persons generally?" The answer as a rule must be No. But the inquiry is really a wider one and is governed by no rule of thumb. The true question always is:
A Was the individual or were the individuals bringing the action personally pointed to by the words complained of?

Many of the earlier cases appear to have been concerned with words alleged to refer not to a class but to one or more out of a larger number of persons without, it was said, sufficiently indicating who was aimed at. The authorities quoted in argument in *Le Fanu* v. *Malcolmson* (4) were of this type though in that case itself the defamatory words complained of, whilst they appeared to
B apply to a class, in reality were capable of being shown and were shown to be applicable to some of the individuals comprising that class.

No doubt it is true to say that a class cannot be defamed as a class nor can an individual be defamed by a general reference to the class to which he belongs. The well-known words of WILLES, J., in *Eastwood* v. *Holmes* (2) sufficiently illustrate the point. Nevertheless the words, or the words combined with the
C surrounding circumstances, may be shown to refer to some person or persons individually. *Le Fanu* v. *Malcolmson* (4) has already been quoted and *Foxcroft* v. *Lacy* (5) is an earlier example to the same effect. In each case a number of persons were involved but they sued, jointly or severally, as individuals because their identity was sufficiently ascertained.

The question whether the words refer in fact to the plaintiff or plaintiffs is a matter for the jury or for a judge sitting as a judge of fact, but as a prior
D question it has always to be ascertained whether there is any evidence upon which a conclusion that they do so refer could reasonably be reached. In deciding this question the size of the class, the generality of the charge and the extravagance of the accusation may all be elements to be taken into consideration. But none of them is conclusive. Each case must be considered according to its own circumstances. I can imagine it being said that each member of a body, however large, was defamed where the libel consisted in the assertion that none
E of the members of a community was elected as a member unless he had committed a murder.

Whatever the tribunal the first question is: Are the words in conjunction with the relevant circumstances reasonably capable of being understood to apply to the plaintiff? In the present case that question must, I think, be answered in the negative. It is true that the plaintiff appellant was and is a
F member of a body upon which very grave reflections have been cast, that he is the representative of that body in England, and that there are only 24 members of it in this country. But the newspaper article makes no reference to England; it confines itself to allegations about "a minute body" established in France and the United States. Minute no doubt its membership of 2,000 is when compared with the vast population of Russia, but in itself it forms a considerable body. Out of that body there was nothing to point to the plaintiff, nor, indeed,
G to any individual in this country. Nor do I think the plaintiff's case is improved by the allegations of his friends that "their minds turned to" him when they read the article. Apart from the vagueness of the question, I can see no justification for an inference that he was the person aimed at. If it could be said, as it is conceded it could not, that each member of the body, wherever resident, could claim to be defamed, some case might be made on behalf of the plaintiff as one of its members, but, as the evidence stands, I see nothing to point to him
H in contradistinction to the rest. Indeed, inasmuch as he is a member of the English group, he is the less likely to be referred to.

I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Hasties* (for the appellant); *Shirley, Woolmer & Co.* (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Dictum of Lord Greene, M.R., at p. 501, *applied.* Davis Cohen & Sons, Ltd. *v.* Hall. [1952] 1 All E.R. 157.

JAMES A. JOBLING & CO., LTD. *v.* SUNDERLAND COUNTY BOROUGH ASSESSMENT COMMITTEE.

[Court of Appeal (Lord Greene, M.R., Goddard, L.J., and Hallett, J.), **March 31, 1944.**]

Rates and Rating—Derating—Industrial hereditament—Building used for storage and distribution—Rating and Valuation (Apportionment) Act, 1928 (*c.* 44), *s.* 3 (1), (3).

The appellant company were manufacturers of glassware. Close to, but not connected with, the manufacturing premises the appellants also owned a building which was used for the purpose of storing and distributing the finished goods except for a small proportion thereof which underwent a finishing process. The question was whether this building was an industrial hereditament within the Rating and Valuation (Apportionment) Act, 1928 :—

Held : storage and distribution were the primary purposes of the building, therefore the premises were used primarily for purposes not those of a factory or workshop within the proviso to s. 3 (1) and were not an industrial hereditament.

Decision of Divisional Court ([1944] 1 All E.R. 207) *affirmed.*

[**EDITORIAL NOTE.** The main importance of this case in the Divisional Court was that it invited a reconsideration of *Spillers, Ltd.* v. *Cardiff Assessment Committee* [1931] 2 K.B. 21. The Court of Appeal, however, have held that the point that these premises were " contiguous " had been abandoned and only a subsidiary point is dealt with.

As to Derating, see HALSBURY, Hailsham Edn., Vol. 27, pp. 439-445, paras. 876-886 ; and for Cases, see DIGEST, Supp., Rates and Rating, Nos. 226a-226ff.]

Cases referred to :

*(1) *Toogood & Sons, Ltd.* v. *Green*, [1932] A.C. 663 ; Digest Supp. ; 101 L.J.K.B. 453 ; 147 L.T. 201.

*(2) *Kaye* v. *Burrows*, [1931] A.C. 477 ; Digest Supp. ; 100 L.J.K.B. 282 ; 145 L.T. 83.

Appeal by the company from a decision of the Divisional Court (Viscount Caldecote, L.C.J., Macnaghten and Atkinson, JJ.), given on Dec. 21, 1943, and reported [1944] 1 All E.R. 207, where the facts are fully stated.

A. S. Comyns Carr, K.C., and *Harold B. Williams* for the appellants.

W. Craig Henderson, K.C., and *E. M. Hoy* for the respondents.

Lord Greene, M.R. : The appellants are seeking by the proposal which they have submitted, to have a particular hereditament which they own, classed as an industrial hereditament in order to obtain the benefit of derating. I do not propose to go into the facts as set out in the stated case. It is sufficient to say that the building in question is one which is quite separate from the factory where the manufacturing processes of making the appellants' glassware go on. It is not contiguous to the factory within the meaning of the Rating and Valuation (Apportionment) Act, 1928, s. 3 (3). In passing I should say that the contention that it was contiguous was abandoned earlier in these proceedings. It was not reserved as a point to be argued in some higher court, but was quite clearly definitely abandoned, and, accordingly, we ruled that it must not be raised in this court.

The crucial test, as Lord Thankerton said in *Toogood & Sons* v. *Green* (1), at p. 671, is what is done on the hereditament. Putting it quite shortly, in this case there is a certain amount of actual manufacturing process which occupies a very small proportion of the hereditament. In the case it is stated as follows :

> A very small proportion of the hereditament is used for the actual manufacturing processes, namely, milling, grinding and the like of a very small proportion of the goods brought into the hereditament. The main use to which the hereditament is put is for sorting, storing, packing and the despatch of the appellants' finished products.

The deputy recorder had to apply the relevant parts of the section to his findings of fact. The words which have to be considered are to be found in sect. 3 (1), in which " industrial hereditament " is defined as meaning :

> . . . a hereditament occupied and used . . . subject as hereinafter provided as a factory or workshop.

I am only reading the relevant words. Then comes the proviso that the expression is not to include:

> . . . a hereditament occupied and used as a factory or workshop if it is primarily occupied and used for the following purposes, or for any combination of such purposes, that is to say . . . (*d*) purposes of storage . . . (*f*) any other purposes, whether or not similar to any of the foregoing, which are not those of a factory or workshop.

The very small amount of actual manufacturing process which goes on upon the hereditament was found by the deputy recorder not to be sufficient to satisfy the implication of the words "primarily occupied and used" as appearing in the subsection. What then is left when these particular activities are deducted from the whole? All that is left is the sorting, storing, packing and despatch of goods, the manufacture of which has been already completed.

An argument was put forward that the process of storing, sorting, packing and despatch of these finished products was a process of adapting for sale so as to be in itself a process which would be sufficient to bring the hereditaments within the meaning of factory or workshop as defined in the Factory Acts. In my opinion, that argument cannot bear examination for a moment. All that is done is to sort, store and pack and despatch these articles. Nothing is done to the articles themselves, and it is a complete misuse of language to say that that amounts to adapting them for sale. There is no adaptation whatsoever. The article remains precisely the same article after it is sorted and packed as it was before. That point, therefore, I can put aside.

The main argument for the appellant was to this effect: The deputy recorder and the Divisional Court, it was said, were wrong in holding that the proviso to which I have referred applied to the facts of this case. First of all it was said this is not a purpose of storage; it is a manufacturing process in that the storage is a storage of the finished product of manufacture. In my opinion, that proposition as stated cannot stand. It is to be observed that there is all the difference in the world between the case where in a place where the manufacturing processes go on articles have necessarily and conveniently to be stored, and the case where, the whole of the manufacturing process being completed, they are put in a different hereditament altogether for the purpose of storage. I cannot see any reason for thinking that a hereditament of the second class which is used primarily for such a purpose ceases to come within the proviso merely because the articles stored have at a previous stage gone through the process of manufacture in a different hereditament. The unit for rating is not the business but the hereditament, and you have to find out what is being done in the hereditament with which the rating authorities are dealing. It seems to me that that argument fails.

But, as the Divisional Court said, even if that be wrong (and, speaking for myself, I do not think it is wrong), then clearly the matter must fall within para. (*f*):

> . . . any other purposes, whether or not similar to any of the foregoing, which are not those of a factory or workshop.

Going back to what I said a moment ago, if you subtract from the total of the operations carried on in this hereditament the very small matter of manufacturing process which goes on, all that is left consists of the storing and so forth. It is sought to say that all those operations are really manufacturing processes because they are ancilliary to and the natural consequence of a manufacturing business. It may very well be true in one context and for one purpose to say that that is so, but, once it is realised that you have to look at the use to which the hereditament is put, it seems to me when you are employing that hereditament for a purpose other than that of a factory or workshop you cannot bring yourself back into that category merely by saying: These goods for the purposes for which I am using this hereditament must have come from the factory which I have in the next street, or wherever it may be. In the result, the decision of the deputy recorder and the Divisional Court, in my opinion, was manifestly right and the appeal must be dismissed with costs.

GODDARD, L.J.: I agree and put my judgment quite shortly in this way. Under sect. 3 (2):

> . . . the expressions "factory" and "workshop" have respectively the same meanings as in the Factory and Workshops Acts, 1901 to 1920.

In this case the hereditament which one has to consider is a factory and workshop within those Acts, because, if not, *cadit questio*, of course the building would not fall to be derated. But it is not every building which is technically a factory or workshop within the meaning of the Factory Acts which is to be derated. What you have to look at is the primary purpose for which it is used, and, if you find that the primary purpose for which it is used is not that of a factory or workshop, then it is not derated. Or, to put it in another way, if the primary purpose for which it is used is a purpose which but for the small manufacturing business which is carried on there would not make it a factory at all, then it would not be derated. In this case on the findings of the deputy recorder it is quite clear that the primary purposes for which this building was used were not those of a factory and workshop, and, therefore, the building does not fall to be derated.

Hallett, J.: I agree. I think what Lord Dunedin said in *Burrow's* case (2), at p. 485, must clearly be considered in the light of the facts of that case. It seems to me that, when he speaks of the manufacturing process which is being carried on, he does not mean the manufacturing process which is being carried on by the ratepayer anywhere. What he does mean is the manufacturing process which is being carried on in the hereditament which is the subject of consideration. So read it seems to me that what was said there is perfectly consistent with the judgments which have now been delivered by this court.

Appeal dismissed with costs.

Solicitors: *Tamplin & Co.*, agents for *Wilkinson & Marshall*, Newcastle-upon-Tyne (for the appellant company); *Isadore Goldman & Son*, agents for *R. R. Crute & Son*, Sunderland (for the respondents).

[*Reported by* R. L. Ziar, Esq., *Barrister-at-Law.*]

Re HILL, WESTMINSTER BANK, LTD. *v.* WILSON.

[Court of Appeal (Lord Greene, M.R., MacKinnon and Luxmoore, L.JJ.), **March 31, 1944.**]

Executors—Administration—Estate slightly insufficient to pay legacies and annuities in full—Annuities charged on income and capital—Payment in full possible if capital resorted to—Whether rule that annuities be valued is of universal application.

The testator gave certain pecuniary legacies followed by a gift of certain annuities and a residuary gift. The income of the estate proved insufficient to pay the annuities, but it was shown that, having regard to the ages of the annuitants, the annuities could be paid out of income with such resort to capital as might from time to time be necessary and that, assuming the annuitants did not live to an age entirely outside the scope of human expectation, there would be a surplus for the residuary legatees. It was contended that in these circumstances the court was bound to apply the rule that the annuities must be valued and the amount of the valuation paid over to the annuitants:—

Held: the rule in question was a rule of convenience only and it is not imperative that it should be applied and, in the circumstances of this case, the rule ought not to be applied. The annuities should be paid in full out of income and, so far as the income was insuffient, out of capital.

[**EDITORIAL NOTE.** There is a rule of administration that when the income of the estate is insufficient to provide for annuities, the annuitants receive the actuarial value of their annuities, abated if necessary. This rule is one of convenience and not of universal application and where the deficiency of income is small it is not necessary to apply it. The deficiency can be greater where the annuitants or one or more of them are of such an age that the death of one may happen within a short time. The age of the annuitants and the deficiency must be considered together.

As to Valuation of Annuities, see HALSBURY, Hailsham Edn., Vol. 14, pp. 358, 359, para. 669; and for Cases, see DIGEST, Vol. 23, pp. 420-423, Nos. 4913-4937.]

Cases referred to:

(1) *Re Pettit, Le Fevre* v. *Pettit*, [1922] 2 Ch. 765; 39 Digest 167, *587*; 91 L.J.Ch. 732; 127 L.T. 491.

*(2) *Wright* v. *Callender* (1852), 2 De G.M. & G. 652; 39 Digest 149, *424*; 21 L.J.Ch. 787; 19 L.T.O.S. 308.

(3) *Wroughton* v. *Colquhoun* (1847), 1 De G. & Sm. 357; 39 Digest 162, *540*.

*(4) *Re Cotterell, Buckland* v. *Bedingfield,* [1910] 1 Ch. 402; 23 Digest 421, *4924*; 79 L.J.Ch. 189; 102 L.T. 157.

(5) *Re Cox, Public Trustee* v. *Eve,* [1938] Ch. 556; [1938] 1 All E.R. 661; Digest Supp.; 108 L.J.Ch. 67; 159 L.T. 13.

(6) *Re Bradberry,* [1943] Ch. 35; [1942] 2 All E.R. 629.

APPEAL by one of the residuary legatees from a decision of UTHWATT, J., given on Oct. 20, 1943. The facts are fully set out in the judgment of the court prepared by LUXMOORE, L.J.

L. M. Jopling for the appellant.

Harold Christie, K.C., and *B. G. Barnett-Hall* for the respondent annuitants, *C. D. Myles* for the Executors.

LORD GREENE, M.R.: The judgment which I am about to read, prepared by LUXMOORE, L.J., is the judgment of the court.

The main question raised in this appeal is whether the rule under which annuitants are given the actuarial value of their annuities when the annual income of an estate is insufficient to provide for them is one of universal application and must be applied even in a case where the annual income may only be a few pounds or even a few shillings short of the total sum required to provide for the annuities. UTHWATT, J., held that the rule must be applied in the present case although recognising that the result of the application would be to confer on the annuitants something not given by the terms of the will and more valuable to them than the testamentary dispositions. The defendant Basil Heath Brown, who is one of the persons interested in the testator's residuary estate, has appealed from the order of UTHWATT, J., and by his notice of appeal asks that that order may be reversed so far as it declares that, upon the true construction of the will and in the events which have happened, the annuities given by the will of the testator ought to be valued according to the Government tables and having regard to the gross amount and not the net amount (after deduction of tax) of each annuity and that it might be declared that the said annuities ought not to be valued but that the same ought to be paid out of the income of the testator's residuary estate and so far as income might be insufficient out of the estate, or, in the alternative, if the said annuities ought to be valued, that they ought not to be valued according to the Government tables, but according to the value thereof, and ought not to be valued having regard to the gross amount thereof, but that the value thereof ought to be determined having regard to the net amount (after deduction of tax) of each annuity. It will be observed that the notice of appeal raises several questions in addition to that which is above described as the main question, but none of these additional questions arise if the first declaration sought is granted and it is held that the valuation rule does not apply to the estate with which this court is concerned.

The facts material to be considered are as follows: Arthur Lennox Hill (hereinafter called "the testator") made his will on Apr. 28, 1930, and after making certain specific bequests he gave a pecuniary legacy of £100 to Elizabeth Jane Elkington and one of £50 to Eva Chaplin. He declared that these legacies were to be free of legacy duty and all other duties (if any) payable by reason of his death. He devised and bequeathed all his real and personal estate not thereby or by any codicil otherwise disposed of to the Westminster Bank, Ltd., on the usual trusts for sale and conversion and payment of debts and funeral and testamentary expenses and for investment. He directed the bank to stand possessed of such investments and of all parts of his estate for the time being unsold upon trust to pay the following annuities to the following persons for their respective lives clear of all deductions whatsoever (including income tax at the current rate deductible at the source) by equal quarterly payments the first whereof should respectively be made three calendar months after his death, viz., (i) to the defendant Elizabeth Jane Elkington an annuity of £500; (ii) to the defendant Evangeline Dorothea Keevil Brown an annuity of £200; (iii) to Ethel Wilson an annuity of £100. The will provided that, in the event of the defendant Elizabeth Jane Elkington predeceasing the other two annuitants, the annuity of £500 payable to her should be payable to Evangeline Dorothea Keevil Brown and Ethel Wilson during their joint lives in equal proportions; and that, on the death of Evangeline Dorothea Keevil Brown in the lifetime of her brother Reginald Job Heath Brown her moiety of the £500 annuity should be paid to her said brother; that, in the event of Ethel Wilson predeceasing her brothers Alfred Gurney Wilson and Noel Wilson, her moiety of the £500 annuity should be paid to her two brothers in equal shares during their joint lives and on the death of either to the survivor for his life; that, in the event of the defendant Evangeline Dorothea Keevil Brown predeceasing her said brother the defendant Reginald Job Heath Brown, the annuity of £200 payable to her as aforesaid should be paid to the defendant Reginald Job Heath Brown during his life and that, in the event of the said Ethel Wilson predeceasing her brothers the defendant Alfred Gurney Wilson and the said Noel Wilson, the annuity of £100 payable to her as aforesaid should be paid to her said brothers in equal shares during their joint lives and on the death of either to the survivor for his life. Subject as aforesaid the testator directed the bank to stand possessed of his residuary estate and of the income thereof in trust for the children of the defendant Reginald Job Heath Brown born in the testator's lifetime or at any time after his decease who attain the age of 21 years or being female marry under that age, if more than one in equal shares as tenants in common.

The testator died on Apr. 28, 1942, leaving four of the annuitants, viz., Elizabeth Jane Elkington, Evangeline Dorothea Keevil Brown, Reginald Job Heath Brown and Alfred Gurney Wilson, him surviving but two of the annuitants Ethel Wilson and Noel Wilson both predeceased the testator. The four surviving annuitants are respectively between the ages of 59 and 64. The testator's estate was valued for probate at £33,579 9*s.* gross, the net value after payment of duty being just over £26,000. This sum is invested and produces a gross income of £995 18*s.* 6*d.* before deducting income tax, but the trustees contemplate certain changes of investment which will, it is estimated, reduce the gross income to £867 or thereabouts. The annuities at present payable require for their discharge a gross annual sum of £1,114 10*s.* 6*d.* including the income fees payable to the trustee bank and the income tax on such annuities and fees. Having regard to the income of each of the respective annuitants, if income tax remains at the present standard rate a total sum of £46 3*s.* 6*d.* will be recoverable by the said annuitants and under the rule in *Re Pettit* (1) will be repayable annually to the testator's estate. The sum of £46 3*s.* 6*d.* so repayable annually represents a gross annual sum of £92 7*s.* and on the figures above stated the gross annual income of the testator's estate available to meet the gross sum of £1,114 10*s.* is £959 7*s.* There is thus an annual deficiency of £155 3*s.* The evidence now before the court establishes that, if the annuities and all consequential payments having regard to the terms of the testator's will are paid so far as possible out of income and so far as necessary out of capital, and bearing in mind that capital will have to bear income tax on any net sum paid thereout, the estate will last 54 years if the amounts receivable under the rule in *Re Pettit* (1) are taken into account and 44 years if these amounts are ignored. It must be borne in mind that these calculations are based on all the annuitants being alive during the whole of the said periods of 54 or 44 years as the case may be so that the respective ages of the annuitants would at the end of the first alternative period vary from 113 to 119 and in the second alternative period from 103 to 109 years. The evidence further establishes that the total actuarial value of the several annuities now payable under the testator's testamentary dispositions is £15,054 3*s.* 4*d.*

It appears, therefore, to be plain on the evidence that, since the annuities are charged on capital as well as income there is no commercial risk that the annuities will not be paid in full if they are paid out of income and capital as and when they fall due for payment. Indeed, if and when either of the annuities, even though it be the smallest, ceases to be payable, the income of the estate will then be sufficient to meet those annuities which remain to be paid. It is well settled that, in certain cases where there is a direction to pay annuities out of an estate which is insufficient by its income to provide for them, such annuities may be valued according to actuarial principles and the values so ascertained treated as pecuniary legacies and paid over to the annuitants. The question is whether this method must be applied or can be insisted upon in every possible case. In the ordinary case where there is a simple gift of an annuity with a direction to set aside a fund to answer it, the annuity being charged on capital as well as income and there being a gift over of the residue of the estate, it was decided in *Wright* v. *Callendar* (2) that the right of the annuitant and the other persons interested is to have the directions of the testator carried into effect and, if the estate is not sufficient to pay the annuitant in full, he is entitled to have the deficiency made up out of capital but he must take the estate as it stands and is not, except with the consent of the persons entitled to the residuary estate, to have the value of the annuity paid over to him. This is undoubtedly the law where the question is simply as between an annuitant and the residuary legatees. Where, however, pecuniary legatees are also concerned and the estate is insufficient for the payment of the annuity and the pecuniary legacies, then, where there is a direction in the will to set apart and invest a sum sufficient to answer the annuity, the court as a matter of convenience of administration directs the annuity to be valued and treats the amount of the valuation as a legacy and makes it abate in its due proportion and pays the abated amount to the annuitant: see *Wright* v. *Callendar* (2), *Wroughton* v. *Colquhoun* (3).

There is an intermediate case where, although the estate is insufficient to pay pecuniary legacies in full and to set aside a fund sufficient by its income to answer the annuity or annuities, the estate is sufficient to pay the pecuniary legacies and the full value of the annuity or annuities and even to leave a surplus for residue and in such a case it is usual to apply the rule; but it would seem that there is no reason to do so if there is no competition between the legatees and annuitants or between the annuitants *inter se*: for example, in a case like the present where the pecuniary legatees can be paid in full at once and it is plain on the evidence that the residue will be more than sufficient to pay all the annuities in full as and when they fall due in accordance with the testator's directions. It was argued that the decision in *Re Cotterell* (4) laid it down that the rule was of universal application and ought to be applied even in cases where it is certain that a testator's directions with regard to the payment in full of legacies and annuities will be fulfilled to the last penny although the direction for setting apart a fund sufficient by its income to provide the annuities cannot be satisfied. We are unable to agree that the decision goes to any such length. The facts in *Re Cotterell* (4) would appear to leave little doubt but that the residue of the estate after payment of the legacies was in all circumstances sufficient by its income and capital to ensure that the annuity would be paid in full and the residue would not be exhausted unless the annuitant lived for a period far beyond the expectancy of human life, but no reference was made to this either in argument or by the judge. In that case, as in the general run of cases, the direction to appropriate a sum to provide by its income for an annuity is properly speaking a provision for convenience of administration and is in reality ancillary to the gift of the annuity if it be charged on capital and it is plain from *Wright* v. *Callendar* (2) that, if there be no competing legacy, such a direction would be ignored. It seems to follow that, if an estate after payment in full of the legacies bequeathed can be said to be sufficient to answer out of income supplemented by capital an annuity (if only one be given) or a number of annuities (if more than one be given), the direction to set aside should also be ignored.

The reason for the application of the rule in *Re Cotterell* (4) is, we think, correctly stated by SIMONDS, J., in *Re Cox* (5), at p. 563 ([1938] 1 All E.R. at p. 666):

> The reason [for the application of the rule] is clear from a hypothetical example. Suppose an annuity of £100 is bequeathed to one annuitant, A, who is ninety years of age, and a similar annuity to another, B, who is nineteen years of age, and suppose that the whole estate available for satisfaction of the annuities is only £1,000. If both the income and the capital of that sum are applied year by year until it is exhausted in payment of the two annuities, A will probably get his annuity paid in full for the whole of his life, but B will not do so. There is thus an inequality in that treatment which the testator is presumed not to have intended. The only fair way of dealing with annuities as between annuitants of different ages is to make an actuarial valuation of the annuities, and to pay the value of each so ascertained to the annuitants . . .

The reason so stated has obviously no application to a case like the present where it is plain that the available estate is more than sufficient to provide for the payment in full of the annuities out of income and capital as directed by the testator unless a series of events should transpire entirely outside the scope of human expectation, namely, the joint survival of all the annuitants for a period of time of impossible length having regard to their respective ages at the time when the matter is to be considered.

Although UTHWATT, J., obviously felt the hardship on the residuary legatees that would be caused by so doing, he applied the rule because he thought it was one of universal application and that to refuse to do so would create confusion in the administration of other estates. But the rule is not a rule of law. It is one of convenience. As Uthwatt, J., himself said in *Re Bradberry* (6), at p. 40 ([1942] 2 All E.R. at p. 634):

> Matters of administration are settled by practice which reflects common sense or, what is to my mind the same thing, reason tempered by convenience.

It would be contrary to common sense to apply the so-called rule to a case where there is no proper ground for its application and when by so doing the testator's directions are interfered with unnecessarily and an inequitable result is achieved. No confusion can be caused if the court refuses to apply the rule where it is clear on the evidence that all the annuities can properly be satisfied in full out of the estate and there is no commercial risk of any insufficiency. In the court below the case was argued on the footing that such a state of facts existed but that there was no direct evidence to support it. When the case was argued in this court the attention of the parties was called to the absence of such evidence and an opportunity was given to file the necessary affidavit. This has now been done and it is conclusively established by it that the annuities given by the will must in any event be satisfied in full and be paid as and when they fall due.

For the reasons stated we think Uthwatt, J., was in error in holding that the rule in question was one of universal application and in applying it to the present case. The appeal must be allowed and a declaration made as asked by the notice of appeal, that, upon the true construction of the will and in the events that have happened, the annuities in question ought not to be valued but that the same ought to be paid out of the income of the testator's residuary estate and so far as income may be insufficient out of capital.

Counsel for the appellant addressed a short argument to us on the alternative question and claimed that, if the annuities ought to be valued, they should be valued having regard to their net amount after deduction of income tax. Having regard to the conclusion arrived at on the main point this question does not arise and we see no reason for attempting to determine it on the inadequate material before the court.

Appeal allowed.

Solicitors: *Philcox Sons & Edwards* (for the appellant; *Peacock & Goddard*, agents for *Trevanion, Curtis & Ridley*, Bournemouth (for the respondents).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

R. *v.* WILLIAM GOODWIN.

[Court of Criminal Appeal (Viscount Caldecote, L.C.J., Humphreys and Atkinson, JJ.), **April 3, 1944.**]

Criminal Law—Prevention of crime—Prisoner with previous conviction charged with being found on certain places about to commit an offence having been previously convicted—"Offence"—"Found"—"About to commit an offence"—Prevention of Crimes Act, 1871 (*c.* 112), *ss.* 7 (iii), 20.

The appellant was observed by police officers to go to two different blocks of flats and to examine the locks on some of the doors and then leave. Shortly after leaving the second block of flats he was arrested and subsequently charged under the Prevention of Crimes Act, 1871, s. 7 (iii), for that he had been convicted on indictment of a crime in 1940 and that within seven years immediately after the expiration of the sentence then passed on him he was found in the blocks of flats under such circumstances as to satisfy the court that he was about to commit an offence punishable on indictment, to wit, larceny. It was not denied that the appellant had been convicted as stated in 1940. On behalf of the appellant it was contended (i) that larceny being a felony was not an "offence" within the meaning of sect. 7 (iii); (ii) that sect. 7 (iii) required that the prisoner should have been arrested on the place where it was alleged that he was about to commit an offence; and (iii) that there was no evidence that the appellant was on the premises in question in such circumstances as to satisfy a court that he was about to commit an offence:—

HELD: (i) larceny is an "offence" within the meaning of sect. 7 (iii) of the Act.

(ii) for the purposes of a charge under sect. 7 (iii) of the Act, actual arrest on the premises is not necessary to constitute being "found" there.

(iii) the evidence was not sufficient to support the charge of being about to commit an offence. The evidence must show that the person charged was then and there about to commit an offence.

A [**EDITORIAL NOTE.** The Act here considered has seldom been resorted to by the authorities and cases upon it are rare. The judgment herein is chiefly of importance from the fact that it gives considerable guidance as to the summing up to the jury in such a case.

FOR THE PREVENTION OF CRIMES ACT, 1871 s. 7, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 4, pp. 673, 674; and FOR CASE, see DIGEST, Vol. 14, p. 183, No. 1621.]

B Case referred to:

*(1) *Moran* v. *Jones* (1911), 104 L.T. 921; 37 Digest 364, *1662*.

APPEAL by the prisoner from a conviction at the London Sessions of an offence under the Prevention of Crimes Act, 1871, s. 7. The facts are fully set out in the judgment of the court delivered by HUMPHREYS, J.

H. Fenton for the appellant.

R. H. Blundell for the Crown.

C HUMPHREYS, J. [delivering the judgment of the court]: The appellant was convicted at the London Sessions of an offence created by the Prevention of Crimes Act, 1871, s. 7, and he now appeals by leave of the court against that conviction. He was sentenced to what is in fact the maximum sentence permissible under that section, and he is also appealing against the sentence.

The section in question is one of a very unusual character. Quite contrary
D to the law which prevails in ordinary cases, which requires that a man shall be tried by a jury without the jury being informed of his past unless he desires that they should be so informed and puts his character in issue, this section provides as follows:

> Where any person is convicted on indictment of a crime, and a previous conviction of a crime is proved against him, he shall, at any time within seven years immediately
> E after the expiration of the sentence passed on him for the last of such crimes be guilty of an offence against this Act, and be liable to imprisonment, with or without hard labour, for a term not exceeding one year, under the following circumstances or any of them . . . Thirdly. If he is found in any place, whether public or private, under such circumstances as to satisfy the court before whom he is brought that he was about to commit or to aid in the commission of any offence punishable on indictment or summary conviction, or was waiting for an opportunity to commit or aid in the commission of any offence punishable on indictment or summary conviction.

F The appellant in this case was indicted under the terms of that section. The indictment alleged that he had been convicted at the Central Criminal Court of a crime in 1940, and that within seven years immediately after the expiration of that sentence, to wit, on Dec. 2, 1943, he was found in certain public and private places, to wit, Portsea Hall and Clifton Court in the county of London, in such circumstances as to satisfy the court before which
G he was brought that he was about to commit an offence punishable on indictment, to wit, larceny.

No point was made at the trial and no point is made upon this appeal of the fact that he seems to be charged in that indictment with two offences, inasmuch as it is alleged that he was found at two separate places in each case in such circumstances as to satisfy the court that he was about to commit an offence. That point is not taken.

H One of the points which has been taken by counsel for the appellant, and which may be mentioned in order to get rid of it, is this: the indictment here was bad on the face of it because it charged the appellant in these circumstances with being about to commit an offence punishable on indictment, to wit, larceny, which is, of course, a felony, and under the very terms of this statute felony is not an offence. It seems a very startling proposition. When one looks at sect. 20 there is no doubt that the language of the section gives rise to verbal difficulty. Sect. 20, the interpretation section, provides that crime means any felony or certain other named offences, and then goes on:

> The expression " offence " means any act or omission which is not a crime as defined by this Act, and is punishable on indictment or summary conviction.

Counsel for the appellant argued that the result of those two definitions is that crime includes every felony, and, therefore, includes larceny, and " offence," being defined as something which is not a crime, obviously does not include larceny, and, therefore, the indictment is bad in alleging that this man was about to commit an offence punishable on indictment, to wit, larceny. It seems to me to be a little odd that, in all the years from 1871 up to the present time, so far as I am aware, that point has never been raised. Whatever may be the possible interpretations of this interpretation section, in our opinion, it is quite plain that the Act of Parliament cannot have intended to provide that the word " offence " did not include larceny. It would be a complete absurdity, and perhaps it is a sufficient answer to that contention to say that, in our opinion, at least the section can mean no more than this, that the expression " offence " may include any act or omission which is not a crime as defined by this Act. Therefore, that point fails. It would in any event fail on the ground that this is a matter which ought to have been taken by motion to quash the indictment, if the indictment was bad.

The much more substantial point which is taken here on behalf of the appellant is put in two ways. First, says counsel for the appellant, the Act requires that the person who is to come within the terms of it, that is to say, sect. 7 (iii), should be arrested at the place, whether public or private, where it is alleged that he was about to commit the offence. We are not inclined to agree that there is any necessity for this court to hold that the word " found " is intended to be, certainly according to the ordinary English language it would not be, equivalent to " arrested." It would have been very easy for the statute to have provided, if it desired to do so, that a person who is arrested under certain circumstances might be found guilty of a crime. That is not what this provision says. It says that he must be found doing certain things which are described as being things of such a nature as to satisfy the court that he was about to commit an offence. The court is indebted to counsel for the Crown for having brought to their attention *Moran* v. *Jones* (1), a case decided in 1911 by the Divisional Court upon a case stated. The offence charged in that case was under the Vagrancy Act, 1824, s. 4, which is as follows :

> . . . every person being found in or upon any dwellinghouse, warehouse, coach-house, stable, or outhouse, or in any inclosed yard, garden, or area, for any unlawful purpose . . .

The case raised the question as to what is the meaning in that statute of the word " found." We see no reason why the word " found " in the present statute we are construing should not be given the same meaning. This is what BRAY, J., says, at p. 922 :

> In order to be found upon premises a person must be upon those premises, and the offence, therefore, consists in being upon premises for an unlawful purpose and being found there. It is not, in my opinion, sufficient for a person to be upon the premises for an unlawful purpose unless he is also found there. What constitutes a finding within the meaning of the section ? The simplest case would be a case of apprehension upon the premises. Actual apprehension upon the premises is, however, in my opinion, not necessary to constitute the offence. I think there may be many cases in which a person is found upon the premises within the meaning of the section although he is not apprehended until after he has quitted the premises.

That is a decision which has the full approval of this court and we think that the second point taken on behalf of the appellant must fail.

The next point which was taken by counsel for the appellant is the perfectly sound and reasonable point that, whatever may be the law with regard to this case, there was no real evidence that the accused came within the terms of the section under which he is indicted. While it is not necessary that a person should be arrested at the place where it is alleged that he was found about to commit an offence, there is no doubt from the language of the section that it is necessary that he should be found—even if " found " means no more than discovered or seen—in such circumstances as to satisfy the court that he was then and there about to commit an offence. It would not be sufficient to come within the terms of this section that the jury should be satisfied (as indeed they might well be satisfied in the case of a person who they already know is an old criminal who has been at least once previously convicted) that he had it in mind that he would commit an offence if he had the opportunity; there should be positive evidence that he was then and there about to commit an offence. What is the proof of that? The evidence here was that this man being known to the police, he was watched by police officers. He was seen to go from the Edgware Road to a block of flats called Portsea Hall. He went up to the second floor and examined the locks of two of the doorways there, and having done that he came down again. That is the evidence with regard to Portsea Hall, and the indictment charges that he was found at Portsea Hall in such circumstances as to satisfy the court that he was about to commit an offence there, to wit, larceny. The next evidence is this. Having left Portsea Hall he went by bus to Maida Vale. He was followed, and he did very much the same thing, examining the locks and door of a block of flats called Clifton Court. Having left Clifton Court, that is to say, having come downstairs and out into the street, he was arrested and was charged not with this offence, but with the offence of loitering with intent to break in, which is said to be an offence against the Vagrancy Act, 1824, s. 4. Those are not quite the words of the section, but the offence with which he was then charged was no doubt the offence provided by that section, that he was a person who, being found in an enclosed place for an unlawful purpose, was liable to be arrested. That is the offence under the Vagrancy Act.

The appellant at his trial set up an alibi, and as not infrequently happens with people who set up an alibi as their defence, the trial proceeded as if the only issue was whether he was the man who was seen by the police or not. Witnesses were called with regard to that alibi, and we must take it that the witnesses were disbelieved by the jury because they convicted the appellant. It may be that as the result of the nature of the defence the deputy chairman did not emphasise the necessity for proving with great exactness and great particularity that the particular offence created by this particular part of this particular subsection was committed by the appellant.

As I have already observed, this is quite an unusual section, in that it requires that the jury shall know that the man who is before them and whom they are trying is a criminal and that he is a man who is likely, from what is known of him, to commit the very crime with which he is being charged. As has already been said, it is precisely the thing which in most cases we take the greatest possible care to prevent the jury knowing anything about. That being so, it is not too much to say that, whenever such a charge is brought against a person, the presiding judge and everybody concerned in the case should be meticulously careful to see that the man is not convicted as the result of the appalling prejudice which must in such circumstances be brought against him, but is convicted upon clear and unmistakable evidence that he committed the particular charge named in the indictment, quite irrespective of whether he committed any other. I mention that because there is another offence with which it is possible this man might have been charged under that same sect. 7 (iii). The subsection goes on to say:

> . . . or was waiting for an opportunity to commit . . . any offence punishable on indictment or summary conviction.

It may be in this case that there was ample evidence that the accused was—we express no opinion about it one way or the other—waiting for an opportunity to commit some such offence as stealing, but he was not charged with that. He was charged with this specific offence of being about to commit, first of all at Portsea Hall and then at Clifton Court, the offence of larceny. What is the proof that at Portsea Hall he was about to commit the offence of larceny? If he had been interrupted, then no doubt no difficulty would have arisen in proving that he was about to commit a particular offence. But he was not interrupted. The evidence is that, having tried the locks of these two flats he went away. It seems to us the short answer which might have been made on his behalf was this. If, when he was found, he was about to commit the offence, why did he not commit it? Nobody stopped him, but he did not. It may be he had the intention to commit, but it must always be remembered in dealing with this section that an intention to commit an offence is not enough.

The man must be about to commit. That may mean much the same thing as attempted to commit an offence. It is clear there was not enough here to justify a conviction for attempted housebreaking. When we come to Clifton Court exactly the same observation applies. He was found there examining locks. It may be his idea was that, if he could find a lock suitable for him, and he had a piece of celluloid in his pocket, he would come back later that day or that night and commit an offence there. But that will not do under this section; it must be that he was then and there about to commit the offence of larceny which involves in this case breaking into the premises to commit larceny. In our opinion, the evidence was insufficient and there was no sufficient direction to the jury upon that intricate matter to enable us to say that the jury appreciated that it was necessary that they should find that he was then and there about to commit this crime before they found him guilty.

Upon those grounds in our opinion the appeal must succeed and the conviction must be quashed.

The court would add about this section that they think the police and those who have to deal with these matters, including courts of justice, would do well to remember that, if the circumstances of a particular case are equally applicable to such an offence as the offence I have just referred to under the Vagrancy Act or any other offence, which does not involve the proof beforehand to the jury of a man's bad character, it is much more satisfactory that the person should be charged with that than that he should be charged with this offence which does put him in such an extremely difficult position for nobody with experience of a criminal court can fail to agree that, when once a jury know that a man is a man who is given to committing a particular class of crime, it must be extremely difficult for them, doing their best though they do, to treat that man in the same fair and impartial way as they would if they knew nothing whatever about him. For that reason, if the facts of the case are such that a man may equally be charged with two offences, one of which involves the proof to the jury that he is a man of bad character and the other of which requires no such proof, it is always desirable that the latter should be selected as the charge to be made against such a person.

The appeal is allowed and the conviction quashed.

Appeal allowed and conviction quashed.

Solicitors: *Marris & Shepherd* (for the appellant); *Solicitor to the Metropolitan Police* (for the Crown).

[*Reported by* R. BOSWELL, ESQ., *Barrister-at-Law.*]

L.C., LTD. (IN LIQUIDATION) *v.* G. B. OLLIVANT, LTD. AND OTHERS

[HOUSE OF LORDS (Viscount Simon, L.C., Lord Thankerton, Lord Russell of Killowen, Lord Macmillan and Lord Wright), **November 30, December 2, 1943, April 3, 1944.**]

Contract—Sale of business—Payment for goodwill to be made by annual instalments ascertained in a prescribed manner from profits—Whether excess profits tax deductible before arriving at amount of profits.

An agreement, dated Sept. 27, 1933, provided for the sale of property of various kinds including, in particular, the business of West African merchants formerly carried on by the vendors. The agreement provided, *inter alia,* that the consideration for the sale of the goodwill of the business should be a maximum sum of £200,000, but which the purchasers should discharge by paying in each of the following 8 years "one-half the sum which the auditors of the purchasers . . . should certify to be the profits of such financial year," without deduction for income tax. The agreement contained provisions as to how the profits were to be computed. It was also provided that the purchasers were to be relieved from all obligation to make any further payment after 8 years or after the aggregate instalments had amounted to £200,000. The point at issue was whether or not, in arriving at the annual instalments payable under the agreement in respect of the goodwill, the purchasers were entitled to have brought into account as a deduction the sums payable by them in respect of excess profits tax and national defence contribution :—

Held [Viscount Simon, L.C., and Lord Macmillan *dissenting*] : on the true construction of the agreement, the profits were to be ascertained in accordance with ordinary commercial practice in ascertaining the profits of a trading company as modified by the special provisions set out in the agreement. Since the special provisions did not exclude the deduction of excess profits tax before striking the profit balance, excess profits tax and national defence contribution were rightly deducted in order to ascertain the profits.

Decision of the Court of Appeal ([1942] 2 All E.R. 528) *affirmed.*

[**EDITORIAL NOTE.** The value of the goodwill of a business to a purchaser is always very difficult of assessment and in general practice only very rough-and-ready methods are adopted. The plan here adopted of making the value depend in part at least upon the profits during the eight years following the date of purchase seems a very fair method of dealing with this difficulty, but, now that the majority of the House of Lords have decided that, by the adoption of that plan, the parties have made the value depend upon the amount of certain direct taxation imposed in the future by the Government, the fairness of the method is clearly open to serious question. The matter is, of course, largely one of the construction of the particular agreement, but the dissenting opinions deal with the general principles involved. The majority of their Lordships have adopted the judgment of Lord Greene, M.R., in the Court of Appeal and merely added observations of their own and Lord Wright is the only member of the majority who has dealt with the reasons why excess profits tax must be dealt with in a way different from that which has always been applied to income tax, the only form of direct taxation dealt with in the authorities.

As to Ascertainment of Profits, see HALSBURY, Hailsham Edn., Vol. 5, p. 310 ; and for Cases, see DIGEST, Vol. 9, pp. 600, 601, Nos. 4006-4017.]

Cases referred to :

*(1) *Ashton Gas Co.* v. *A.-G.*, [1906] A.C. 10 ; 10 Digest 1162, *8225* ; 75 L.J.Ch. 1 ; 93 L.T. 676 ; *affirming* [1904] 2 Ch. 621.

(2) *London County Council* v. *A.-G.*, [1901] A.C. 26 ; 28 Digest 73, *392* ; 70 L.J.Q.B. 77 ; 83 L.T. 605.

(3) *Re Spanish Prospecting Co., Ltd.*, [1911] 1 Ch. 92 ; 10 Digest 1002, *6958* ; 80 L.J.Ch. 210 ; 103 L.T. 609.

*(4) *Vulcan Motor and Engineering Co.* (1906), *Ltd.* v. *Hampson*, [1921] 3 K.B. 597 ; 9 Digest 545, *3595* ; 90 L.J.K.B. 1366 ; 125 L.T. 717.

Appeal by the vendors from a decision of the Court of Appeal (Lord Greene, M.R., Lord Clauson and du Parcq, L.J.), given on Oct. 26, 1942, and reported [1942] 2 All E.R. 528. The facts are fully stated in the opinion of Viscount Simon, L.C., and the agreement is more fully referred to in the judgment of Lord Greene, M.R., in the report of the proceedings in the Court of Appeal.

D. N. Pritt, K.C., and *J. S. Scrimgeour* for the appellants.

Charles Romer, K.C., *Frederick Grant, K.C.*, and *W. Gordon Brown* for the respondents.

Viscount Simon, L.C. : My Lords, the problem in this case is the not unfamiliar one of deciding how an agreement should be construed when its written terms provide elaborately for many things, but do not include any express provision to meet a contingency which the parties presumably never anticipated but which has since occurred. The rule to be followed in such cases is clear. The only difficulty is in applying it. The rule is that we are not to make a new agreement for the parties, or to speculate how they would have dealt with the new contingency had they anticipated it ; but that (except in cases when the intervening event produces frustration) we have to take the words of the agreement as they stand and apply them, as best we can, to the new situation which has caused the difficulty.

By an agreement in writing dated Sept. 27, 1933, made between the appellants (who were then carrying on business under the name of G. B. Ollivant & Co., Ltd.) as vendors of the first part, the respondents the United Africa Co., Ltd., of the second part and Leonard Chadwick of the third part, it was agreed, *inter alia*, that the appellants should sell to a company to be incorporated for the purpose its property and assets of various kinds including in particular the business of West Africa merchants which had, until then, been carried on by the appellants. Among the assets agreed to be sold by the appellants was the goodwill of the business. The consideration to be paid by the new company for such goodwill was provided for in the agreement by elaborate clauses which for the present purpose may be summarised as follows. Within 28 days after the accounts of the new company for each financial year of the new company which comprises any part of the period of eight years commencing on Oct. 1, 1933, and ending on Sept. 30, 1941, were made up and certified for submission to the shareholders, the new company was to pay to the vendor company a sum equal to one-half of the sum which the auditors of the new company (whose certificate is final) should certify to be the profits of such financial year computed in the manner specified in the third schedule to the agreement. The total of these yearly payments, however, was not to exceed £200,000 in any case. If in any of the eight years the computation of profits in accordance with the third schedule should show a loss, such loss would be carried forward until made good out of subsequent profits. The vendor company was not in any event to be required to repay or bring into any subsequent account any sum so paid to it.

The third schedule, which was headed "Method of computing profits of the new company," contained the following, amongst other, provisions:

> (1) The profits of the new company shall be computed by the auditors for the time being of the purchasers and their computation shall be binding on both parties. Subject to any special provisions in this agreement contained, the general principles to be adopted by them in making such computations shall be those of ordinary commercial practice, but they shall be entitled to make such adjustments as they think appropriate in order to give effect to the principles of this agreement.
>
> (3) The account shall include all usual and proper expenditure attributable to the working of the business whether in this country or abroad . . .
>
> (8) No deduction shall be made for general reserves or for income tax.

Para. (3) also contained elaborate provisions fixing what should be the percentage of depreciation to be allowed; para. (5) required the account to include a charge for interest at the rate of 5 per cent. per annum on share capital and on certain advances; and para. (6) provided that transactions between the United company and the new company should be carried out in accordance with "the ordinary commercial practice" adopted by companies who are not associated with each other.

Such being, in outline, the provisions in the agreement for the calculation of the instalments payable by reference to profits, the difficulty that has now arisen is due to the enactment, some six years after the agreement was entered into, of the excess profits tax by the Finance (No. 2) Act, 1939. If under the terms of the agreement excess profits tax is a legitimate deduction in computing the vendor's profits for the year ended Aug. 31, 1940, then no sum is payable to the appellants for the said year. If, on the other hand, no deduction for excess profits tax should be made for this purpose from the profits earned in that year, then the sum of £82,502 is payable to the appellants in respect of the said year.

The joint liquidators of the appellants, being in doubt as to which was the right method of computation, have adopted the convenient course of taking out an originating summons for the determination of this question of construction. On the hearing of this summons, FARWELL, J., decided that excess profits tax should be deducted, and, on appeal to the Court of Appeal, that court (LORD GREENE, M.R., LORD CLAUSON and DU PARCQ, L.J.) reached the same conclusion for somewhat different reasons.

The view taken by LORD GREENE, M.R., was that, when the agreement required the auditors, for the purpose of computing the profits of the purchasers, to apply "the general principles of ordinary commercial practice," the reference must be to the computation of the profits of a trading company in order to arrive at the amount of distributable profits. The argument then is that excess profits tax would be a proper deduction in order to ascertain the distributable profits, and it followed, in the view of LORD GREENE, M.R., that as the deduction of excess profits tax was not excluded by the express language of the agreement, the amount of this tax fell to be deducted before arriving at the figure one half of which is the stipulated instalment.

I need not say that I have examined this argument with profound respect for the views of its author on such a point, and the more so because some of my colleagues in this House deem it to be correct. To my mind, however, there are two objections to this line of reasoning which I am unable to get over, and which I must proceed to state.

In the first place, the argument amounts to saying that in the relevant clause of the agreement the "computation of profits" means the computation of "divisible" or "distributable" profits. The word "divisible" or "distributable" does not occur in the agreement from beginning to end, and, to my mind, the profits of a trading company when ascertained in accordance with ordinary commercial practice are the profits before, and not after, deducting the direct taxation which has to be paid in respect of them. It is not to be disputed that this is the case with income tax, for income tax is not a deduction which has to be made in order to arrive at profits; it is the Crown's share of the profits. All this has been explained once and for all in the well-known case of *Ashton Gas Co.* v. *A.-G.* (1). Counsel for the respondents admitted that this would be true whether the express provision excluding income tax was in the agreement or not.

Why is not the same thing true about excess profits tax? Varying a famous phrase of LORD MACNAGHTEN (*L.C.C.* v. *A.-G.* (2), at p. 35) I venture to observe that excess profits tax, if I may be pardoned for saying so, is a tax on profits. It is a tax (very elaborately calculated it is true) on profits, for it is a tax on excess profits—it skims the cream off profits so far as they are in excess of the standard profit. In the year in which the question in the present case arose, the tax took away 60 per cent. of the excess profits; now it takes 100 per cent. But I am quite unable to see why the amount thus taken should not be regarded as part of the profits. Both by name and by nature it is part of the profits, and it is none the less so because the Crown takes this part and leaves only the balance, if any, available for distribution among shareholders. If the excess profits tax were to be retrospectively repealed this would not increase the profits of the company in the least: it would only change their destination. The profits would be the same as before, but, as the Crown in that event would take less, the shareholders could receive more.

The second difficulty arises from what appears to me to be an error in describing the purpose and incidents of a profit and loss account. The Court of Appeal speaks of such an account as though its primary object was to ascertain what balance of profit was available for distribution to shareholders, and this leads to the assumption that a properly constructed profit and loss account must include on the debit side the amount of excess profits tax. This is not my understanding of the matter. The primary purpose of a profit and loss account is to ascertain what balance of profit or loss the enterprise has achieved during the year. That balance of profit, as FLETCHER MOULTON, L.J., pointed out in the *Spanish Prospecting Co.'s* case (3), at p. 101 is not necessarily the same in size as the fund out of which dividends may be legally paid in the case of limited companies. Moreover, it is a misapprehension to suppose that excess profits tax is, as a matter of course, introduced into a profit and loss account. If the accounts of the enterprise are set out in full, there will normally be first a trading account in which the receipts of the business are set off against the expenses directly incurred in earning those receipts. The "gross profit" arrived at in the trading account will then be carried to a profit and loss account as its opening item, to which would be added on the credit side such items as interest on investments, rents or the like, and against these will be set the overhead expenses of the business, so as to produce the "net profit." So far, according to the more usual practice of accountants in dealing with the affairs of a company, no charge in the nature of direct taxation will have been debited at all. The net profit from the profit and loss account will then be taken to an appropriation account, where there will be set against the net profits the various purposes for which the net profits are being used—so much for taxation, so much for reserves, so much for dividends, etc. The reports of company meetings, which are published daily in the press, afford constant illustrations of how the net profits shown in a profit and loss account are usually arrived at without deducting taxation, and how excess profits tax is provided for (as it properly should be) at a subsequent stage, by an appropriation of that profit.

It is sought to buttress the view which I reject by the assertion that the reference to "ordinary commercial practice" can only be understood as referring to the method of arriving at divisible profits. But I see no necessity for such an assumption. "Ordinary commercial practice" in para. (1) of the third schedule, like the same phrase in para. (6), does not seem to me to require the introduction of the distinction between profits that are divisible and profits that are not divisible. To arrive at the proper figure of profits, many things have to be considered, e.g., as to what is the proper line to be drawn between expenditure which should be deducted against income and expenditure which should be treated as incurred on capital account.

I am, therefore, unable to accept the proposition that the profit of a trading company is only what is left after deducting excess profits tax, or that the profits of this company should be so calculated. The profit is surely the figure before that deduction has been made. Excess profits tax is not an expenditure incurred in the earning of profits. It is an impost which has to be paid as a portion—and a very large portion in many cases—of the profits which the company has made. I may add that excess profits tax demanded in any year is not finally fixed, but is liable to be revised and even to be entirely repaid in the light of subsequent losses—a circumstance difficult to reconcile with the stipulation in the agreement that the vendor company was in no circumstances to repay what it received.

I would allow the appeal.

Lord Thankerton: My Lords, I am of opinion that the appeal should be dismissed, and I am quite satisfied with the opinion expressed by Lord Greene, M.R., with which his colleagues were in agreement. Were it not for some difference of opinion among your Lordships, I should deem it unnecessary to add any observations.

The question at issue relates to the construction of the contract between the parties, and in particular of the provisions in the contract relative to the ascertainment of the eight yearly instalments payable in satisfaction of the purchase price of the vendors' good-will. The total amount payable in eight instalments has a maximum limit of £200,000, but, in effect, the amount of the purchase price will be regulated by the summation of the eight instalments, which may fall short of £200,000.

Under head L. (2) of cl. 4 of the contract the amount of the instalment in each year is:

> . . . a sum equal to one-half the sum which the auditors of the new company . . . shall certify to be the profits of such financial year ascertained in accordance with the provisions in that behalf hereinafter contained and such payments being instalments of a capital sum shall be made without any deduction for income tax.

That takes one to the third schedule, which is headed "Method of computing profits of the new company," and of which I need only quote para. (1), which provides:

> The profits of the new company shall be computed by the auditors for the time being of the new company and their computation shall be binding on both parties. Subject to any special provisions in this agreement contained the general principles to be adopted by them in making such computations shall be those of ordinary commercial practice but they shall be entitled to make such adjustments as they think appropriate in order to give effect to the principles of the agreement.

In my opinion, Lord Greene, M.R., has rightly taken the arguments in three steps, viz., (*a*) do the "general principles of ordinary commercial practice" refer to the ordinary commercial practice in ascertaining the profits of a trading company; (*b*) if so, what is the ordinary purpose for which profits of a trading company are computed? Is it for the purpose of ascertaining divisible profits as shown by a profit and loss account; and (*c*) if so, does excess profits tax fall to be deducted in drawing up such a profit and loss account? There was no dispute either in the Court of Appeal or in this House that the last question should be answered affirmatively. Counsel for the appellants, as I understood him, did not dispute that the ordinary purpose for which profits were computed by a trading company was the ascertainment of divisible profits, which was done by means of a profit and loss account, but he disputed that the "general principles of ordinary commercial practice" referred to the ascertainment of divisible profit. As I understood his argument, it was that these words related to the computation of profits for the purposes of this contract. The express terms of the provision under construction appear to me to exclude any such idea, for, as I read them, they direct the application of general principles which are in ordinary commercial use outside of and apart from this particular agreement, but the application of such general principles is to be modified by the express provisions of this agreement, which direct the adjustments required in this particular agreement.

If then one is to look outside this agreement to find the "general principles of ordinary commercial practice," it surely must relate to the ordinary practice
A of trading companies, and I should have, without difficulty, come to the conclusion that the practice referred to is the practice of such companies in ascertaining the divisible profits of the company for the purposes of the shareholders, even apart from the indications in this contract, which seem to me to place that view beyond doubt.

Of these indications, the terms of head L. (2) are the most important, for they start with the accounts for the financial year, made up and certified by the
B same auditors for submission to the shareholders. These accounts would include the usual profit and loss account, drawn up for the purpose of ascertaining the divisible profit, its computation being made by the application of the general principles of ordinary commercial practice, and I am not prepared to hold that the auditors were intended to make up any other or different computation of profits to which, under para. (1) of the third schedule, were to be applied the modifications prescribed by the special provisions of the agreement.

C The other indications, which I do not consider it necessary to take in detail, are to be found on a perusal of the special provisions, which, in my view, are of a kind appropriate to the modification of an ordinary profit and loss account, so as to adapt it to the special circumstances of the particular case. One further observation I would make: the suggestion that the parties, when making the contract, could not have had the excess profits tax in view does not help
D the appellant. What either party would have maintained, or what agreement might have been made about it is pure speculation and outside the province of a court of construction. The ordinary commercial practice did not relate solely to the practice ruling at the date of the contract; it referred to the practice ruling at the time of the particular financial year under consideration, and any change in such practice from that ruling at the date of the contract would require to be observed as, *ex hypothesi*, it could not have been the subject
E of a special provision, unless, by some chance, it was inconsistent with an existing special provision.

I am, therefore, of opinion that the Court of Appeal rightly held that the amount of excess profits tax fell to be deducted, and that this appeal fails and should be dismissed with costs.

LORD RUSSELL OF KILLOWEN [read by LORD THANKERTON]: My Lords,
F but for the fact that there is a difference of opinion among us, I would content myself with stating that I agree, as I do, with LORD GREENE, M.R., both in his analysis of this very unusual form of agreement, and in his opinion as to its true construction. I will, however, add only a very few words of my own. LORD GREENE, M.R., has taken the view that the provision in the third schedule that the auditors in computing the profits of the purchasing company are to
G adopt the general principles of ordinary commercial practice refers to the general principles of ordinary commercial practice adopted by auditors in computing the profits of a trading company for the ordinary purpose for which those profits are computed, viz., to prepare a profit and loss account on the basis of which the profits (if distributed) are to be distributed. He reaches this conclusion because, as he says, he can think of no other ordinary commercial practice in computing the profits of a trading company save the practice of
H computing those profits for that purpose.

I agree with LORD GREENE, M.R., in this. The same conclusion is in my opinion also reached by a consideration of cl. 4 (L) (2) in the body of the agreement. That is the clause which requires the auditors to certify the profits now in question in accordance with the provisions of the third schedule. The certificate is to be given so as to enable payment to be made by the purchasing company within 28 days after the same auditors have certified the accounts for the financial year "for submission to the shareholders." Those accounts will necessarily include the ordinary profit and loss account referred to by

Lord Greene, M.R., showing the profits divisible among the shareholders, upon the basis of which the question whether any and what part thereof shall be divided is to be determined. This profit and loss account will have been prepared in accordance with the general principles of ordinary commercial practice. The clause then requires that the auditors shall certify (I now quote the words of the clause):

> The profits of such financial year ascertained in accordance with the provisions in that behalf hereinafter contained. A

I find it impossible to entertain any other view of those words than that they mean that the auditors are to certify a profit and loss account of the company in the form which it would have assumed if it had been prepared according to the general principles of ordinary commercial practice, but with the variations imposed by the special provisions. Examples of such variations would be the percentages of depreciation if they differed from those in the company's accounts B and the elimination of sums carried to general reserves. The new percentages of depreciation would be those enumerated in para. 3 (*b*) of the third schedule. The general reserves would disappear under para. 8 of the third schedule; any other reserves would remain as deductions. This clause indicates strongly that the ordinary profit and loss account (but as varied by the special provisions) is the document which is to be certified. Reserves are built up out of divisible profits. In practice no doubt the auditors would take the profit and loss C account already certified by them, and recast it in the light of the special provisions.

The alternative view suggested is that the "profits" which have to be certified, are merely the credit balance shown on a trading account, i.e., amount of the trade earnings less the expenses incurred in earning that amount. To certify such a balance is not in my opinion to certify "the profits of a financial year" D nor would the computation which led up to such a certificate be such a computation as is contemplated by the third schedule. The account which is contemplated by the schedule is a complete though highly artificial profit and loss account. Para. 2 testifies to its completeness. Para. 4 is eloquent of its artificiality.

I would dismiss this appeal with costs.

Lord Macmillan: My Lords, I find myself unable to agree with the view E of this case which has commended itself to the majority of your Lordships.

The transaction in question is concerned with the sale of the goodwill of a trading business and is embodied in a written agreement. I shall call the appellants "the vendors" and the respondents, who have acquired right to the agreement, "the purchasers."

The goodwill of a business consists of the profitable connection which it has established with its customers on which a reasonable expectation of future F profit-making is based. The sale of the good-will of a business is thus the sale of an expectancy of making future profits, and it is accordingly appropriate, as has been done in this case, to make the price dependant on the realisation of that expectancy.

The method of payment adopted in the present case was to fix a maximum price of £200,000 payable in annual instalments, the instalments to consist of G 50 per cent. of the purchasers' annual profits. The instalments are to continue to be paid until the whole price is paid or until eight years have elapsed, whichever shall first happen. No further instalments are to be paid after the expiry of eight years in any event. Each annual instalment is made payable 28 days after the purchasers' accounts for the year have been made up and certified by their auditors for submission to their shareholders. I agree with Lord Greene, M.R., that this reference to the accounts of the purchasers is "merely H to fix a time within which the amount of the annual instalment in a given year is to be ascertained and paid." For the purpose of ascertaining the purchasers' profits in each year, of which the vendors are to receive one half, the purchasers' auditors are to prepare a special account in accordance with an elaborate series of directions embodied in a schedule to the agreement. Among these directions there is an injunction to the auditors in computing the purchasers' profits to adopt the general principles of ordinary commercial practice, and they are to be entitled to make "such adjustments as they think appropriate in order to give effect to the principles of the agreement." It is expressly provided that no deduction is to be made for income tax.

In the first four years the purchasers' profits computed in accordance with the directions in the schedule amounted in the aggregate to £106,692, and the vendors received payment of one half thereof, viz., £53,346. In the next two years the accounts disclosed losses amounting to £135,848 which were carried forward against future profits in terms of the agreement. In the seventh year, 1939-40, the account showed a profit of £301,875. After deducting the losses of the two previous years this left £165,004, one half of which, viz., £82,502, is claimed by the vendors which would bring up the total payments to them over seven years to £135,848, leaving £64,152 of the maximum price of £200,000 still unpaid. It so happens, however, that in the year 1939-40 a new war tax on profits was imposed under the name of excess profits tax under the Finance (No 2) Act, 1939, and this tax has since been continued with certain modifications.

The question is whether in computing the profits of the purchasers for the year 1939-40 in terms of the agreement there should be debited the amount of excess profits tax, viz., £192,000. If this is so, the vendors instead of receiving an instalment of £82,502 would be debited with a loss of £26,996 to be carried forward against the profits of the eighth and last year.

Now the agreement says nothing about excess profits tax for the very good reason that no such tax was in existence or in contemplation when the parties entered into it. Nevertheless your Lordships have to say what is to be done about it and must arrive at your decision by the interpretation of the provisions of an agreement which makes no reference to excess profits tax and which was framed by the parties without any intention of dealing with such a tax. It is the familiar but always hazardous judicial operation of imposing upon parties by the interpretation of words which they have used an intention or at least an effect which they never entertained or contemplated.

The agreement does, however, in my opinion, afford some guidance in aid of its application to the unforeseen imposition of excess profits tax. It says that the profits are to be computed according to ordinary commercial practice and directs regard to be had to the principles of the agreement. I confess that I have always understood that in ordinary commercial practice the profits of a business were ascertained by setting its receipts against its outgoings. I agree with SCRUTTON, L.J., when he said that "profits mean profits after deducting the expense of earning them" (*Vulcan Motor and Engineering Co., Ltd.*, v. *Hampson* (4), at p. 606), though I entirely disagree with his view that excess profits duty (the tax with which he was concerned) was an expense of earning the receipts. It is indeed a commonplace in tax law that in ascertaining what deductions are permissible in computing the amount of the taxpayer's profits or gains the question is whether the deduction claimed represents an outlay in order to earn profits or is a disbursement of profits earned. It seems to me unintelligible that the payment of a tax levied on profits after they have been earned should be construed to be a payment made in order to earn these profits. I need not examine the complicated details of the legislation relating to excess profits tax. It is enough for my purpose to emphasise that, as its name denotes, the tax is a tax on profits, namely the profits earned in excess of a fixed standard and that for the purpose of computing it the profits are, subject to certain special provisions, to "include all such income arising from the trade or business as is chargeable to income tax under Case I of Schedule D": see the Finance (No. 2) Act, 1939, Sched. VII, para. 7. It is in short a super income tax. For its purposes the profits arising from a trade or business are to be "computed on income tax principles" with certain adaptations (1939 Act, s. 14 (1)).

Here it is significant to note that the agreement under construction expressly directs that in computing profits income tax is not to be deducted. Counsel for the purchasers candidly and very properly admitted that, even if the agreement had said nothing about income tax, it would not have been admissible to deduct it. Why? Clearly because in accordance with ordinary practice in computing profits this would be a necessary implication. How can it be a necessary implication of this agreement that income tax should not be deducted and at the same time a necessary implication that excess profits tax should be deducted; that a tax on profits should not be deducted but that a tax on excess profits should be deducted ?

Then there is the reference to " the principles of the agreement " to which the auditors are entitled to have regard in adjusting the profits account. The principle of the agreement, as I see it, is that the price to be paid for the goodwill is to be dependent on the realisation of the anticipated earning power of the business. Its value is to be tested by the experience of the purchasers over eight years. In my opinion this clearly points to their experience as traders not as taxpayers. It is the volume of profitable business done that is to be the measure of the price, subject to a maximum. The question of the amount of taxation which the purchasers have to bear on what the goodwill has earned for them seems to me irrelevant. If over eight years the business whose goodwill they have bought yields £400,000 of profit then the full price of £200,000 is payable. This is an appropriate and fair way of assessing the value of a goodwill.

I would also point out that excess profits tax is an emergency imposition which is not intended to be permanent and will, we may hope, cease after the termination of the war. But the purchasers acquire a permanent right to the vendors' goodwill for all time and it would seem strange if the price of that permanent right should be affected by the accident of the incidence of a transitory war tax in the course of the first eight years of the purchasers' enjoyment of the goodwill, a tax, moreover, which may in certain eventualities be repaid.

It is said that on a sound construction of this agreement it is not the business profits of the purchasers that are to be the basis of the price of the goodwill, but, subject to adjustment, the distributable profits of the purchasers, that is to say, the profits which the purchasers as a limited company could distribute among their shareholders. I see no warrant for this interpretation. The special account which is to be prepared for the computation of profits for the purpose of the sale of the goodwill must present a very different appearance from that which the auditors have to certify for the purpose of ascertaining the dividend fund. It is to exclude income tax, it is to include profits derived from two other companies and it is to give effect to a whole series of directions about depreciation, investments, interest and other matters. Anything more unlike the distributable profits of the purchasers it would be difficult to conceive.

If it is said that to hold that the excess profits tax is not to be deducted is to make a new agreement for the parties, I can only reply that it seems to me that to read " profits " as " distributable profits " is equally to make a new agreement for them. The truth is, that, as neither of the parties had excess profits tax in mind when they made the agreement and the agreement makes no reference to it, any decision one way or the other as to what is to be done about the tax will make a new agreement for the parties, for the decision will impose upon them, by way of interpreting their expressed agreement, something upon which they never agreed at all, because it was not in their minds.

In agreement with VISCOUNT SIMON, L.C., I should allow the appeal.

LORD WRIGHT [read by LORD MACMILLAN]: My Lords, I agree with the judgment of LORD GREENE, M.R., and should be content simply to indorse his judgment. But I shall very briefly state in my own words why I think the appeal fails.

The issue depends on the meaning of the agreement of Sept. 27, 1933, and in particular on what is the consideration for the sale to the respondents of the goodwill of the appellants' business as West African merchants. For shortness I refer to the former as the vendors and the latter as the purchasers ; I disregard changes of name or new formations. The consideration was expressed to be £200,000, but payable only by annual instalments over eight years ; each instalment was to be a sum equal to one-half of the sum which the auditors of the purchasing company (whose certificate was to be final) should certify to be the profits of the financial year in accordance with the provisions contained in the agreement. The eight years over which the obligation was to extend were to begin on Oct. 1, 1933, and end on Sept. 30, 1941.

No question arises here as to the years 1934, 1935, 1936 or 1937. In 1938 and 1939 there were losses. In 1940 there were profits calculated at £301,875 if excess profits tax was not charged, but at £109,875 only if excess profits tax was deducted. If that latter course was adopted, there would be no profits for 1940 to which to apply the agreement by reason of the losses which under the agreement had to be carried over from 1938 and 1939. If excess profits tax was not deducted the appellants would be entitled to receive £82,502.

The parties when they made the agreement clearly did not give any attention to the possibility of excess profits duties being chargeable. It is impossible to guess what stipulations they might have hammered out if they had thought of it. The court must decide on the actual contract as applied with necessary implications to the facts.

What was sold was the goodwill of the trading company. The vendors took the chance of one-half of its annual profits reaching £200,000 in the stipulated period of eight years. Clause. 4. L. of the agreement requires the purchasers' auditors to certify within 28 days after the accounts for each year are certified "for submission to the shareholders" what are the profits of the year "ascertained in accordance with the provisions in that behalf hereinafter contained." The third schedule contains the method of computing the profits. The auditors' computation is to be binding on both parties. That is stipulated in cl. 1 which goes on to provide that "subject to any special provisions in this agreement contained" the general principles to be adopted by the auditors in making the computation shall be those of "ordinary commercial practice." This I take to be the general overriding provision, on which, read with the rest of the agreement, the decision of this case in my opinion depends. The special provisions which follow in the schedule deal with a number of details, but these are mainly directed to ensuring that the business is conducted with due regard to the vendors' interests, and do not affect what is the overriding provision for the purposes of this case. Are there then general principles which can be described as "those of ordinary commercial practice," prescribing the proper method of dealing with excess profits tax to be followed by auditors in preparing accounts of a trading company for submission to shareholders? That is the problem: on the answer to it will depend what is meant by "profits" in the agreement. I have already stated my view that there is nothing in the special provisions of the agreement to modify these general principles if there are any such. The accounts which are to be certified are to be those of a trading company for submission to its shareholders with the object of showing them what are the profits available to be distributed. Such an account could ordinarily be the profit and loss account. LORD GREENE, M.R., conveniently described the profits thus intended as "the divisible profits." The word "divisible" is not used in the agreement, but it does not introduce something new, not already covered by the agreement. It merely concentrates in a word the effect of the provisions of the contract as to how the profits are to be computed, and fairly describes what is meant and for the purposes of the agreement by the otherwise undifferentiated term profits. Counsel for the appellants admitted before the House that for the purpose of drawing up the profit and loss account of a trading company excess profits tax must be deducted if ordinary commercial practice is to be followed. It follows that in the present case the auditors in certifying the accounts would have to deduct the excess profits tax, if for no other reason, simply because they are required to do so under the express provisions of the Third Schedule, para. 1, read with the rest of the agreement, in particular cl. 4, L. (2).

I think this course can be justified by a broader reasoning which corresponds to the business exigencies of this case. In each of the 8 years the vendor company is to get half of the profits which would otherwise have been available to the shareholders, and divisible as dividends. Whether these profits are so divided or are used for developing the company's business or in other similar ways does not affect the position. It is true that what the state takes as excess profits tax is part of the profits in the sense that it is part of what has been earned on the balance of receipts and expenditure. But that part of the earned profits is not available to the company, and cannot be brought into computation as a profit by which the company can benefit; it is not here necessary to examine the niceties of fixing on the figure for the standard year and for computing the figure for the excess duty. Whatever sum that figure amounts to, it is taken out of the coffers of the company. Indeed the Finance (No. 2) Act, 1939, s. 18, expressly provides that in computing the profits and gains for the purposes of income tax the excess profits tax shall be allowed to be deducted as an expense incurred in the relevant period. I do not take that as meaning that it is actually an expense, because it is clearly not so; what is meant is that it is as much to be deducted from the earnings as if it were an expense in the strict sense. The excess profits tax is obviously in many respects on a different footing from income tax, though both taxes have the same feature that they involve a taking of profits by the state. But income tax is not treated as reducing a company's divisible profits. The company deducts the amount of the tax on paying A the shareholders, who in this way bear the burden and cannot be taxed a second time in respect of the dividend. The divisible profits of the company are thus computed without deduction of income tax. The excess profits tax, however, never comes into the divisible profits, but is bodily taken away out of the profits, which must be reduced accordingly when they come into the profit and loss account.

The substance of the agreement is to provide for what is in effect a sharing B of the annual profits of the company between the vendors and the company for the specified period, subject to qualifications not here material. The agreement cannot, I think, be fairly construed, in the absence of clear words, as including in the computation of the profits, which give the standard of what is to be paid, profits which the company never had in any relevant sense.

The question here is not what is the technical form in which accountants C may or may not prepare the accounts (about which there is no precise evidence before your Lordships) but the practical computation.

I do not get any help from para. 3 of the Third Schedule, which provides for including all usual and proper expenditure in working the business, because I do not think that the excess profits tax falls within that description for purposes of this agreement.

The purchasing company is a subsidiary of Levers and Unilever, Ltd., but D questions between the principal and the subsidiaries do not here affect the position as between the appellants and respondents. There is no suggestion that the respondents are not liable for the excess profits tax. Nor need the respondent company's liability for national defence contribution be separately considered, because it is merged in the excess profits tax. If or when the 20 per cent. return of moneys paid as excess profits tax materialises, the 8 years' period of the agreement will have expired and it will be too late for the appel- E lants to profit from any return or repayment.

In my judgment the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Clifford-Turner & Co.* (for the appellants); *Linklaters & Paines* (for the respondents).

F

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

G

NOTE

SUTCH *v.* BURNS.

H

An appeal from the decision of Atkinson, J., reported [1943] 2 All E.R. 441, was allowed by the Court of Appeal on Mar. 23, 1944, and the action was dismissed because the assumption (contrary to the fact) that the policy was such as complied with the Road Traffic Act, 1930, made the case a hypothetical one. The court regretted that it had no alternative but to dismiss the action but, in doing so, it was following *Glasgow Navigation Co.* v. *Iron Ore Co.* [1910] A.C. 293.

HARDWICKE v. GILROY.

[Court of Appeal (Scott, Luxmoore and du Parcq, L.JJ.), **March 24, April 24, 1944.**]

County Courts—Jurisdiction—Counterclaim for slander—County Courts Act, 1934 (c. 53), *ss.* 40, 63.

A The appellant was the defendant to an action brought in the county court and to which she brought a counterclaim for £10 damages for slander. The county court judge was of the opinion that the two claims might conveniently be tried together. It was contended that, by reason of the County Courts Act, 1934, s. 40, the county court had no jurisdiction in an action for slander whether by original plaint or by counterclaim, irrespective of the amount of the damages claimed :—

B Held : the County Courts Act, 1934, s. 63, confers on a county court, in the absence of a successful application made by a party under s. 63 (2), jurisdiction to hear any counterclaim or set-off and counterclaim although, by reason of the subject-matter or the amount of damages claimed, it would otherwise be beyond the jurisdiction of the county court.

[**EDITORIAL NOTE.** The County Courts Act, 1934, s. 40, excludes an action for C slander from the jurisdiction of the county court. Sect. 63, however, qualifies this exclusion by allowing a counterclaim involving matters beyond the jurisdiction of the county court to be tried in that court in the absence of an application by any party for the matter to be transferred to the High Court. In the absence of such an application, the county court therefore, had jurisdiction in any matter raised by way of counterclaim. The main contention in this appeal was that, when sect. 63 (1) speaks of a matter beyond the jurisdiction of the county court, it must refer to a matter in which the county court had some jurisdiction, for it could not otherwise be " beyond " D the jurisdiction. That word could not, it was contended, be used of a subject-matter, such as slander, in which the county court has no jurisdiction whatever.

As to Jurisdiction of County Court, see HALSBURY, Hailsham Edn., Vol. 8, pp. 162-172, paras. 248-269 ; and for Cases, see DIGEST, Vol. 13, p. 473, Nos. 221, 222.]

Appeal by the plaintiff in a counterclaim for slander brought in a county E court from a decision of His Honour Judge Allchin that the county court had no jurisdiction to hear the counterclaim. The facts are fully set out in the judgment of the court delivered by Scott, L.J.

Robert Fortune for the appellant.

James Comyn for the respondent.

Scott, L.J. [delivering the judgment of the court] : This is an appeal F from His Honour Judge Allchin, sitting in the Watford County Court, who made an order striking out a counterclaim for £10 damages for slander of the defendant in the way of her trade or business, and adjourned the hearing of the plaintiff's claim in the action pending an appeal. His Honour Judge Allchin was of opinion that it would, by reason of the facts concerned in the alleged slander being intimately connected with those affecting the claim, have been G convenient to have dealt with the two claims together ; but held that upon the correct interpretation of the County Courts Act, 1934, the counterclaim for slander was excluded from his jurisdiction ; and he accordingly struck it out, though he gave leave to appeal. The question before us is whether he was right. It turns upon the interpretation of the County Courts Act, 1934, s. 63 (1), which provides that :

> Where, in any action or matter commenced in a county court, any counter-claim H or set-off and counterclaim of any defendant involves matter beyond the jurisdiction of a county court, any party to the action or matter may, within such time as may be prescribed by rules of the Supreme Court, apply to the High Court or a judge thereof for an order that the whole proceedings, or the proceedings on the counterclaim or set-off and counterclaim, be transferred to the High Court.

Subsect. (2) provides that the High Court or judge may on such an application direct (*inter alia*) that the proceedings as a whole or the counterclaim by itself be transferred to the High Court ; or conversely that the whole be left to be dealt with in the county court. An application under the section has to be made within 8 days of the receipt of the counterclaim by the party against whom it is made (R.S.C., Ord. 54, r. 13). Subsect. (3) of the section provides that :

> If no application is made under this section within the time prescribed as aforesaid, or if on such application it is ordered that the whole proceedings be heard and determined in the county court, the county court shall have jurisdiction to hear and determine the whole proceedings, notwithstanding any enactment to the contrary.

In the present case no such application was made by the respondent as defendant to the counterclaim below ; instead he pleaded a defence to it. In this respect His Honour Judge Allchin was under a misapprehension, for he assumed in his oral judgment that no such defence had been delivered ; but that slight slip does not touch the real ground of his decision, which was that, in his view, the County Courts Act, 1934, s. 40, excludes from the purview of a county court judge's jurisdiction any claim for damages for slander, whether by original plaint or by counter-claim, unless the parties consent. He would no doubt have acknowledged the jurisdiction of the county court to deal with a claim or counterclaim for slander in an action transferred from the High Court ; but in the case before him he held that the unqualified exclusion of an action for slander by the proviso to sect. 40 (1) compelled him to disclaim jurisdiction. The point is, therefore, clean cut.

In our opinion sect. 63 (3) confers jurisdiction over a counterclaim for slander in unambiguous language.

The intention of the legislature is clear. So far as a plaintiff's claim is concerned, the question of jurisdiction is dealt with in sects. 40 to 62. In sect. 63 the Act deals with counterclaims. Here different considerations apply, and different rules are accordingly laid down. A counterclaim which "involves matter beyond the jurisdiction of a county court" may nevertheless be heard by the county court in the absence of an application by the plaintiff under the section. It is clear in our opinion that a cause of action not normally triable in the county court, such as slander, is a "matter" properly described as being "beyond the jurisdiction of a county court."

It was submitted on behalf of the respondent that only a counterclaim for a sum of money exceeding the jurisdiction of the court could be so described. This construction of the section does not appeal to us, and a consideration of earlier enactments confirms us in the view that it is erroneous. The Supreme Court of Judicature (Consolidation) Act, 1925, s. 203, dealt with counterclaims in county courts and the phrase "matter beyond the jurisdiction of the court" occurs in the body of the section and in proviso (3). In proviso (2) (c) the legislature deals expressly, and in a different manner, with counterclaims "for an amount of money exceeding the jurisdiction of the court." We find here a clear indication that the phrase "matter beyond the jurisdiction of the court." was used by the legislature in 1925 with reference to counterclaims which were outside the jurisdiction of the court because of their subject-matter, and not merely those in which the sum claimed was in excess of that which a plaintiff can recover. In the County Courts (Amendment) Act, 1934, the distinction was removed, and the expression "matter beyond the jurisdiction of a county court" was used (in sect. 11), as it is in the present Act, with reference to both subject-matter and amount.

In our opinion His Honour Judge Allchin placed too narrow a construction on the section. The appeal is allowed with costs here and below. The order made by him must be set aside, and the counterclaim restored.

Appeal allowed with costs.

Solicitors : *E. C. Kilsby & Son* (for the appellant) ; *A. Leslie Smith* (for the respondent).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

Re A SOLICITOR, *Re* TAXATION OF COSTS.

[CHANCERY DIVISION (Morton, J.), **March 28, 1944.**]

Practice—Costs—Taxation—Non-contentious business—Application to transfer taxation of bill of costs to district registry—Jurisdiction of court to order transfer—Jurisdiction of district registrar to act as taxing master—R.S.C., Ord. 35, *rr.* 6A, 17.

A The respondents obtained an order for taxation of their solicitor's bill of costs for non-contentious business. The solicitor thereupon made this application asking that all proceedings directed by the order be transferred to the district registry at Manchester or Liverpool under R.S.C., Ord. 35, r. 17. It was contended on behalf of the respondents that the court had no jurisdiction to order the transfer for the applicant :—

B HELD : the court had no jurisdiction to order the transfer of the proceedings to a district registry.

[**EDITORIAL NOTE.** No doubt it is often convenient that legal proceedings should be transacted locally, but it is here shown that, so far as the taxation of bills of costs for non-contentious business is concerned, there is no jurisdiction to order taxation in a district registry.

As TO TAXATION OF COSTS, see HALSBURY, Hailsham Edn., Vol. 31, pp. 182-185,
C paras. 214, 215 ; and FOR CASES, see DIGEST, Vol. 42, p. 205, Nos. 2277-2281.]

Case referred to :

*(1) *Stead* v. *Smith*, [1911] A.C. 688 ; 16 Digest 183, 882 ; 81 L.J.K.B. 68 ; 105 L.T. 120 ; *affg. Re Stead*, [1910] 2 K.B. 713.

APPLICATION for an order under R.S.C., Ord. 35, r. 17, to refer a bill of costs of a solicitor for non-contentious business to the district registrar for taxation.
D The facts are fully set out in the judgment.

J. F. Bowyer for the applicant.

C. L. Fawell for the respondents.

MORTON, J. : On Feb. 3, 1944, Irene Loveday Wright and Sara Wright obtained an order, on a petition to the court, for taxation under the Solicitors Act, 1932, of a bill of costs of their solicitor, Robert Walford Sumner of South-
E port. No taxation has yet taken place, but Sumner has issued a summons asking that all proceedings directed by the order of Feb. 3, 1944, may be transferred to the district registry at Manchester or Liverpool. In support of his application Sumner has filed an affidavit, which I need not read at length, setting forth certain reasons why he suggests it would be more convenient for all parties if the taxation is transferred to the Manchester Registry. I gather that the respondents to the summons, that is to say, the two ladies who obtained
F the order on the petition, do not share that view ; but certainly by the affidavit of Sumner some reason is shown for the transfer, if I have jurisdiction to make an order for transfer. It is submitted, however, by counsel for the respondents to this summons that I have no such jurisdiction, and I have come to the conclusion that that submission is correct.

In *Re Stead* (1), an application had been made by an originating
G summons in the Manchester District Registry for an order referring the bill of costs of a solicitor for non-contentious business to the district registrar for taxation, and the Court of Appeal held, at p. 713 in the headnote of the report, that :

> . . . although an originating summons was the proper form in which to make the application and a judge of the King's Bench Division had power to refer the bill for taxation yet the district registrar was not the "proper officer" to whom a bill for
> H non-contentious business could be referred for taxation within the Solicitors Act, 1843, s. 37, and that the bill must be taxed by a master of the Supreme Court.

The Solicitors Act, 1843, s. 37, has now been replaced by the Solicitors Act, 1932, s. 66. That case was affirmed by the House of Lords, when LORD LOREBURN, L.C., stated his concurrence in the judgment of the Court of Appeal briefly, and the other Lords sitting expressed their agreement.

I think it is quite plain, from the reasoning of the decision in *Re Stead* (1) and from the reasons given by the members of the Court of Appeal for that decision, that this application cannot succeed unless by some means it can be brought within certain words which were inserted in R.S.C., Ord. 35, r. 6A, in September, 1910—I think very probably as a result of *Re Stead* (1). R.S.C., Ord. 35, r. 6A, as it now stands, is in the following terms, so far as material:

> Where a cause or matter hereafter commenced in the Chancery Division is proceeding in the district registry of Liverpool or in the district registry of Manchester, or where a summons is issued in either of those district registries for the taxation of the costs of a solicitor under any statute or otherwise, the district registrar shall act in respect thereof, and throughout all the proceedings therein, including any proceedings during vacation, as a master of the judge of the Chancery Division to whom the cause or matter is assigned or the vacation judge, as the case may be, and as registrar and taxing master of the Supreme Court according to directions to be given from time to time by such judge.

So that there is provision that, under certain circumstances which are defined in the rule, the district registrar may act as a taxing master of the Supreme Court. It seems to me that, looking for the moment only at that rule, it is plain that the applicant cannot bring himself within the rule. Clearly the present case does not come within the words;

> Where a cause or matter hereafter commenced in the Chancery Division is proceeding in the district registry of Liverpool or in the district registry of Manchester . . .

Nor is this a case where a summons has been issued in either of those district registries for the taxation of Sumner's costs.

Counsel for the applicant submits, however, that the jurisdiction is conferred upon me by the terms of R.S.C., Ord. 35, r. 17. That rule is in the following terms:

> Any party to a cause or matter proceeding in London may apply to the court or a judge for an order to remove the cause or matter from London to any district registry, and the court or judge may make an order accordingly if satisfied that there is sufficient reason for doing so, upon such terms, if any, as shall be just.

It is submitted that I can make an order for the transfer of this matter to the district registry of Manchester and thereupon the district registrar of Manchester will be in a position to tax the costs in question. I do not take that view. It seems to me that, even if I assume, first, that the present case comes within r. 17 so that I could transfer it and, secondly, that there is good reason shown for transferring it, there is still no ground upon which the district registrar of Manchester is empowered to act as a taxing master for the purpose of the taxation of this bill. I am not expressing any view as to whether the present case does or does not come within the provisions of r. 17; but, even if it does, it seems to me that there could be no good object to be achieved by making an order for transfer because the order for transfer could not confer upon the district registrar in Manchester the jurisdiction which it is desired he should exercise.

It seems to me that, unless the case comes within the wording of R.S.C., Ord. 35, r. 6A (which it does not), the district registrar cannot tax this bill. For these reasons, I propose to dismiss this summons.

I should add that I have not thought it right to form or to express any view (which would necessarily be *obiter*) as to whether, assuming there is jurisdiction to make such an order as would result in the taxation being carried out at Manchester, I ought in the circumstances of this case to make such an order. I perceive that certain reasons are set out in the affidavit of Sumner, but I express no view as to whether these reasons are sufficient to induce me to make the order if the jurisdiction existed.

For these reasons I dismiss this application with costs.

Application dismissed with costs.

Solicitors: *Field, Roscoe & Co.*, agents for *Arkle & Darbishire*, Liverpool (for the applicant); *Williamson, Hill & Co.*, agents for *H. Collinson*, Halifax (for the respondents).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

Applied. HOSKING *v.* DE HAVILLAND AIRCRAFT CO., LTD. [1949] 1 All E.R. 540.

CALLAGHAN *v.* FRED. KIDD AND SON (ENGINEERS), LTD.

[COURT OF APPEAL (Scott and du Parcq, L.JJ., and Cohen, J.), **April 24, 1944.**]

Factories—Safe means of access—Obstacles left on floor near grinding machine—Practice of doing so to be prevented by employer—Factories Act, 1937 (c. 67), *s.* 26 (1).

It was part of the work of a factory for girls to take about 8 or 9 iron bars to a grindstone for the purpose of grinding them. Usually the girl took the bars to the grindstone and proceeded at once with the grinding, but on the occasion of the accident here considered, the girl, instead of proceeding at once to grind them, went away and left the bars lying on the floor in front of the machine. There was a clear space of some 18ft. in front of the machine. The appellant in using the grindstone passed from the right grindstone to the left and being intent on his work did not notice the bars on the floor, tripped over them and was injured by the revolving grindstone. It was contended that in these circumstances the employers had failed to observe the statutory duty imposed upon them by the Factories Act, 1937, s. 26 (1) which requires that, so far as reasonably practicable, safe means of access to every place where any person has to work shall be provided and maintained :—

HELD : there had been a breach of the statutory duty by the employers and the appellant was entitled to recover damages for his injuries.

[**EDITORIAL NOTE.** The statute provides that a safe means of access shall not only be provided but shall also be maintained. This, which is a provision first introduced in 1937, it is said, means that the system of working in the factory must be such that means of access is at all times safe. If the management know that obstacles are from time to time placed in a way to prevent safe access to a working place, then their duty is to make a regulation forbidding that practice and to see that the regulation is carried out. The Act allows a way of escape where it is not reasonably practicable to provide a safe access, but that did not arise here. The judgment deals with many subsidiary points but keeps them open. It also suggests that here there was an unsafe system of working at common law.

FOR THE FACTORIES ACT, 1937, s. 26, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 30, p. 221.]

Case referred to :

(1) *Wilsons & Clyde Coal Co., Ltd.* v. *English*, [1938] A.C. 57 ; [1937] 3 All E.R. 628 ; Digest Supp. ; 106 L.J.P.C. 117 ; 157 L.T. 406.

APPEAL by the workman from a decision of His Honour JUDGE GAMON, sitting at the county court at Stockton-on-Tees. The facts are fully set out in the judgment of the court delivered by SCOTT, L.J.

S. R. Edgedale (*J. G. Kekwick* with him) for the appellant.

Alun Pugh for the respondents.

SCOTT, L.J. [delivering the judgment of the court] : This appeal depends upon the correct interpretation of the Factories Act, 1937, s. 26 (1), and its application to the facts of the case as found by the county court judge. He has furnished us with an admirable note of the evidence and found the facts clearly and concisely, although one or two of his inferences of fact may be open to criticism.

The appellant, plaintiff below, was a lad who had been in the employment of the respondents for six years ; and we infer from that that he was over 18 years old when he met with the accident in respect of which he brought his action. Fortunately, his injury was slight and from that point of view the action is unimportant ; but it is of considerable importance because of the rather wide issue raised on the construction of the subsection, which is in the following terms :

> There shall, so far as reasonably practicable, be provided and maintained safe means of access to every place at which any person has at any time to work.

The judge found :

> At about 4.30 p.m., on June 1, 1943, the plaintiff sustained an injury to his right hand. He tripped over some iron bars lying on the floor, and in trying to save himself his hand came in contact with a grindstone which was revolving at the rate of about

> 2,500 revolutions per minute. The grindstone was the left one of a pair of grindstones mounted about breast-high on a pedestal. Normally there was a clear space of about 18ft. in front of the pedestal; but at the time when the accident happened there were some 8 to 12 iron bars 2ft. long by $\frac{7}{8}$ths of an inch in diameter lying on the floor straight in front of the pedestal between the two grindstones. These iron bars had been brought by a girl to be ground. Bars of this kind were continually being brought to the grindstone to be ground by girls employed at the works. Eight to nine bars were about as many as a girl could conveniently carry at a time; and normally a girl bringing such a number of bars to be ground would proceed to grind them straight away, and, when they had been ground, take them away and fetch some more. On this occasion, however, the girl who had brought them, instead of proceeding at once to grind them, had gone away for some purpose and left the bars lying there. It is clear that the grindstone was properly fenced and that the pedestal was standing in a properly lighted place. The bars would have been obvious to the plaintiff if he had looked down: but the plaintiff had just been trying the right grindstone and was proceeding to use the left grindstone: he was intent on his work and had no reason to suspect that there would be anything lying on the floor in front of the pedestal; and in moving across to the left grindstone he inadvertently caught his foot against the bars on the ground and that threw him off his balance. I entirely acquit the plaintiff of anything in the nature of negligence. On the other hand, I do not think it would be reasonable to impute negligence to the girl who left the bars at the foot of the pedestal. Placed as they were on the floor, they were so obvious that she could not, I think, have been expected to anticipate that any such accident as occurred might be caused by them: they constituted nothing in the nature of a concealed trap.

Those are the findings of fact. The salient points are that the pedestal which carried the two grindstones, revolving at 2,500 times a minute, was a piece of machinery to which the operatives in the factory—including many girls—were as a matter of normal routine continually resorting in order to grind their tools, including the iron bars of the type of those over which the appellant tripped up. That, when he tripped, he should stretch out a hand to save himself was natural, if not inevitable: and the judge was obviously right in acquitting him of negligence in failing to observe this collection of rusty iron bars lying side by side on the flat concrete floor close to the pedestal as he walked round from the grindstone on the other side of which he was going to complete his sharpening process. As the judge says, he would be intent on his job, with eyes up and not down. It was contended for the respondents before us, pursuant to a written notice to the appellant, that the evidence not only justified the inference of contributory negligence, but that there was no evidence the other way on which the acquittal of the appellant by the judge could in law be justified. That contention is plainly untenable, and we say no more about it.

Important evidence was given by two witnesses for the respondents that there was a space of clear floor of four feet to the right and left of and behind the pedestal, and of 18ft. in front, and that employees were in the habit, with the approval of the management, of coming from all directions to the pedestal for tool grinding and of doing so in large numbers throughout the day. It was the duty of the girls to grind the iron rods, for some unstated purpose, and they "normally brought 8 to 12 rods at a time and laid them on the floor close to the pedestal. The girls were supposed to stay by them during the grinding process, and then to carry them all away again." The system of working at the factory was, therefore, clearly one in which the management ought to have seen to it that the above practice was made a regular duty. It was a condition of the access to the grindstones remaining continuously safe; and that fact ought to have been obvious to the management. The appellant's particulars of claim did not allege this form of common law negligence against the respondents; but the judge expressly dealt with it in his judgment and decided the issue in favour of the respondents. It is not necessary for us to decide it; but it must not be assumed that we agree with his view.

The real question in the appeal arises on the Factories Act; and on that the judge held that there was no breach of duty by the respondents to "maintain a safe means of access": and his reason was that:

> . . . the unsafe condition which caused the accident was brought about by reason merely of a casual interference on the part of a fellow employee of the plaintiff.

With that conclusion we cannot agree. He had held that the girl who went away and left the bars unguarded on the floor was not negligent, because he could not blame her for failing to realise that to do so would be dangerous to others: but that very finding in our view came very near to involving a correlative duty upon the management to impress upon all operatives the imperative duty of not leaving the bars on the floor unguarded for others to trip over unexpectedly. If the failure of the management to give general directions to that effect was, as we think, a defect in the system, that would impose common law liability.

That failure has, however, a repercussion also upon the issue of breach of statutory duty. The section imposes a direct obligation upon the occupier of the factory not only to provide, but also to " maintain safe means of access ": and in our opinion those words are equivalent to " maintain the safety of the access," and impose a positive and continuing duty. What LORD WRIGHT said in *Wilsons & Clyde Coal Co.* v. *English* (1), at p. 84 ([1937] 3 All E.R., at p. 644), of the employer's duty to maintain a safe system of working, is applicable—perhaps even *a fortiori*—to the positive duty of the employer created by the subsection:

> I think the whole course of authority consistently recognises a duty which rests on the employer and which is personal to the employer, to take reasonable care for the safety of his workmen, whether the employer be an individual, a firm, or a company, and whether or not the employer takes any share in the conduct of the operations. The obligation is three-fold, as I have explained. Thus the obligation to provide and maintain proper plant and appliances is a continuing obligation. It is not, however, broken by a mere misuse or failure to use proper plant and appliances due to the negligence of a fellow-servant or a merely temporary failure to keep in order or adjust plant and appliances or a casual departure from the system of working, if these matters can be regarded as the casual negligence of the managers, foreman, or other employees. It may be difficult in some cases to distinguish on the facts between the employers' failure to provide and maintain and the fellow-servants' negligence in the respects indicated.

Counsel for the respondents sought to escape from the obligation of the section by contending (i) that it puts on the plaintiff the burden of alleging and proving in any given case, whether in a prosecution or an action, that it was " reasonably practicable " to do whatever might be necessary to ensure safety; and that in the present case the appellant had failed to discharge that burden; or alternatively (ii) that the evidence as a whole showed that it was not " reasonably practicable." The judge did not, we think, really address his mind to either of these issues; and, consequently, it cannot be said that there is either a decision of law on the fact, or a finding of fact by him against the appellant.

It is unnecessary to decide the question of onus of proof; for on the evidence two things are, we think, clear: (*a*) that the access was definitely unsafe at the time of the accident; and (*b*) that the management had given no general orders to call the attention of their staff to the danger entailed by leaving anything on the flat surface of the floor near to the pedestal, although they knew quite well that rods were not infrequently deposited there by the girls who brought them, and there left unguarded. For these reasons the conclusions are inevitable: (i) that the respondents had failed " to maintain safe means of access "; (ii) that it was reasonably practicable to do so; and (iii) that the respondents breach of statutory duty was the cause of the appellant's injury.

If it were necessary to decide the question of onus, the obvious fact that the difficulty or ease of doing what is necessary to maintain safety is so much more within the knowledge of the management than of their workpeople, makes us disposed to hold that it is for the defence, whether in a prosecution or an action, to establish the proposition of fact involved in the words of limitation of the section.

The appeal must be allowed with costs here and below.

Appeal allowed with costs.

Solicitors: *W. H. Thompson* (for the appellant); *F. G. Bowles* (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

NO-NAIL CASES PROPRIETARY, LTD. *v.* NO-NAIL BOXES, LTD.

[COURT OF APPEAL (Scott, Luxmoore and du Parcq, L.JJ.), **March 27, 28, 29, 30, April 21, 1944.**]

Patents—Licensees sub-contractors to Government department—Written authority to use patents for service of Crown—Whether royalties payable under licence—Minimum royalty clause—Patents and Designs Acts, 1907-1939, *s.* 29.

The appellants were the owners of a patent relating to a process for the manufacture of boxes without nails and the respondents were their sole licensees. The grant of the licence was made by a deed dated July 5, 1935, which, by cl. 6, provided for the payment of royalties based on the output of the machines, and by cl. 7 provided for the payment of a minimum amount irrespective of output. From 1939-1941 the respondents obtained several contracts from agents of and contractors to the Air Ministry for the supply of such boxes and the appropriate royalties were duly paid to the plaintiffs. On Dec. 10, 1941, the Ministry of Aircraft Production, which acted on behalf of the Air Ministry in matters relating to patents, wrote to the respondents asking them to request the appellants to waive further payments of royalties in respect of containers manufactured for the service of the Crown and to cease payment of royalties in respect of such containers after Dec. 31, 1941, and giving them authority under the Patents and Designs Acts, 1907-1939, s. 29, to use such patents as were necessary in the manufacture of such containers. In accordance with the instructions contained in this letter, the respondents paid no royalties in respect of supplies delivered after that date. The appellants contended that, since no statutory authority was necessary to empower the respondents to use the patent, the user was by virtue of the licence and they were entitled to the royalties payable thereunder. Alternatively, they claimed a declaration that the clause relating to minimum royalties was still operative, but the respondents contended that, according to the wording of the clause, a declaration and guarantee of the maximum capacity of each unit was a condition precedent to any liability thereunder :—

HELD : (i) the containers were supplied to a company as agents for the Air Ministry, and were being used in the service of the Crown. The proviso to sect. 29, therefore, applied and the only payment recoverable was that provided for by sect. 29 and to this extent the licence was inoperative.

(ii) a declaration and guarantee of the maximum capacity was a condition precedent to any liability under the minimum royalty clause and no payment was recoverable thereunder.

Decision of ATKINSON, J. ([1943] 2 All E.R. 54) *varied.*

[**EDITORIAL NOTE.** The statutory provision giving the right to the Government to use a patent for the service of the Crown without payment of royalties was said not to effect the position between the patentee and his licensee. This, however, is rejected. It would, indeed, make the position of the licensee one of serious hardship. The point on the minimum royalty clause is purely a question of construction of the particular clause.

AS TO USE OF PATENTS BY THE CROWN, see HALSBURY, Hailsham Edn., Vol. 24, pp. 532, 533, para. 1019 ; and FOR CASES, see DIGEST, Vol. 36, pp. 690, 691, Nos. 1668-1674.]

Cases referred to :

(1) *R.* v. *Dibdin,* [1910] P. 57 ; 42 Digest 600, *689* ; 79 L.J.K.B. 517 ; 101 L.T. 722.

*(2) *Akt. fur Autogene Aluminium Schweissung* v. *London Aluminium Co., Ltd.* (*No.* 2) (1923), 40 R.P.C. 107 ; 36 Digest 823, *3073.*

(3) *Dixon* v. *London Small Arms Co.* (1876), 1 App. Cas. 632 ; 36 Digest 690, *1670* ; 46 L.J.K.B. 617 ; 35 L.T. 559.

*(4) *Coombe* v. *Greene* (1843), 11 M. & W. 480 ; 31 Digest 323, *4643* ; 12 L.J.Ex. 291 ; 1 L.T.O.S. 148.

APPEAL by the plaintiffs and cross-appeal by the defendants from a decision of ATKINSON, J., given on Mar. 24, 1943, and reported [1943] 2 All E.R. 54, where the facts are fully set out. The appeal was heard by all three members of the court, but during the hearing of the cross-appeal LUXMOORE, L.J., was unfortunately taken ill and took no further part in the proceedings. By agreement between the parties, the cross-appeal was continued before two lords justices. The judgment on the appeal is thus the judgment of the whole court, but that on the cross-appeal is the judgment of Scott and du Parcq, L.JJ.

G. Granville Sharp and *Kenneth Diplock* for the appellants.

Sir Walter Monckton, K.C., Valentine Holmes and *A. L. Macmillan* for the respondents.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*), and *Hon. H. L. Parker* for the Crown.

du Parcq, L.J. [delivering the judgment of the court]: It became clear in the course of the argument that the interests of the Crown might be affected by our decision of the appeal and that it was desirable that the Crown should be represented at the bar, so that all relevant arguments might be put before us. Counsel on each side welcomed a suggestion that the Attorney-General should be invited to appear as *amicus curiae*; and we are indebted to him for acceding to our request and for his valuable contribution to the full and able discussion which we have heard at the bar.

The trial judge found himself compelled to decide against the plaintiffs on the first of their two main contentions, which was that the Patents and Designs Acts, 1907-1939, s. 29 (1), did not render inoperative, or in any way affect, the terms of the agreement and licence contained in the deed of July 5, 1935. We agree with the judge's conclusion on this part of the case, and can add little to what he said; but, in deference to the elaborate and ingenious argument presented to us by counsel for the plaintiffs, we will state in our own words why we think that their contentions must fail.

In our view, the language of sect. 29 (1) is clear; and anyone who reads it with a sincere desire to give effect to the expressed intention of the legislature can hardly fail to give to it the meaning for which the Crown and the defendants contend. A Government department has authorised the defendants to use the invention in question for the services of the Crown on terms to be agreed on between the department and the plaintiffs as patentees, or otherwise settled in pursuance of the subsection. It follows that, so far as concerns the use of the invention for the services of the Crown, the terms of the agreement and licence concluded between the parties have become inoperative.

But, say the plaintiffs by their counsel, to read the section with this simple adherence to its literal meaning is to do violence to a settled principle of construction. In *R.* v. *Dibdin* (1), Fletcher Moulton, L.J., referred to "the fundamental rule of construction that a proviso must be considered with relation to the principal matter to which it stands as a proviso"; and many cases can be cited in which this rule has been observed. It is, indeed, only a branch of the elementary principle that words in a statute (and, we may be pardoned for adding, words in a judgment) must be read with reference to their context. One expects a proviso to depend upon, and to limit or define, the main enactment. In *R.* v. *Dibdin* (1) (to take that case as an example) the main enactment said that no marriage contracted between a man and his deceased wife's sister should thenceforth be void or voidable as a civil contract by reason of such affinity. The proviso that no clergyman should be liable to any suit, penalty or censure for anything done or omitted to be done by him in the performance of the duties of his office could fairly be read as meaning that a clergyman who refused to solemnise such a marriage was not to be exposed to penalties. So read, it fulfilled one of the purposes of a proviso in that it modified the main enactment. To interpret it as meaning that a clergyman could lawfully treat two persons lawfully united in wedlock as "open and notorious evil livers" would have been to regard the legislature as having, one might almost say covertly and surreptitiously, introduced into a proviso an enactment of wide import. The context did not require, and could hardly be said to permit, such a construction. It must not be supposed, however, that, if Parliament had in plain terms stated in the proviso that a clergyman might do just what the clergyman in *R.* v. *Dibdin* (1) had claimed a right to do, the courts would have been entitled to refuse to give effect to that enactment on the ground that the draftsman of the Act had broken a rule which he should have observed. The object of the rule is to ensure that effect shall be given to the true intention of

Parliament, and not to prevent the courts from giving effect to that intention. Still less is the rule designed for the purpose of defeating the intention of the legislature. The courts have not, and certainly do not claim, the right to say to Parliament or to its draftsman: "Observe the rules which we lay down, or, though your meaning may be perfectly clear, we will teach you a lesson by interpreting your language in a sense which you obviously did not intend."

Whether the section is viewed in its historical setting, or read without reference to the state of the common law down to 1883 and to the legislation and judicial A
decisions subsequent to that date, it appears to us that much misplaced ingenuity must be exercised before its natural meaning can be cut down. It was said that, since a licensee already has authority to "make, use or exercise the invention," he could require no further authority. But what the Government department may give him is not merely an authority to use the invention, which he certainly does not need, but an authority to use it for the services of the Crown on terms which are to be agreed, or failing that, in accordance with the statute, and that B
is a very different thing. It is not a matter for surprise that Parliament should allow that latter authority to be granted to a licensee by a Government department; and it must certainly have been in the contemplation of Parliament that the Crown would often wish to make use of the services of the licensees of a patent, who, in practice, must often be the most suitable and, sometimes, the only persons who can be employed.

Then counsel for the appellants argued that the proviso does no more than C
enable Government departments to use a patent which, without it, they could not have used. Apart from the section, there was, they said, nothing to prevent the Government department from making use of this invention at a price, and Parliament did not mean to enable them to avoid paying the price which any of His Majesty's subjects would have to pay. We can only say that it seems to us to be clear that not the least important object of the proviso was to relieve D
Government departments of that obligation. Then there was a suggestion, which we find it difficult to follow, that the defendants could not be brought within the words "their agents, contractors or others." Those words seem to us to be wide enough to include anybody on whom a Government department may choose to confer its authority. It is true that the Government department must make, use or exercise the invention "by" the authorised "agents, contractors or others": but this only means that the authority must empower E
or permit the "agents, contractors or others" to do for the department what (if that course were convenient) it might do for itself. In our opinion, SARGANT, J., correctly summarised this part of the proviso when he said, in *Aktiengesellschaft fur Autogene Aluminium Schweissung* v. *London Aluminium Co., Ltd.* (*No.* 2) (2), at p. 117:

> . . . protection is afforded to the Government department, and to any person or persons, F
> contractors or others, who are acting as agents for, or by the express or implied authority of, a Government department.

It is, of course, essential that the persons acting by the authority of the Government department shall make, use or exercise the invention "for the services of the Crown"; but, if this condition is fulfilled, the relationship between the Crown or the Government department and the persons acting G
by the department's authority is otherwise immaterial.

It was objected that, on this construction, the words "agents, contractors or others" mean no more than "any person or persons whatsoever," and are an unnecessary periphrasis. That they are periphrastic must be admitted. But the periphrasis has a historical explanation. Until the legislature intervened, the Crown was free to use a patented invention by its "officers, agents and servants . . . acting on behalf of and for the use of the Crown" (see *per* H
LORD CAIRNS, L.C., in *Dixon* v. *London Small Arms Co.* (3), at pp. 641 and 642). In *Dixon's* case (3) the House of Lords held that "contractors with" the Crown could not be regarded as agents of the Crown for this purpose. Sect. 29 of the consolidating Act is clearly designed first to put contractors with the Crown on the same footing as agents of the Crown, and then to include in the all-embracing word "others" all persons who could not be brought within the definition of "contractors" or "agents." The argument for the plaintiffs was really seeking to make the very width of the language used by the legislature a reason for

putting a narrow interpretation upon it, and so, as it seems to us, defeating the intention of Parliament.

For these reasons, we are of opinion that the appeal fails.

The cross-appeal in this case is against the decision of ATKINSON, J., on the
second of the plaintiffs' two main contentions: namely, that, at the least, they
were entitled to a declaration that cl. 7 of the deed of July 5, 1935, relating to
minimum royalties, was still effective. The defendants disputed this claim
A on the three grounds which are stated in the judgment of ATKINSON, J., at
pp. 59, 60. He rejected all three of the defendants' contentions. As to the
first two, we find ourselves in complete agreement with him, and we will add
nothing to what he said.

The third raises a much less simple question. The answer to it must depend
on the construction of cl. 7, and the clause must, of course, be construed with
reference to the facts known to the parties when the agreement was made.
B The argument for the defendants is simple. The minimum amount to be paid
depends upon a calculation, the end of which is to arrive at the appropriate
fraction of the units' "full capacity." To find the "full capacity," one must
start with the "maximum capacity." "Maximum capacity" appears to
mean the greatest quantity which the units can produce in a fixed period of time
when worked without interruption and with the largest possible amount of material.
C The figure which represents this capacity is no doubt ascertainable, as
ATKINSON, J., said; but that does not mean that there can be no doubt or
dispute about it. The defendants say that it was, or might be, of importance
to them that it should be the subject of a guarantee, and that, on the true
construction of cl. 7, the declared and guaranteed maximum capacity was to
be the only basis of the calculation. It was incumbent on the plaintiffs to declare
and guarantee the maximum capacity "upon installation of" each unit, which,
D by virtue of the interpretation clause, means "at the date of the notice in
writing which the licensor gives stating that any unit is ready for
operation." There is no provision in the contract permitting any other basis
to be taken for the calculation. When, therefore, the plaintiffs failed to give
a declaration and guarantee, they made the calculation impossible and gave up,
or lost, their right to minimum payments. Further, the defendants were
entitled to a guarantee, if not absolutely, at least as a condition precedent
E to any liability to make minimum payments. It would be unjust that they
should be compelled to make the payments without having had the guarantee
on which the payments were conditional.

This is plainly a formidable argument. The plaintiffs' first answer to it is
that it is founded on a wrong view of the facts. The maximum capacity of each
unit, they contend, was constant and invariable, as regular, if we understood
them aright, and as predictable as the movements of the earth itself. It
F cannot, therefore, have been the intention of the parties that the minimum
payments should be made only if the declaration and guarantee were given.
The contract, it is said, calls for payment apart from any conditions. The
words of the clause are "the licensee shall pay"; and the contract insists
that the payments "shall never be less" than the agreed sum. These words,
it is suggested, lose their meaning if the obligation to pay can be avoided by
G reason of so trifling and immaterial a default as the omission to state a fact
about which all were agreed. "Never, except in certain circumstances" is,
it was argued, a contradiction in terms. In truth (it is said) the defendants'
obligation to pay a minimum sum and the plaintiffs' obligation to give a
guarantee were independent of each other; and the plaintiffs' omission to give
the guarantee had no effect on the defendants' liability to make the payments.

In our opinion this answer, which found favour with ATKINSON, J., ought
H not to prevail. He was prepared to read the material words as if they were
equivalent to "the maximum capacity of each unit, from which shall be calculated the 'full capacity' of each unit based, etc., shall be declared and guaranteed
by the licensor upon installation." This is not, in our view, the natural construction of the words, though it might, perhaps, be acceptable if in truth the
maximum capacity could be said to be as well-known to the parties as the
number of seconds in an hour. But it is difficult to suppose that the contract
would have stipulated for a guarantee of anything which was so obvious and so
constant; and the evidence shows that there was no such certainty about a

unit's maximum capacity. The plaintiffs, in a letter written to their own solicitors on Jan. 6, 1943, which was put in evidence at the trial, referring to the absence of any declaration of guarantee, said :

> May be verbal mention has been made of a production of eight to nine boxes per minute, but we cannot trace any correspondence confirming any statement being made.

It was rightly observed by counsel for the defendants that there would be a very substantial difference between the amount payable according as a production of eight or of nine boxes was taken as the basis of the calculation to be made. In the light of this letter, and of the other evidence, we are satisfied that the meaning which *prima facie* the words bear must be attributed to them, and that there could be no calculation of minimum payments, and, therefore, no minimum payments, in the absence of a declaration and guarantee. The clause is so framed as to make the obligation to give the guarantee and the obligation to make minimum payments interdependent. The second cannot stand if the first is not performed. If the contract had called for the certificate of an engineer instead of a declaration and guarantee by the licensors, the plaintiffs' contention would have been unarguable and for the present purpose either stipulation must, in our opinion, lead to the same result by the application of the same principle of construction.

The only question now left for consideration is whether the defendants by their conduct waived the requirement of a declaration and guarantee. ATKINSON, J., would have been prepared to hold that a waiver was established, if he had thought that the question arose. In our opinion, there was no evidence of waiver. The mere fact that the defendants did not demand a declaration and guarantee cannot amount to a waiver, even if it be inferred that they did not demand them because they did not want them. A similar point arose in *Coombe* v. *Greene* (4), decided by the Court of Exchequer in 1843. There the appointment of a surveyor by the defendant was a " preliminary step " without which the plaintiff could not perform his obligation. The declaration did not allege that a surveyor had been appointed, but did allege that the plaintiff was at all material times ready and willing to appoint one, " of which the defendant during all that time had due notice." On demurrer the court held that, as the declaration did not aver any such appointment to have taken place, there must be judgment for the defendant. It is unfortunate for the plaintiffs that it did not occur to them to carry out strictly the terms of their bargain, and it may be that the defendants have had a lucky escape ; but we do not find it possible to avoid the conclusion that the claim for minimum payments must fail. To adopt the construction of the contract adopted by ATKINSON, J., would be, we think, equivalent to re-writing it.

There was a faint suggestion that the defendants were (as the reply alleged) " estopped from relying upon any failure by the plaintiffs to declare or guarantee the maximum capacity " of the units ; but it was, we think, ultimately conceded that this replication could not be maintained. There was no evidence of any words or conduct on the part of the defendants which had caused the plaintiffs to omit to give the declaration and guarantee when they should have done so—that is, at the date of each installation. Any subsequent words or conduct must be irrelevant for this purpose.

In our judgment, the cross-appeal succeeds. The appeal will, therefore, be dismissed and the cross-appeal allowed, in each case with costs. The order made by ATKINSON, J., must be set aside and judgment entered for the defendants with costs.

Appeal dismissed with costs. Cross-appeal allowed with costs. Leave to appeal to House of Lords.

Solicitors : *Markby, Stewart & Wadesons* (for the appellants) ; *George Martin & Co.* (for the respondents) ; *Treasury Solicitor* (for the Crown).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

ASSOCIATED INSULATION PRODUCTS, LTD. *v.* H. GOLDER (H.M. INSPECTOR OF TAXES).

[KING'S BENCH DIVISION (Macnaghten, J.), **April 3, 1944.**]

Income Tax—Dividends—Dividends of foreign corporation—Dividend payable four years after declaration—Whether shareholders assessable in year of declaration or in year of payment.

The appellant company was the beneficial owner of a number of shares in a corporation formed under the laws of the United States of America. On Dec. 15, 1936, the American corporation declared a dividend but by a further resolution provided that the distribution of the dividend should be in the form of a certificate of indebtedness to the shareholders payable on Jan. 1, 1940, with interest thereon at a fixed rate until payment. The appellant company contended that it was assessable to income tax in respect of this dividend in the year in which the dividend was declared :—

HELD : the company was assessable in respect of the dividend in the year in which it was actually paid.

[**EDITORIAL NOTE.** The point here taken is small but important. If it were held that the assessment could be made at the time of the declaration, an assessment might be made upon a sum which was not ultimately received, since it is quite possible that the company might find itself unable to fulfil its promise to pay or able to fulfil it only in part.

AS TO INCOME ARISING FROM SECURITIES AND POSSESSIONS OUT OF THE UNITED KINGDOM, see HALSBURY, Vol. 17, pp. 189-202, paras. 390-417 ; and FOR CASES, see DIGEST, Vol. 28, pp. 77-81, Nos. 422-450.]

Cases referred to :

(1) *Inland Revenue Comrs.* v. *Fisher's Executors*, [1926] A.C. 395 ; 28 Digest 107, *664* ; 94 L.J.K.B. 310 ; 132 L.T. 278 ; *affg.* [1925] 1 K.B. 451.

(2) *Aykroyd* v. *Inland Revenue Comrs.*, [1942] 2 All E.R. 665 ; 24 Tax Cas. 515.

(3) *Cross* v. *London and Provincial Trust, Ltd.*, [1938] 1 K.B. 792 ; [1938] 1 All E.R. 428 ; Digest Supp. ; 107 L.J.K.B. 423 ; 158 L.T. 217 ; 21 Tax Cas. 705.

APPEAL by the taxpayer from a decision of the Special Commissioners confirming assessments to income tax made on the appellant company. The facts are fully set out in the judgment.

Cyril King, K.C., and *J. S. Scrimgeour* for the appellants.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*), and *Reginald P. Hills* for the respondent.

MACNAGHTEN, J. : This is an appeal by the Associated Insulation Products, Ltd., from a decision of the Special Commissioners, confirming assessments made upon the company under Sched. D, Case V, for the four years ended Apr. 5, 1937, 1939, 1940 and 1941.

The assessments were made in respect of dividends received by the appellants from an American corporation called Mica Insulator Co., which has an issued capital of 750,000 dollars, divided into 7,500 shares of 100 dollars each. The appellant company holds beneficially 5,340 of those shares.

On Dec. 15, 1936, the American corporation passed the following resolution :

> That a distribution of 7 per cent. on the capital stock of the corporation, amounting to 52,500 dollars, be and the same is hereby declared payable on Dec. 15, 1936.

If nothing more had been resolved, that would have been the declaration of a dividend of 52,500 dollars, payable in the currency of the United States on that date ; but by a further resolution it was provided that the distribution should not be payable in cash, but in scrip ; and that the scrip should be in the form of a certificate of indebtedness set out in the resolution. The certificate acknowledged that the corporation was indebted to the stock-holder in the sum amounting to 7 per cent. on the stock held by him payable, not on Dec. 15, 1936, but on Jan. 1, 1940, and carrying interest at the rate of 4 per cent. per annum, payable on Mar. 15, June 15, Sept. 15, and Dec. 15, in each year. The certificate was a negotiable instrument and the American corporation reserved the right to pay it off at any time before the due date, In the tax year 1936-37, the American corporation redeemed a few of these certificates before they fell due and the amount so received by the appellant company is the first of the four assessments in question on this appeal. All the remaining certificates were paid by the corporation on the due date, Jan. 1, 1940; and the amount then received by the appellant company is the third of the assessments in question.

On Dec. 20, 1937, the American corporation passed resolutions for a distribution of 16 per cent. on the capital stock payable in scrip in the form of certificates similar to those issued in the previous year. These certificates became due and payable on Jan. 1, 1941, and they also carried interest at 4 per cent. per annum payable quarterly.

The American corporation redeemed a small number of these certificates during their currency and on Jan. 1, 1941, it paid all the certificates which had not been previously redeemed. The second and fourth assessments were made in respect of the moneys received by the appellant company for these certificates issued to it.

The first point raised on behalf of the appellant is that the dividends declared by the American corporation ought, in view of the decision of the House of Lords in *Fisher's* case (1), to be regarded as payments of capital and not as income payments: but my decision in *Aykroyd* v. *Inland Revenue Comrs.* (2) precluded counsel for the appellants from arguing that point before me, and he accordingly reserved it for argument elsewhere, if need be.

Assuming, therefore, that the dollars paid to the appellant company were not capital but income, the further point is raised that the assessments cannot be upheld because the company, under our income tax law, must be regarded as having received the income at the date when the resolutions declaring the dividends to be payable in scrip were passed; that is to say, in the case of the first distribution, on Dec. 15, 1936; and in the case of the second distribution on Dec. 20, 1937. In answer to this the Crown rely on the simple proposition that a promise to pay a debt is not payment of the debt, *Cross* v. *London and Provincial Trust, Ltd.* (3). In the computation of the profits of a trade or business, debts due in respect of the trade or business must, no doubt, be included; but dividends are not assessable until they are received. Dividends payable in future are not assessable until they become payable and are actually paid.

From the evidence adduced before the Special Commissioners it appears that, according to American law, the certificates are regarded for taxation purposes in the United States as income; and counsel for the appellant submitted that this is a matter of some importance, and should be taken into consideration in deciding whether they should be regarded as income in the United Kingdom. The law as to income for the purposes of taxation in the United States is obviously different from what it is in this country; and I do not think the American law affords any guidance as to how this case ought to be decided.

It seems to me to be a plain case. Under Sched. D, Case V, the appellant company is taxable on income from foreign possessions. That means what it says—in order to be taxable the appellant company must receive not a promise to pay, but payment. If the Revenue had assessed the company on these certificates for the years in which they were issued, in my view, any such assessment would have been invalid.

I, therefore, think the Special Commissioners were right in confirming the assessments; and the appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Clifford-Turner & Co.* (for the taxpayer); *Solicitor of Inland Revenue* (for the respondent).

[*Reported by* R. BOSWELL, ESQ., *Barrister-at-Law.*]

GLASSON (INSPECTOR OF TAXES) *v.* ROUGIER.

[KING'S BENCH DIVISION (Macnaghten, J.), **March 29, 1944.**]

Income Tax—Profit from profession or vocation—Authoress—Lump sum paid in computation of royalties—Capital or income—Income Tax Act, 1918 (*c.* 40), *Sched. D, case II.*

An authoress received in respect of certain novels royalties under a number of agreements with her publishers. Being desirous of raising a substantial sum of money, she entered into an agreement with those publishers whereby she granted the sole and exclusive right to publish throughout the term of the copyright 3 of her novels in volume form in the English language in the British Empire in consideration of £750 payable in three instalments of £250 each on July 8, 1940, Aug. 1, 1940, and Sept. 1, 1940. She was assessed to income tax on this sum of £750, the assessment being made under Sched. D, case II, as profits from her vocation of authoress :—

HELD : the sum was paid in computation of the royalties previously payable and was income and not a capital sum.

[**EDITORIAL NOTE.** It has recently been pointed out that, for the purposes of Sched. E, the distinction between capital and income receipts is not applicable. Sched. D, case II, is very similar to Sched. E, and it seems that there also no such distinction can be made.

AS TO SCHED. D, case II, see HALSBURY, Hailsham Edn., Vol. 17, pp. 174-177, paras. 363-371 ; and FOR CASES, see DIGEST, Vol. 28, pp. 61, 62, Nos. 310-315.]

Case referred to :

*(1) *Beare* v. *Carter*, [1940] 2 K.B. 187 ; Digest Supp. ; 109 L.J.K.B. 701 ; 163 L.T. 269 ; 23 Tax Cas. 353.

APPEAL by the Crown by way of case stated by the General Commissioners for the division of Bramber Lower in the county of Sussex. The respondent was assessed under Sched. D in a sum of £675 received by his wife under an agreement, details of which are set out in the judgment of MACNAGHTEN, J.

The Solicitor-General (*Sir David Maxwell Fyfe, K.C.*), and *Reginald P. Hills* for the appellant.

The respondent in person.

MACNAGHTEN, J. : Mrs. Rougier, an authoress of distinction, made agreements dated June 15, 1925, Aug. 23, 1932, and Feb. 25, 1935, whereby she granted to William Heinemann, Ltd., the sole and exclusive licence to print and publish in volume form in the English language in Great Britain, Ireland, the British Colonies and Dominions (except Canada and dependencies) novels written by her, subject to the payment of royalties at the rates specified in those agreements and the other terms therein set out. In 1940, being desirous of raising a substantial sum of money, she entered into negotiations with her publishers which resulted in an agreement of July 8, 1940.

By that agreement the three previous agreements were annulled so far as three of her novels were concerned, and Mrs. Rougier granted to the publishers the sole and exclusive right throughout the term of her copyright to publish those 3 novels in volume form in the English language in Great Britain, Ireland, the British Colonies and dependencies, and the publishers agreed to pay Mrs. Rougier the sum of £750 in three instalments : £250 on the signing of the agreement ; £250 on Aug. 1, 1940 ; and £250 on Sept. 1, 1940. That is the sum (less £75, the commission paid by Mrs. Rougier to her literary agent for negotiating the agreement) which is the subject-matter of this appeal. Mr. Rougier argued his own appeal very well and clearly.

He first raised the point that the decision of the Commissioners is a decision on a question of fact. If that be so, the appeal must necessarily fail, because there is no power to state a case for the opinion of the court except on questions of law. Therefore, their decision on any question of fact is final. Here the question at issue is : Whether the payment received by Mrs. Rougier is "capital" or an " income " payment for the purpose of income tax, and that is a question of law. Therefore, I cannot accede to that argument, any more than I can accede to his argument that, if the appeal be allowed, the revenue will get the tax twice. Though the statute does not expressly forbid double taxation, it is no doubt true that the revenue cannot get tax more than once upon the same income. If tax is charged upon the £675 received by Mrs. Rougier and she invests the money at interest, tax will also be charged on the interest received by her; but that would not offend against the rule which prohibits double taxation. The "income" received by Mrs. Rougier under the agreement of July 8, 1940, is not the same "income" as that received by her by way of interest.

The points on which the Crown relies are two. First of all, it is said, on the true construction of this agreement, the sum of £750 paid by the publishers under the agreement of July 8, 1940, was paid to release them from and extinguish their liability to continue paying the royalties which they had been theretofore paying Mrs. Rougier in respect of the three novels the subject-matter of the agreement; that the royalties so paid by the publishers were "income" within the meaning of the Income Tax Acts and were chargeable with tax is not disputed, and that the £750 paid to her was a sum paid in computation of these royalties. I think this contention on the part of the Crown is right. It is well-settled that a sum of money paid in computation of annual sums which are "income" for the purposes of the Income Tax Acts is chargeable to income tax; just as in the computation of the profits of a business a sum paid in computation of an annual "expense" is allowed as an "expense."

Reference was made to *Beare* v. *Carter* (1). The assessment in respect of Mrs. Rougier is made under Sched. D, case II, which imposes the tax on profits from any "profession" or "vocation." Dr. Carter was assessed under Sched. D, case VI because there was no ground for saying that he was following any profession or vocation within the meaning of case II. Mrs. Rougier, on the other hand, is a well-known and talented authoress, and her profits, therefore, from that vocation fall to be assessed under case II. In *Beare* v. *Carter* (1) the General Commissioners had decided that the sum received by Dr. Carter from the publishers of the one and only book which he had ever written was a payment in the nature of capital and not in the nature of income. This decision was upheld on the ground that the payment was made for the copyright of the book and was, therefore, to be regarded as a "capital" payment. If Dr. Carter had been assessed under case II, and it had been established that he was following the vocation of an author, the decision would necessarily have been the other way, and the sum that he received from the publishers would have been part of the profits or emoluments gained by him from his vocation. Therefore, apart from the point which I have mentioned raised by the Crown in this case, Mrs. Rougier, being an authoress, would be assessable to income tax in respect of this sum as being part of the profits or emoluments derived by her from following that vocation.

Mr. Rougier frankly admitted that, if it had been his wife's practice always to sell the copyright of her works out and out, the sums so received by her for the copyright would have been subject to income tax in the ordinary way. But he argued that, since this was the only case in which she had ever disposed of her copyright for a lump sum, it should be excluded from the assessment of her profits as an authoress. In my opinion, this argument cannot be sustained. Whatever Mrs. Rougier receives, whether by way of royalty or by payment for the sale of her copyright, each and all are profits earned by her in her vocation which must, in accordance with the Income Tax Acts, be included in the assessment.

I, therefore, think that the Crown is right, and the appeal must be allowed. The assessment must go back to the Commissioners to restore the amount at which it stood before they reduced it.

Appeal allowed with costs.

Solicitor: *Solicitor of Inland Revenue* (for the appellant).

[*Reported by* R. Boswell, Esq., *Barrister-at-Law.*]

TOMLINSON *v.* THE LONDON, MIDLAND & SCOTTISH RY. CO.

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and Goddard, L.JJ.), **March 29, 1944.**]

Master and Servant—Dismissal—Misconduct—Incorporation of provisions of conciliation machinery in contract of service—Exception of grave misconduct—Employee dismissed summarily for behaviour at canteen committee meeting—Exceptionally grave misconduct entitling company to dismiss summarily.

The appellant was under a contract of service with the respondent company which incorporated the machinery of negotiation for railway staff agreed to between the company and the appellant's trade union. A meeting of a canteen committee was held outside the employee's usual hours of duty. At this meeting, at which the appellant was irregularly presiding as chairman, a dispute arose, and the appellant assaulted a fellow employee and was disrespectful to a superior officer. As a result of his behaviour at this meeting the appellant was summarily dismissed from the company's service. The appellant claimed that his conduct of service had not been validly terminated. It was contended on his behalf (i) that the conduct at the meeting was not misconduct within the meaning of the machinery of negotiation for railway staff, and (ii) alternatively, that it was not exceptionally grave misconduct which entitled the company to dismiss him summarily under cll. 8 and 9 of the machinery :—

HELD : the appellant's conduct at the meeting in question was exceptionally grave misconduct under cll. 8 and 9 of the machinery of negotiation for railway staff, and the company was entitled to dismiss him summarily.

[**EDITORIAL NOTE.** There are two aspects of importance in this case. There is first a discussion of the incorporation into contracts of service of rules agreed upon by what is called the conciliatory machinery. The other is how far matters transacted outside the normal working hours can be subject to duties arising under the contract of service. The facts perhaps make this a clear case, but the matters dealt with are both novel and important.

AS TO DISMISSAL WITHOUT NOTICE, see HALSBURY, Hailsham Edn., Vol. 22, pp. 152, 153, para. 253 ; and FOR CASES, see DIGEST, Vol. 34, pp. 72-75, Nos. 492-513, pp. 77, 78, Nos. 546-550.]

Cases referred to :

(1) *Pearce* v. *Foster* (1886), 17 Q.B.D. 536 ; 34 Digest 74, *507* ; 55 L.J.Q.B. 306 ; 54 L.T. 664.

(2) *Ross* v. *Pender* (1894), 1 R. (Ct. of Sess.) 352 ; 34 Digest 60, *c*.

(3) *Jupiter General Insce. Co.* v. *Shroff* (*Ardeshir Bomanji*), [1937] 3 All E.R. 67 ; Digest Supp.

APPEAL by the plaintiff from a decision of CASSELS, J., dated Nov. 18, 1943. The facts are fully stated in the judgment of LORD GREENE, M.R.

The relevant clauses of the machinery of negotiation for railway staff are as follows :

An employee to whom the machinery of negotiation for railway staff is applicable, if charged with misconduct, neglect of duty, or other breaches of discipline, will (except as provided in cl. 8 below) be dealt with as follows :—

1. He will be informed in writing of the nature of his offence.

2. He will be permitted to state his defence in writing and in so doing to advance any extenuating circumstances ; and

3. He may, if he so desires, be heard in person before the appropriate officer of the company, but this shall not apply to cases of a trivial character.

4. At such hearings before the appropriate officer of the company an employee charged with an offence (*a*) will be permitted to call witnesses, and (*b*) may be accompanied, if he so desires, by a spokesman who shall be either a fellow-employee or a representative of his trade union.

5. If after investigation of such written defence, or alternatively after such hearing before an officer of the company, the employee is adjudged guilty, he will be informed in writing of the decision, but (except in cases of a trivial character) he shall have the right to appeal to the appropriate superior officer against such punishment to be inflicted.

6. Any such appeal must be made in writing within 7 days.

7. If the employee appealing so desires (*a*) he may be heard in person before the appropriate superior officer of the company, and if so (*b*) he may be accompanied by a spokesman who shall be either a fellow employee or a representative of his trade union.

8. The procedure set out in cll. 1 to 7 above shall not apply in cases of exceptionally

grave misconduct in which summary action by the management is justifiable, and shall not preclude suspension from duty in cases in which the management consider this necessary.

9. An employee dealt with under the provisions of cl. 8 shall not be precluded from submitting an appeal in writing to the appropriate superior officer of the company.

10. This agreement shall come into force as from Mar. 1, 1935, and shall supersede all existing agreements as to disciplinary procedure applicable to employees covered by the machinery of negotiation for railway staff.

In the court of first instance the following judgment was delivered by Cassels, J., after stating the facts.

Cassels, J.: I propose to deal with the service agreement first. I think that with the service agreement between the plaintiff and the defendants is incorporated the rules and the machinery of negotiation. The defendants have contended that this was a case of exceptionally grave misconduct, as to which cll. 8 and 9 of the machinery were proper to be applied. This was the reason for serving the plaintiff with form 1 (*a*) which gave him the right to submit his appeal in writing to the appropriate superior officer of the company, and to have a spokesman.

On behalf of the plaintiff, it was contended that cll. 1 to 7 really applied; that they were not observed; that the rules of natural justice were not observed. I hold that the procedure under cll. 8 and 9 applied, and the defendants' procedure was correct. The plaintiff was heard on his appeal through his spokesman, and all that his witnesses could say was put before Lazenby, who investigated the case. The company was entitled to treat this misconduct as being serious in view of the circumstances.

Even if the company had failed to observe the machinery of negotiation, which is incorporated in the plaintiff's agreement of service, no breach of it will avail the plaintiff to obtain what he seeks in this action, viz., a declaration that his contract of service with the defendants has never been validly terminated, and is still subsisting; and payment of his arrears of wages since Aug. 17, 1943. He could only obtain damages for dismissal without notice; and, as the plaintiff himself agreed that that notice would be one week—as, in fact, it would be—the damages would be, as the amount was agreed, £4 13s. He is not entitled to the declaration which he seeks. The plaintiff would not be entitled to damages for wrongful dismissal if that dismissal was justified.

That leads me to a consideration of the issue as to whether the defendants have satisfied me that the plaintiff's conduct on the night of Aug. 12, 1943, constituted misconduct for which they were justified in dismissing him summarily. If they were not justified, then the plaintiff would be entitled to one week's notice. If they were justified, the plaintiff is entitled to nothing. I have come to the conclusion that the plaintiff's conduct on Aug. 12 was amply sufficient to justify his summary dismissal. Here was a man adopting a defiant attitude towards his colleagues in the presence of his superior officer, who was attending this meeting on duty. Full of his own importance, the plaintiff became violent, created a disturbance, assaulted another servant of the company, and had to be restrained by his fellow-workmen. Such conduct in a service where discipline has to be maintained could never be passed over lightly. If the higher authorities in the company took the view that he was creating enmity and discord and jeopardising the smooth working of the depot—which, incidentally, is concerned with the most important part of the working of the railway, viz., the running—it was not an unreasonable view to take. I think Crossley, the superintendent, was right in regarding this conduct as an insult to his position. He was belittled, and it would indeed be difficult for him to maintain supervision over his large staff if such conduct were not to be dealt with severely.

For the plaintiff it was contended that this was not misconduct at all, because he was not on duty. I think I must take the circumstances into consideration. Here was a meeting on the defendants' premises, concerning the welfare of the men employed in the depot. Crossley attended in his official capacity, and was flouted by the plaintiff. It was a business in which both employers and employed were concerned. The meeting had been called in the interests of the plaintiff and his fellow-employees. The canteen was for the employees' benefit. It was a considerable scheme. Accommodation was to be provided for 140 persons taking a meal at once. Misconduct at such a time was misconduct in the employment and I am satisfied that this dismissal was entirely by reason of the serious misconduct of the plaintiff on Aug. 12.

If it were necessary that I should decide it, I should say, without any hesitation, that the defendants acted *bona fide* in what they did. I know it was urged on behalf of the plaintiff that, if he was entitled to damages for wrongful dismissal, he was entitled to much larger damages than a week's wages. In view of my decision, this point does not arise. It was submitted on his behalf that I have to consider, if I consider damages at all, that this dismissal represents the termination of his career of 23 years' accumulated training, hard work and experience, and that he is thrown on the labour market unable to obtain employment with any of the other railways of this country, and can never return to the same category of labour. I am not able to give consideration to these submissions. The law is very clear. I cannot take into consideration the plaintiff's injured feelings, or his loss of prospects. If entitled to any damages at all, he would be entitled to a week's wages. The law is the same for the plaintiff as for other people.

The plaintiff appealed.

Edward Wooll, K.C., and *Rose Heilbron* for the appellant.

G. J. Lynskey, K.C., and *H. I. Nelson* for the respondent company.

Wooll, K.C.: The company did not plead that the appellant was guilty of exceptionally grave misconduct under cll. 8 and 9 of the machinery of negotiation for railway staff, therefore, before the appellant could be dismissed at all, whatever his conduct, the procedure under cll. 1 to 7 should have been observed. Alternatively, appellant's conduct was not misconduct within the meaning of the machinery of negotiation for railway staff. The appellant was not on duty at the time of the meeting and was not acting as an employee of the company, therefore, his conduct was not conduct referrable to his employment. Alternatively, the appellant's behaviour was not exceptionally grave misconduct. [Counsel referred to *Pearce* v. *Foster* (1), *Ross* v. *Pender* (2) and *Jupiter General Insurance Co.* v. *Shroff* (3).]

Rose Heilbron followed on the same side.

Counsel for the respondent company were not called upon.

LORD GREENE, M.R.: The respondents, the London, Midland & Scottish Ry. Co., were minded to set up a canteen for the use of their workers at the Edgehill Motive Power Depot. The activities of this enterprise were to be managed by a committee of workers, and an invitation was issued for such a committee to be formed, with the instruction that the company's local officer, for example, the district locomotive superintendent, or his principal assistant, should be chairman. This litigation is concerned with something that took place in connection with the activities of that committee. The appellant complains of the action of the railway company in summarily dismissing him, and he says that, having regard to the rules applicable for regulating the relations of the railway company and their employees, his dismissal was ineffective, and his employment was never terminated because certain procedure laid down in the conciliation machinery in force was not followed.

I do not propose to read the provisions of the conciliation machinery, but it is not disputed, as I understand it, although we have not heard counsel for the respondent company, that that machinery is to be treated as incorporated in the contracts of service between the railway company and their employees. Therefore it forms one of the terms of that contractual relationship. The particular machinery which the appellant says ought to have been put into operation in his case is, by the express terms of the conciliation provisions, not to apply.

> . . . in cases of exceptionally grave misconduct in which summary action by the management is justifiable. . .

It was held by CASSELS, J., that the appellant had been guilty of exceptionally grave misconduct, and that summary action by the management in dismissing him was justified. It was suggested by counsel for the appellant that that particular issue was not really competent because it was not set up in terms by way of defence that the appellant had been guilty of exceptionally grave misconduct. I do not propose to go into the question of whether on a strict examination of the pleadings that particular matter was or was not open, because at the hearing the first argument for the railway company was founded upon the proposition that the appellant had been guilty of such misconduct, and the railway company's case was conducted on that basis. No objection was taken to that course. We were referred to a passage in the shorthand note at which it was first made clear by counsel for the company that he was relying on the point, and no objection was then taken that the point was not open to him. As I say, the case proceeded on the footing that it was open to him. Cassels, J., was invited to deal with that matter in his judgment, as he did. It seems to me quite impossible in those circumstances, the course of the trial having been as I have said, for counsel for the appellant to say in this court that that issue, which was the important issue presented to the judge, was one which ought not to have been taken into consideration in view of the pleadings.

The matter, therefore, falls to be dealt with in this court on the basis of the issues which were in fact submitted to the judge. The issue which was put in the forefront was this particular issue of whether the conduct was exceptionally grave misconduct or not. Once that matter was decided in favour of the railway company, all the other points in the case, of course, disappeared, because it formed a conclusive answer to the plaintiff's claim.

The circumstances in which the misconduct relied upon took place need be stated in no more than a few words. Steps were taken to form the committee of workers in accordance with the company's memorandum with regard to the proposed canteen to which I have referred. I do not propose to go into the various meetings and resolutions that were passed at what were said to be meetings of the committee but which were quite clearly irregular in many respects. It is sufficient to say that at the meeting held on Aug. 12 the appellant placed himself in the chair where quite obviously he had no right to be because the previous meetings were quite obviously irregular, having been summoned, and summoned to the knowledge of the appellant, without Crossley, the officer who was to be chairman, being given any notification. What took place at that assembly Cassels, J., describes, after a careful analysis of the evidence, in a few words. He said that the assembly was turned into a rough-house, and he describes the plaintiff's conduct as follows :

> Here was a man adopting a defiant attitude towards his colleagues in the presence of his superior officer who was attending this meeting on duty. Full of his own importance the plaintiff became violent, created a disturbance, assaulted another servant of the company and had to be restrained by his fellow workmen.

That is putting the matter very concisely and, indeed, from the evidence which Cassels, J., has summarised, very moderately. He found that those circumstances were sufficient to constitute exceptionally grave misconduct. I think it impossible to differ from the view which he took.

The main argument which was put before us was that no conduct outside working hours can be misconduct within the meaning of this rule, or at any rate this particular conduct outside working hours could not be misconduct within the meaning of the rule.

It was said that here were men in their leisure time doing something which it was no part of their duty to do. I agree, but just let us see what they were doing. The company in a matter concerning the welfare of its employees which it was anxious to foster and encourage sets up the machinery of a committee to deal with that particular welfare organisation. The proper setting up and organisation of this canteen was a matter of very great interest to the company, and of very great interest to the employees themselves. It was as intimately linked as anything can be linked with the general relationship of employers and men, and the contentment and comfort of the men in their work. That being the object, and a committee being set up for that purpose, this appellant proceeds to act in such a way as not only to interfere with the proper and smooth working of that machinery, but to make it impossible to carry it on smoothly in the future if conduct of that kind was going to become the rule. Annoyed because a fellow member had pointed out that he had no right to be in the chair, and pointed it out no doubt with some emphasis, he rushes at that employee and violently assaults him, with the result that he had to go to hospital. Moreover, it does not stop there, because not only did he assault him in that way, but he threatened him that, if he opposed him or aggravated him, as he put it, again he would be treated in a similar manner. Conduct of that kind is calculated completely to wreck and make impossible the working of the machinery that the company was endeavouring to set up for the benefit of the workers and indirectly for the benefit of the company itself. It seems to me quite impossible to suggest merely because this happened outside working hours that it was so disconnected with the employment as to make it wrong to regard it as misconduct within cl. 8. To say that seems to me to shut one's eyes to the obvious realities of the situation. I am not surprised that Cassels, J., came to the view that he did, and I should have come to the same view myself upon the facts as found by him with regard to what took place at that meeting, as to which there is no quarrel with his findings.

In these circumstances there is no ground whatever upon which this court ought to differ from the decision of Cassels, J., on that fundamental issue in the case, and the result is, in my opinion, that the appeal must be dismissed with costs.

MacKinnon, L.J.: I agree, and I do not think I desire to add anything.

Goddard, L.J.: I agree. I only want to add a word because earlier today I said something about the pleadings in this case. If I was criticising the statement of claim here, there was no ground for doing it, but I do not think the pleadings were satisfactory, and I do not think that the defence set up what ought to have been pleaded in this case. Unfortunately nowadays enough attention is not given to pleadings.

The position is this. The plaintiff set out in his statement of claim the terms of his contract of employment, the rules comprised in a rule book, and also the memorandum of agreement which it is agreed formed part of his contract of employment. That memorandum provides that, if charged with misconduct or other breaches of discipline, except as provided in cl. 8 below, the charge shall be dealt with in a particular way. The plaintiff set out cll. 1 to 5 of that memorandum and alleged that that procedure had not been followed in his case. Cll. 6 and 7 only deal with an appeal. If, therefore, that being the contract alleged, the defendants desired to justify the dismissal and to excuse themselves from not having put into force cll. 1 to 5 of the memorandum, they ought to have alleged cl. 8, that is to say, they ought to have alleged that the foregoing procedure would not apply in the case of exceptionally grave misconduct in which summary action by the management is justifiable. Therefore, to make it a good and proper pleading they ought to have alleged, by way of showing that they were not bound to have obeyed the provisions of the memorandum alleged in the statement of claim, that the plaintiff had been guilty of exceptionally grave misconduct in which summary action by the management was justifiable.

However, for the reasons pointed out by Lord Greene, M.R., that becomes immaterial, because it was made clear at the outset that the company were relying on the conduct as being exceptionally grave misconduct. No objection was taken at the trial on that, and the case proceeded upon the footing that the issue was whether or not the company could show that the man had been guilty of exceptionally grave misconduct, as to which I have nothing to add to what Lord Greene, M.R., has said. I still think the defence, in order properly to raise this, ought to have alleged exceptionally grave misconduct, and that summary action was justifiable.

Appeal dismissed with costs.

Solicitors: *J. H. Milner & Son* (for the appellant); *Alexander Eddy* (for the respondent company).

[*Reported by* M. D. Chorlton and R. L. Ziar, Esq., *Barristers-at-Law.*]

Re MILLING'S SETTLEMENT, PEAKE *v.* THOM AND OTHERS.

[Chancery Division (Morton, J.), **March 28, 1944.**]

Settlements—Construction—Life interest to daughter and then to the issue on attaining 21*—Gift over if she should die married without leaving issue—Daughter died having had two sons who attained* 21 *but predeceased her—Whether interests of issue defeated.*

By a settlement and in the events which happened, M., as a daughter of the settlor, had a life interest in one-sixth of the settled property, subject to the settlor's power of appointment and revocation. In default of appointment and after her death, M.'s interest was to be held in trust for her issue as tenants in common who being male attained the age of 21 years or being female attained that age or married. By a codicil to his will the settlor appointed that the share of any of his daughters who "shall die without having been married or if married without leaving issue" should be divided equally between the remainder of his daughters who should be living at his decease and the issue of any of them who should be then dead. M. died having had two sons both of whom attained 21 and both of whom predeceased her :—

HELD : upon the construction of the codicil, the two sons of M. acquired a vested and indefeasible interest in M.'s share.

A

[**EDITORIAL NOTE.** The contention here is that the rule in *Maitland* v. *Chalie* (1) applied to this case, but it is decided that that rule does not apply where there is a gift under a settlement and a subsequent exercise of a power of appointment.

AS TO DIVESTING, see HALSBURY, Hailsham Edn., Vol. 34, pp. 400-423, paras. 447-469 ; and FOR CASES, see DIGEST, Vol. 44, pp. 1125, 1126, Nos. 9738- 9751.]

Cases referred to :

(1) *Maitland* v. *Chalie* (1822), 6 Madd. 243 ; 44 Digest 1068, *9215*.

*(2) *Re Cobbold, Cobbold* v. *Lawton*, [1903] 2 Ch. 299 ; 44 Digest 1126, *9751* ; 72 L.J.Ch. 588 ; 88 L.T. 745. B

(3) *Re Davey, Prisk* v. *Mitchell*, [1915] 1 Ch. 837 ; 44 Digest 1134, *9811* ; 84 L.J.Ch. 505 ; 113 L.T. 60.

SUMMONS taken out by the trustees of the settlement to determine a question of construction. The facts are fully set out in the judgment.

Wilfrid Hunt for the two sons of Mrs. West.

Pascoe Hayward for daughters of the settlor other than Mrs. West. C

C. L. Fawell for the trustees of the settlement.

A. C. Nesbit for a son of a daughter of the settlor other than Mrs. West.

MORTON, J.: On Feb. 22, 1877, John Milling made a settlement of certain land. He conveyed the land to trustees upon certain trusts relating to the rents and profits of the premises for a certain period and he provided that when that period came to an end the trustees should pay the rents and profits of the premises to John Milling himself and his assigns during his life. The settlement then proceeded : D

> . . . And from and after his decease the said trustees or trustee shall stand seised of the said premises hereinbefore expressed to be hereby granted and the rents and profits thereof in trust for all or such one or more exclusively of the others or other of the six daughters of the said John Milling, namely . . . [I give their names briefly Elizabeth, Jessie, Mary, Martha, Evelyn and Ada] at such age or time or respective ages or times for such estate or estates in such shares and with such future and executory or other trusts for the said daughters or some or one of them with such provisions for their respective maintenance education and advancement either at the discretion of the said trustees or trustee for the time being or of any other persons or person and upon such conditions with such restrictions and in such manner as the said John Milling shall by deed with or without power of revocation and new appointment or by will or codicil appoint . . . E

I pause there to point out that strangely enough this power of appointment only extends to appointments in favour of the daughters and does not, as is usual, give the testator power to make appointments in favour of the children or issue of the daughter. The settlement proceeds : F

> . . . And in default of such appointment and so far as no such appointment shall extend the said trustees or trustee shall pay the rents and profits of one equal sixth part of the said premises hereinbefore expressed to be hereby granted unto each of the said six daughters of the said John Milling and her assigns during her life for her sole and separate use independently of any husband whom she may marry and of his debts control and engagements and her receipt alone shall be a sufficient discharge for the same and she shall not have power to dispose of the same or deprive herself of the benefit thereof by any mode of anticipation and from and after the decease of each of the said six daughters of the said John Milling respectively the said trustees or trustee shall stand seised of the one sixth share of the said premises the rents and profits whereof the same daughter respectively was entitled to during her life as aforesaid in trust for all the children of the same daughter respectively who being sons or a son shall attain the age of 21 years and being daughters or a daughter shall attain that age or marry under that age and their respective heirs and assigns as tenants in common in equal shares . . . G H

I pause again to say that there is no gift over at all in the event of a daughter dying without having any child who attains a vested interest. There is not the usual accruer clause, nor indeed is there any ultimate trust at all. Then there follows a hotchpot clause and certain other provisions which I need not read, but there is the following proviso later :

> Provided always and it is hereby further agreed and declared that notwithstanding the trusts hereinbefore declared it shall be lawful for each of the said daughters of the said John Milling by deed or will or any codicil thereto to appoint that the whole or any part of the rents and profits of the share the rents and profits whereof shall be payable to her for her life as aforesaid of the said trust premises shall be payable to any husband of hers who may survive her for his life or for any less period.

I should add that there is a power of revocation by deed conferred upon John Milling at the end of the settlement, although I do not think anything turns A upon that for the present purpose. It will be observed that, if the trust in default of appointment operated, there would be a resulting trust to the settlor in the event of any of the six daughters dying without having any child who attained a vested interest.

The facts as to the six daughters are as follows. Elizabeth married one Carter and died leaving issue on Aug. 29, 1917. Jessie died a spinster on Jan. 21, 1942. Mary married Colonel Charles James West and she died on Apr. 26, B 1942, having had two sons, both of whom attained 21 years of age and both of whom predeceased her. She made her will on Mar. 25, 1920, and a codicil dated Dec. 29, 1930. By her will Mrs. West exercised her power of appointing a life interest in favour of Colonel West. Martha married a Mr. Thom and is still living. Evelyn married a Mr. Robinson. She is still living and has a son who has attained the age of 21 years and is a defendant. Ada died a spinster on Aug. 7, 1892.

C To complete the history of the West family, on Mar. 8, 1944, Colonel West took out letters of administration to the estate of his son Charles, and on Mar. 21, 1944, Colonel West took out letters of administration to the estate of his son Neville, so that he now represents the estates of both of those deceased sons.

John Milling made his will on Apr. 11, 1877, and by his will he confirmed the settlement, which seems to have been an unnecessary provision. However, D he did confirm the settlement of Feb. 22, 1877. On Nov. 14, 1887, John Milling made a third codicil, which is a very curious document, and under which arises the question which I have to decide. The codicil is in the following terms, omitting formal parts:

> Whereas in and by my said will I have confirmed the settlement made by me on Feb. 22, 1877, Now therefore I hereby revoke such confirmation And in pursuance of the powers reserved to me in and by the said settlement and of every other power E in anywise enabling me in this behalf I appoint that the share of any daughter of mine who shall die without having been married or if married without leaving issue of and in the trust funds referred to in the said settlement shall be divided equally between and amongst the remainder of my said daughters who shall be living at my decease and the issue of any of them who shall be then dead.

Then follows a revocation of the appointment of certain trustees. The difficulty which arises in the present case is as to the meaning of the words " or if married without leaving issue," because, if those words are taken at their *prima facie* F meaning " or leaving issue her surviving," the result will be that neither of the sons of Mrs. West take any part of her share, although they both attained the age of 21 years and attained a vested interest under the trusts set out in the settlement to take effect in default of appointment. Further, if that meaning is given to the words in question in the codicil, it may be that Colonel West's life interest which has been appointed to him by his wife is also destroyed.

G The West share of the property is now of the value of some £7,500. I have referred to this codicil as being a curious document, and I will point out, in the first instance, that, although the testator seems to be purporting to exercise his power of appointment, he appoints in favour of the issue of any of his daughters who shall have died in his lifetime. Further it would be a strange and capricious thing if the settlor, who was also the testator, should desire to cut out children of a daughter of his who had attained the age of 21 years if they happened to H predecease their mother and give over the share of their mother to her other sisters and to the issue of any of her sisters who might have predeceased the testator, notwithstanding that those issue might have survived the testator by a day or so and died, it may be, under the age of 21.

It is quite clear that the words " leaving issue " in their primary significance point to the period of death. It cannot be said that in the ordinary *prima facie* meaning of the words Mrs. West died leaving issue in the present case. But there is a well-known rule of construction which is sometimes referred to as the rule in *Maitland* v. *Chalie* (1) and is stated by ROMER, L.J., in *Re*

Cobbold (2), at p. 304. In reading the judgment of ROMER, L.J., I propose to read it in the form which he undoubtedly intended it to have, and I think the form which was pointed out in *Re Davey* (3), at p. 847. So amended the the judgment of ROMER, L.J., in *Re Cobbold* (2), at p. 304, is as follows :

> If you have a gift by will to A. for life, and after A.'s death to his children in terms which would give them an absolute interest in A.'s lifetime, and then you have a gift over simply in these terms, " if A. dies without leaving children," you are to construe the expression " leaving " so as not to destroy any prior vested interest. In other words, you construe it as meaning [now I read the words as altered] " without having had a child who had attained a vested interest." That must now be treated as well settled.

In my judgment the rule thus laid down in *Re Cobbold* (2) does not necessarily apply to a case such as the present case where you do not find the two dispositions in a will but where you find a disposition in favour of the children of A. only in a gift in default of appointment under a settlement and where you find the subsequent provision in the event of A. dying without leaving children in a will or codicil exercising the power of appointment. There is no authority, so far as I am aware, which has extended the rule to such a case as the present one.

Counsel for the sisters of Mrs. West has submitted that there is no reason why the rule should be extended to the present case. He points out that, although it seems unlikely that a testator would wish to destroy a previously given vested interest which he has confirmed in his testamentary disposition, a power of appointment is directed to destroying interests which would have taken effect in default of appointment. In the present case the sons of Mrs. West, it is true, have attained a vested interest under the terms of the trust in default of appointment but their interest was always liable to be destroyed by an appointment by John Milling.

I should desire to consider the matter very carefully if I was to lay down as a general rule that the rule in *Re Cobbold* (2) could be applied generally to such a case as the present one. I am content to leave it at this, that I am not satisfied that there is any good reason for applying the rule to such a case as the present one. But assuming that the rule of construction stated by ROMER, L.J., does not apply to the present case, I am still of the opinion that I ought to construe the words " without leaving issue " in the present case as meaning " without having had a child who has attained a vested interest." I think, reading this codicil as a whole, that the testator intended merely to fill the gap which he realised might occur if a daughter of his died without having been married or if a daughter of his died without having a child who attained a vested interest. It is to be observed that, although he purports to be exercising his powers under the will, the testator has not thought fit to interfere with the life interest conferred in default of appointment on his daughters. I think it would be a very curious thing if he meant to cut out the children of a daughter who had attained the age of 21 by this curiously worded codicil. It is to be observed that the appointment purports to be an appointment in favour of the issue of his daughters in certain events, but that could only have effect in the case of a share where there was a resulting trust to the settlor so that he would become absolutely entitled and could dispose of it.

I think there are certain curious results which would follow by giving the words their *prima facie* meaning which I need not elaborate. Counsel for the sons of Mrs. West called attention to some of them in his argument. It is enough, I think, to say that reading the codicil as a whole and in all the circumstances of the present case I am satisfied that the words " without leaving issue " mean, and were intended to mean, without having had a child who attained a vested interest.

The result is that the share in question ought to be held subject to the life interest of Colonel West under the appointment to him as to one moiety in trust for the personal representative of Charles Theodore West and as to the other moiety for the personal representative of Neville West.

Judgment accordingly. Costs of all parties to be paid out of the capital of the settled funds.

Solicitors : *Montagu's and Cox & Cardale* (for the sons of Mrs. West) ; *Routh, Stacey, Hancock & Willis* (for the other parties).

[*Reported by* R. L. ZIAR, ESQ., *Barrister-at-Law.*]

Re VAN BERKEL'S PATENTS.

[CHANCERY DIVISION (Simonds, J.), **March 30, 1944.**]

Patents—Term of patent—Extension of term—Loss due to hostilities—Whether sales to Government to be taken into consideration.

The appellant was the owner of certain patents which expired on Dec. 1, 1943. As a result of the war there had been fewer sales. During 4¼ years of war 4,500 patented articles had been sold to the public and 4,500 to the Government. Before the war 4,500 articles were sold in about 18 months. The patentee applied under the Patents and Designs Acts, 1907-1942, s. 18 (6), for an extension of the term of the patent and contended that the sales of the patented articles to the Government should not be taken into consideration because the patentee had received nothing in respect of royalties on these sales :—

HELD : the sales to the Government must be taken into consideration inasmuch as the patentee derived a profit from the sales and had benefited by the continuity of business and the advertisement value. The patentee was entitled to an extension of 25½ months.

[**EDITORIAL NOTE.** The war may affect the return to the inventor from his invention and in certain circumstances he is entitled to an extension of the term. He has to show, however, that he has lost some return which he might reasonably have expected, and in this, the benefit to him of the use made of his invention by the Government must be taken into consideration.

AS TO EXTENSION OF TERM OF PATENTS, see HALSBURY, Hailsham Edn., Vol. 24, pp. 737-746, paras. 1373-1378 ; and FOR CASES, see DIGEST, Vol. 36, pp. 719-725, Nos. 2056-2125.]

APPLICATION by originating summons under the Patents and Designs Acts, 1907-1942, s. 18 (6), for an extension of the terms of certain patents. The facts are fully set out in the judgment.

G. S. W. Marlow for the applicant.

G. H. Lloyd-Jacob for the Comptroller-General of Patents.

SIMONDS, J. : This case raises a point of novelty. The patents, which related to bacon-slicing machines, expired on Dec. 1, 1943. As a result of the war the sales to the public have substantially diminished. In the course of the four years and three months of the war there have been approximately 4,500 patented articles sold to the public which corresponds to about the number sold in eighteen months before the war.

If the matter stood there, I should, therefore, deduct the eighteen months from the four years and three months and grant an extension of two years and nine months ; but, in addition to the sale of 4,500 patented articles to the public, there have been sales of an almost equal amount to the Government. It has been said, and quite accurately said, that, in respect of the latter sales the patentee has not got the full advantage of his patent because, in determining the price to be paid, he has had nothing in respect of royalties. What he has had is a fair manufacturing profit.

The question is, therefore, whether I ought to take off anything and, if so, how much in respect of those 4,500 sales to the Government. I think it is clear that I must take off something because in respect of those sales the patentee has been enabled to make a profit because he was the patentee and the person to whom the Government addressed their orders. It was only because he, being the patentee, was in a position at once to comply with any orders that could be given, that it was to him that the orders were given.

Secondly, I cannot disregard the fact that in respect of those sales he not only made profits, but got something more by way of continuity of business, and was able to reduce proportionately in respect of each article his overhead charges and to derive some advertising value. All these elements are difficult to calculate, but they have, in my judgment, to be taken into consideration.

I have come to this conclusion that, whereas, if these 4,500 articles had been sold to the public, I should reduce the extension by another eighteen months, inasmuch as they were not to the public, but were to the Government under less favourable conditions, I shall reduce it to a term of seven and a half months instead of the full eighteen months.

I adjourned the matter upon the first hearing in order that the position might be elucidated, for it appeared possible that some claim might be made against the Crown in respect of user of the patent under the Patents Act, 1907-1942, s. 29, or otherwise. Counsel for the applicant has stated that no such application has been made and has undertaken that no such application will be made, and it is on that footing that the extension is granted.

Accordingly, taking the eighteen months plus the seven and a half months, which I take to be twenty-five and a half months, from a period of fifty-one months, I get twenty-five and a half months. I shall extend the term—it will be a new grant—as from the expiry of the patent upon the usual B.T.H. terms for a period of twenty-five and a half months.

Order accordingly.

Solicitors: *Faithfull, Owen & Fraser* (for the patentee); *Solicitor to the Board of Trade* (for the Comptroller-General).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

R. *v.* DISTRICT REGISTRAR, KINGSTON-UPON-HULL, *Ex parte* NORTON.

[King's Bench Division (Viscount Caldecote, L.C.J., Humphreys and Macnaghten, JJ.), **March 15, 1944.**]

Practice and Procedure—Costs—Allocatur may be indorsed on or written at the foot of bill of costs—Allocatur not bad because taxing fee not paid before it is given.

The taxing master's *allocatur* of costs need not be a separate document, but may be indorsed on or written at the foot of the bill of costs provided the bill of costs together with the *allocatur* contains the name of the cause or matter, the name of the party whose costs are to be taxed, the amount at which the costs are taxed, and the signature of the taxing officer. The *allocatur* is not bad because the taxing fee is not paid before it is given.

[**EDITORIAL NOTE.** The position that arose in this case was that there appeared to be no definition of the word "*allocatur*," and the point was whether it must necessarily be a separate document or merely an indorsement or appendage to the bill of costs. The point is made a little more important by the fact that in the procedure adopted in the offices of the courts in London it is always in fact a separate document. This, however, is shown to be a mere matter of convenience and not a requirement of law.

As to Allocatur on Taxation of Costs, see HALSBURY, Hailsham Edn., Vol. 26, p. 103, para. 193; and for Cases, see DIGEST, PRACTICE, pp. 954-957, Nos. 4941-4973.]

Application by the defendant to an arbitration award for an order of *mandamus* that a district registrar be directed to hear certain objections to a bill of costs. The facts are fully set out in the judgment.

G. Russell Vick, K.C., and *Ronald E. Hopkins* for the applicant.

Valentine Holmes for the respondent.

Viscount Caldecote, L.C.J.: An action was referred to arbitration, which lasted two days, and an award was made against the present applicant for the sum of £1,008 16*s.* 11*d.*, together with an order for payment of costs. On Aug. 13 of last year, the plaintiff's solicitor brought in a bill for taxation. The matter was then considered in the absence of the clerk of the applicant's solicitor, and it was adjourned for further consideration in order that objections might be taken or arguments advanced against any figure allowed by the district registrar who was taxing the bill. Those objections were heard on Aug. 31 and the bill, which had been originally sent in for £535, in addition to a figure for disbursements, was allowed at a total figure, including the taxing fee, of £493.

We have been informed upon affidavit that the district registrar at that stage had no information as to any intention on the part of the applicant to bring in objections to the certificate, if and when it was given, and accordingly the district registrar added at the bottom of the bill these words, "Taxed and allowed, £493 6*s.* 4*d.* Aug. 31, 1943. A. V. Rhodes, District Registrar."

The bill itself as delivered begins with the familiar heading " In the High Court of Justice," and so on, " Between Pollard and Norton," plaintiff and defendant, " amount recovered £1,008 16*s.* 11*d.* Plaintiff's bill of costs for taxation."

It has been proved that the applicant and his advisers wished to take further objection to an amount allowed for the instructions for brief. When, however, he brought in that objection, the applicant's solicitor was met by the statement of the district registrar that he could not receive the objection because the matter was at an end as he had decided the matter and made his *allocatur.*

What is said is that the district registrar was wrong upon that matter. No charge has been made of impropriety against the district registrar. What was said was that the district registrar did not comply with the provisions of the law with regard to his *allocatur* or certificate.

We have listened to a full discussion as to what an *allocatur* is. I am bound to say that I attribute no magic to the use of the word "*allocatur.*" I think it will be found in authorities dealing with the question of costs that the decision of the taxing master as to the amount at which the bill is to be taxed is as often called a certificate as an *allocatur,* but the point that has been taken is that the Rules of the Supreme Court—and the applicant must put his case as high as this—require the *allocatur* to be in a particular form in writing and to be contained or made in the form of a separate document. It seems that in London the practice is that it should be given as a separate document, but we have been informed by the district registrar that the practice in the district registries or, at any rate, in his registry, has not been to make the certificate or *allocatur* on a separate form, but to do what was done in this case and add a note or a statement containing the material facts upon the bill of costs itself.

I have listened with care and attention to the references made by counsel for the applicant to the various rules and orders. They are contained, for the most part, in R.S.C., Ord. 65, r. 27, and in the regulations under r. 27. I have not been able to find from first to last anything to say that the *allocatur* or the certificate must be in any particular form.

We have had handed up to us a document which we are informed can be obtained in this building on the payment of a small sum of money and that document is endorsed in front " Allocatur for Costs." I am quite prepared to accept the statement that that is a customary and proper form in which an *allocatur* can be drawn up, but that is far from saying that it is the only form in which it can be drawn up. I am satisfied that the addition to the bill in the form of a note is satisfactory in so far as it contains everything of substance. As in the course of the argument I ventured to suggest, there are at least four matters which are important : the name of the cause or matter, an indication of the party whose costs are to be taxed so that they may be paid, the amount at which the bill of costs is taxed, and the signature of the taxing officer or some other responsible person giving those details. I may say that, in the form of *allocatur* which has been handed in as the proper form, it appears that the certificate or the *allocatur,* as it is called, is to be given by the principal clerk and not by the taxing master himself.

I have not been able to see throughout this case any defect in substance in the form of this note upon the bill of costs. It seems to me to give all the material information, and, even if the rules were much more precise than they are as to the form in which a certificate or *allocatur* should be given, I should, I think, feel some difficulty in saying that it was defective because it might be that it did not precisely follow the form laid down in the Rules. As we all know, there are forms which are proper forms to be used in various proceedings, but the precise language of the form is not the only way in which the matters to be dealt with can be set out, and, if the parties comply substantially with the forms, no objection can be taken on the ground that the precise verbal formula is not adopted. Here, as I have said, there is no rule or order saying that the document shall be in any precise form. Therefore, I see no reason why the fact that in London it is the practice to have a separate document should extend to district registries where, for convenience and having regard to the amount of business to be disposed of, the certificate or *allocatur* can be in a different form.

If there was anything in this note to the bill of costs which was defective in substance, I should feel that that was a proper ground for saying that it was not a certificate or an *allocatur* which ended the time within which a party might carry in objections. I think that this is really a question of substance and not of form, and I have come to the conclusion, after hearing this full discussion, that a proper method has been followed stating the necessary facts with reference to the taxation of this bill and that, therefore, there is no reason for thinking that the district registrar has erred in treating his note as a certificate or an *allocatur* after which it is not possible for him to receive objections to the bill of costs.

One other point was taken, namely, that it could not be a proper certificate because the taxing fee had not been paid before the certificate was given. Here, again, we have not been referred to any rule or provision of any sort that says that the taxing fee must be paid before the certificate of taxation is given and, in these circumstances, I think that no objection can be taken to the course followed by the district registrar and that this application should fail.

HUMPHREYS, J.: I agree.

MACNAGHTEN, J.: I agree and have nothing to add.

Application dismissed.

Solicitors: *Amery-Parkes & Co.*, agents for *A. V. Dickinson*, Hull (for the applicant); *Treasury Solicitor* (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Distinguished. I.R. COMRS. *v.* SILVERTS, LTD. [1950] 2 All E.R. 271.

J. BIBBY AND SONS, LTD. *v.* INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and Luxmoore, L.JJ.), **March 9, 10, May 2, 1944.**]

Revenue—Excess profits tax—Controlling interest in company—Directors holding shares as trustees of settlement—Directors with contingent beneficial interest in shares—Finance (No. 2) Act, 1939 (c. 109), *s.* 13 (2), (3), (9).

For the purposes of excess profits tax, where the average amount of the capital employed in the business in any chargeable accounting period is greater than the average amount of capital employed therein in the standard period and the directors have a "controlling interest" in a company within the meaning of the Finance (No. 2) Act, 1939, s. 13 (9), the standard profits may be increased by 10 per cent., but only by 8 per cent. where they have no such interest. The directors of the appellant company contended that they had a controlling interest on the ground that they were entitled to include among the shares held by them certain shares vested in three of them as trustees of a marriage settlement. They not only held these shares as trustees but had a contingent beneficial interest in them on the death of the present beneficiary without issue. The present beneficiary, who was married in 1916, had no issue but her husband was still living:—

HELD: the directors were entitled to include the shares held by them as trustees and in which they had a contingent beneficial interest in computing the number of shares held by them for the purpose of deciding whether they had a controlling interest in the company within the meaning of the Finance (No. 2) Act, 1939, s. 13 (9).

Decision of MACNAGHTEN, J. ([1943] 2 All E.R. 419), *reversed.*

[**EDITORIAL NOTE.** The facts here are fairly common among private companies, since many of the directors will be holders of shares as trustees of settlements. It will be seen that for the purpose of ascertaining whether they have a controlling interest in the company shares held as trustees can be included except in the case of a bare trustee who is bound to vote as the beneficial owner or owners direct.

FOR THE FINANCE (No. 2) ACT, 1939, s. 13 (9), see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, p. 1197.]

Cases referred to:

(1) *Downs* v. *Collins* (1848), 6 Hare 418; 36 Digest 428, *962*; 12 L.T.O.S. 102.

*(2) *British American Tobacco Co.* v. *Inland Revenue Comrs.*, [1943] A.C. 335; [1943] 1 All E.R. 13; Digest Supp.; *affg.*, [1941] 2 K.B. 270; [1941] 2 All E.R. 651.

(3) *F. A. Clark & Son, Ltd.* v. *Inland Revenue Comrs.*, [1941] 2 K.B. 270; [1941] 2 All E.R. 651; Digest Supp.

APPEAL by the taxpayer from a decision of MACNAGHTEN, J., given on July 28, 1943, and reported [1943] 2 All E.R. 419. The facts are fully stated in the judgment of the court delivered by LORD GREENE, M.R.

J. Millard Tucker, K.C., J. S. Scrimgeour and *Terence Donovan* for the appellants.

The Solicitor-General (*Sir David Maxwell Fyfe, K.C.*), *J. H. Stamp* and *Reginald P. Hills* for the respondents.

LORD GREENE, M.R. [delivering the judgment of the court]: By the Finance (No. 2) Act, 1939, s. 13 (3) which is one of the group of sections dealing A with excess profits tax, then for the first time imposed, the standard profits of a trade or business fall to be increased or decreased in relation to any accounting period in which the average amount of capital employed is greater or less than that employed in the standard period. The amount of the increase or decrease of standard profits is to be what is described as "the statutory percentage" of the increase or decrease in the average amount of capital employed. By sect. 13 (9) "statutory percentage" is defined as meaning in relation to a B trade or business carried on by a body corporate (other than a company "the directors whereof have a controlling interest therein") 8 per cent., and in relation to a trade or business not so carried on 10 per cent. Various amendments in the law relating to excess profits tax were made by the Finance Act, 1940, but they do not apply to the year of the present assessment.

The appellant company claims that it is a company the directors of which C had at the relevant time a controlling interest in it; and that, accordingly, the statutory percentage in its case was 10 per cent. The assessment was made in respect of the chargeable accounting period beginning April 1, 1939, and ending Dec. 31, 1939. It was made upon the footing that the appropriate percentage was 8 per cent.: and the Special Commissioners decided that this was the correct view. Their decision was confirmed by MACNAGHTEN, J., and the company now appeals.

D The holdings of the directors of the company, eight in number, were as follows. Between them they held in their own right 209,332 out of the issued ordinary share capital of £500,000 in shares of £1 each. Three of them were the registered joint holders of a further 57,500 ordinary shares which they held as trustees of their sister's marriage settlement. Under this settlement, subject to the interests of the sister, her children and issue, they have beneficial interests in the entire capital of the settled funds contingently on their surviving their E sister. The ordinary shares are the only shares in the issued capital of the company which carry voting rights. The matter for our decision may be stated thus: ought the 57,500 ordinary shares held by the three directors who are trustees of the marriage settlement to be taken into account in ascertaining whether the eight directors between them "have a controlling interest" in the company? If so, it is not disputed that the directors have a controlling F interest in view of the fact that between them they have more than 50 per cent. of the voting power. If, on the other hand, the 57,500 shares ought not to be taken into account, admittedly the directors have not a controlling interest in the company.

It was suggested in argument that the question thus raised is a question of fact and not a question of law. We cannot agree. It seems to us to be beyond dispute that, while the question what interest the directors have is one of fact, G the question whether such interest is a "controlling interest" is a question of law to be answered by a consideration of the true construction of the language of the statute.

If the reference to "controlling interest" in sect. 13 (9) had stood alone, we should have found little difficulty in deciding that the contention of the company was the correct one. Subject to the one case of a bare trustee who is bound to vote in accordance with the directions of his beneficiary, we can find H nothing in the language of the subsection which points to an intended distinction between a beneficial interest and an interest held by a trustee. A trustee in whom shares are vested in such circumstances that he has the usual discretion to vote as he thinks fit in the interests of the beneficiaries as a whole appears to us to be a person who, if he holds more than half the voting power, is properly and naturally described as a person who has a controlling interest in the company. He is commonly so described in the language of those familiar with the law and practice relating to companies. Thus, if a shareholder owning more than 50 per cent. of the voting power were to die and bequeath his shares to trustees on trust for his widow and children, and the question were asked : " Who now has the controlling interest in the company ? " no person familiar with company affairs would, I think, answer it otherwise than by saying : " The trustees." It was suggested that this answer would be incorrect in that the trustees are subject to the control of the court. We do not agree with this suggestion. The controlling interest must obviously be somewhere : it cannot be *in nubibus* ; and to say that it is *in gremio judicum* appears to us to violate one's common sense. The distinction between a legal and a beneficial interest is sufficiently well-known to justify the belief that, if the legislature had intended to draw A it, it would have said so in express terms.

The case of a bare trustee is not, of course, before us. But it seems to us that, in such a case, the control would naturally be said to be in the beneficial owner and not in the trustee ; so that, if the shares carried more than half the voting power and the beneficial owner was a director, he would properly be described as having a controlling interest in the company. B

It is pointed out, however, that the phrase " the directors whereof have a controlling interest therein " is used in other places in the Act which must, accordingly, be examined before its meaning in sect. 13 (9) can be determined. This is a just observation ; and we will now proceed to examine these references and the arguments based upon them. It is said that the phrase in the other places where it appears is limited by its context to the case of beneficial interests ; and that the same meaning must be attributed to it in sect. 13 (9). C

The first place in the Act in which the phrase appears is in sect. 13 (2). A person carrying on a trade or business to which the excess profits tax applies can elect to have the standard profits taken either at the minimum amount specified in subsect. (2) or at the amount computed in accordance with subsects. (3) to (9). Subsect. (2) provides that the minimum amount is £1,000, or

> . . . in the case of a trade or business carried on by a partnership or by a company the directors whereof have a controlling interest therein, such greater sum, not exceeding D £3,000, as is arrived at by allowing £750 for each working proprietor in the trade or business.

The expression " proprietor " is defined as meaning, in the case of a partnership, a partner, and in the case of a company any director thereof owning not less than one-fifth of the share capital of the company. The expression " working proprietor " is defined by reference to the time worked by a proprietor in the management or conduct of the trade or business. E

Two points call for notice here. The first is that a company is entitled to the additional allowance by virtue of the existence of one or more working proprietors whose aggregate shareholding cannot in the normal case give a controlling interest : the necessary additional shares to give the controlling interest which the directors must have in order to qualify the company for the additional allowance must, therefore, be provided by the remaining directors. The other point is that the only apparent intention of the legislature is to put a company F of the kind described on the same footing as a partnership. In the case of a partnership, it is by no means true to say that all its members must necessarily own their shares in the partnership beneficially. Cases are not infrequently met with where the executors of a deceased partner enter into partnership with a surviving partner, and so carry on the business for the benefit of the beneficiaries : see, for example, *Downs* v. *Collins* (1), where the position of executors G having an option to enter into partnership with surviving partners is discussed, and Lindley on Partnership, 9th Edn., at pp. 662 and 726. There is nothing that we can see in the language of the subsection to exclude a business carried on by such a partnership from the right to claim the additional allowance provided the requirement as to one partner at least being a " working proprietor " is satisfied. If the subsection applies to a partnership, some of the members of which have no beneficial interest, we do not see why it should be necessary H to introduce by implication, in the case of a company, the requirement that the interest must be one held by the directors as beneficial owners. It may also be pointed out that in the subsection substituted by the Finance Act, 1940, s. 31 (1) for sect. 13 (2), a trade or business carried on " by a single individual " is put on the same footing for the purpose of the " minimum amount " as one carried on by a partnership or a company whose directors have a controlling interest. Such an individual may be an executor or trustee—there is nothing in the subsection which can be construed as excluding him.

But the main weight of the argument was based on para. 10 of Part I of the 7th Schedule, which sets out the adaptations of income tax principles which are to have effect in the matter of computation of profits. That paragraph lays down special rules for a company " the directors whereof have a controlling interest therein." In the case of such a company whose standard profits are computed by reference to the profits of a standard period, a limit is put upon the amount of the deduction allowed in respect of " directors' remuneration." Where the standard profits are not so computed, no deduction is allowed. Sub-para. (2) provides that the expression " directors' remuneration " is not to include a director who is employed whole time in a " managerial or technical capacity and is not the beneficial owner of or able, either directly or through the medium of other companies or by any other indirect means, to control more than five per cent. of the ordinary share capital of the company." The argument, as we understand it, is as follows. The object of the paragraph is to prevent directors who control the company from raising their own remuneration so as to diminish the taxable profits, sub-para. (2) being inserted in order not to discourage the appointment to the board of managers or technicians holding a small number of shares. The only directors who can properly vote in favour of an increase in their own salaries are, it is said, directors who are beneficial owners of their shares. Trustee directors who used their votes for the purpose of obtaining such an increase would be committing a breach of trust and there would, accordingly, be no need to provide that, in the case of a company in which trustee directors have a controlling interest, increased remuneration should not be deductible. Therefore, the expression " the directors whereof have a controlling interest therein " must be confined to the case where the interest is a beneficial one.

It seems to us highly unlikely that the legislature would have left the meaning of the expression to be unravelled by such an elaborate process of ratiocination. The taxpayer is apparently left to discover his position not by reference to clear words of definition, but by working out for himself the hidden purport of para. 10 and deducing from it the alleged true meaning of the phrase in controversy. If indeed this is what the legislature has intended to bring about, it seems to us regrettable that the taxpayers who have to pay the taxes and the courts which have to interpret the statute should be left to thread their way through such dialectical mazes. But there appears to us to be a serious flaw in the reasoning. It is not in our opinion true to say that trustee directors necessarily commit a breach of trust when they use their voting power to increase their remuneration. In a proper case the court, if applied to, may well, and not infrequently does, authorise them to do so. We are, of course, assuming that the trustees are entitled to keep their remuneration under the terms of the trust or (as not infrequently happens) under an order of the court.

It is, however, a legitimate criticism of the argument that in para. 10 itself the phrase " beneficial owner " is used in connection with shares held by a managerial or technical director. Again, in sect. 17 (6) of the Act " owned " means " beneficially owned " by virtue of the incorporated provisions of the Finance Act, 1938. In this very statute, therefore, the legislature is showing its appreciation of the difference between beneficial and non-beneficial ownership ; and, if it intended the same difference to be operative in the case of the shares which give the controlling interest, it seems to us unthinkable that it would not have said so.

Counsel for the Crown, realising no doubt the difficulties which confront an interpretation which limits controlling interest to a beneficial interest, put forward an alternative argument to the effect that such a limitation was not necessary for their purpose. Mr Stamp suggested that the question was one of fact—a suggestion with which we have already dealt. Both the Solicitor-General and Mr. Stamp argued that in some cases where trustee directors have a majority of the voting power and in addition have a beneficial interest in the shares, they can properly be said to have a controlling interest in the company. They gave as an example the case of a trustee director who is also tenant for life under the will or settlement which comprises the shares. This was a curious suggestion and we can find no logic in it, when the argument based on para. 10 of Part I of the 7th Schedule is borne in mind. It was founded upon the supposition that a trustee director who is tenant for life can without impropriety vote in favour of an increase of his own remuneration whereas a trustee director who is only interested in remainder is precluded from doing so. But this is surely not the case. A trustee director, whatever his own beneficial interest may be, must use his voting power as a shareholder in the interests of the beneficiaries as a whole; and by voting for an increase in his own remuneration he is not merely, as was suggested, reducing his own dividends; he may also be reducing the amount which otherwise would be or ought to be carried to reserve, a matter which will affect the position of the beneficiaries entitled to the capital of the settled funds. Mr. Stamp went so far as to say that a trustee director who has a beneficial interest may have a controlling interest for some purposes and not for others within the meaning of the statute. But the language does not, in our opinion, admit of such an interpretation. The directors either have or have not a controlling interest—it is not possible to say that their possession of a controlling interest depends upon the particular type of resolution on which they are called upon to vote.

It appears to us that, apart from the special case of a bare trustee, there is no half-way house between an interpretation which limits the expression to the case of beneficial ownership and one which includes ownership by trustees, irrespective of the fact whether or not they also have some beneficial interest in the shares which give control. For the reasons which we have given, we think that the latter interpretation is to be preferred. If we are wrong in this, we do not think that the position is in any way altered by the existence of the contingent beneficial interests which the trustee directors have in the present case.

In conclusion we must mention two matters, lest it be thought that we have overlooked them. Reference was made to the provisions of the Finance Act, 1937, relating to the National Defence Contribution, where the phrase "the directors whereof have a controlling interest therein" first appears. We do not find it necessary to discuss these references, as they do not appear to us to throw any more light on our problem than the references in the Act of 1939, which we have discussed. The other matter is the decision of this court in *British American Tobacco Co.* v. *Commissioners of Inland Revenue* (2) and *F. A. Clark & Son, Ltd.* v. *Commissioners of Inland Revenue* (3), and the decision of the House of Lords in the former of these two cases. These cases were concerned with the meaning of "controlling interest" in connection with National Defence Contribution under the Act of 1937; but the questions arising for decision were of a quite different character from that which is now before us, and we do not find anything in the reasoning of the judgments and opinions delivered which can govern our decision in the present appeal.

The appeal is allowed.

Appeal allowed with costs. Leave to appeal to the House of Lords.

Solicitors: *Layton & Co.* (for the appellants); *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

YAGER *v.* FISHMAN & CO. AND TEFF & TEFF.

[Court of Appeal (Scott, Goddard and du Parcq, L.JJ.), **February 25, 1944.**]

Solicitors—Negligence—Lease—Option to determine—No duty to warn client of date for giving notice to determine.

Solicitors were from time to time advising a client about his difficulties with certain leasehold premises. The lease contained the usual break clause and the client complained that the date for giving notice to determine had been allowed to go by without his being reminded of his opportunity of exercising his option to determine it:—

Held: it was no part of the solicitors' duty to their client, apart from special instructions, to remind him that the date for exercising such an option was approaching.

[**EDITORIAL NOTE.** The point here though discussed at some length is short and of practical importance. No doubt, if solicitors have correspondence with their clients, they often do remind them of the approach of such dates, but it is clearly shown that there is no duty to do so, nor, indeed, any duty to advise clients upon what are purely business matters. It is different where there are special instructions.

As to Liability for Negligence, see HALSBURY, Hailsham Edn., Vol. 31, pp. 134-136, para. 181; and for Cases, see DIGEST, Vol. 42, pp. 100-102, Nos. 940-962.]

Appeal by the solicitors from a judgment of Croom-Johnson, J. The facts are fully stated in the judgment of Scott, L.J.

John Morris, K.C., and *C. Binney* for the appellants.

C. R. Havers, K.C., and *Phineas Quass* for the respondent.

Scott, L.J.: A client claimed damages for negligence against two firms of solicitors as his professional advisers in regard to certain non-contentious business. The first firm (to whom I will refer as "Fishmans") was acting for the plaintiff, now respondent, from, at latest, Mar., 1938, till June 24, 1940, when their managing clerk, one Jordan, not himself a solicitor, passed into the employment of the second firm (to whom I will refer as "Teffs"), taking with him the business of the respondent, out of which this action arose, with the result that Fishmans then ceased to take any further part in it. The appeal is by the second defendants only, the judge having given judgment in favour of the first defendants on the ground that, although he had found them guilty of negligence, the plaintiff had suffered no damage thereby, and further that damage was essential to the cause of action. I do not agree with him that there was no cause of action without damage, because the action lay in contract; but there is no appeal from that decision. Against Teffs, however, he found negligence and awarded the plaintiff £400 damages and costs, such costs not to include any items relating to the claim against Fishmans or to their joinder in the action. Teffs appeal.

The respondent was at all material times a business man, having various interests; apparently he was in the timber and plywood trades. He was also interested in a company called the Euston Furniture Co., Ltd., which carried on business at 791, High Road, Tottenham, under an underlease for 21 years from June 24, 1934, granted by the trustees of one Bradshaw, the head lessees. The respondent had guaranteed the performance of the covenants of this underlease by the Euston Furniture Co.—including rent, repairs, dilapidations, etc. In Dec., 1937, this company had gone into voluntary liquidation, owing arrears of rent and apparently having no balance of assets for creditors, so that the respondent was under liability for the arrears and responsible for future rent. The liquidator did not at first try to get leave to disclaim; but did so towards the end of 1938. The court, however, on Jan. 11, 1939, refused leave. That underlease contained options to the company as under-lessee to determine the lease by six months' previous notice at the end of the third, seventh, or fourteenth years—i.e., June 24, 1937, 1941 or 1948. The important date for giving the notice on the facts of the present case was before Christmas, 1940. The respondent obviously could not exercise that right personally unless he first got the term vested in himself; nor could he, for the same reason, in any other way put himself in a position to reimburse himself, against his own liability for accruing rent, by sub-letting to a new tenant who would pay him an equal or greater rent. But as a matter of business he obviously regarded himself as the real holder of the underlease, and it appears from the correspondence that, in the expectation of being able without difficulty to get an assignment of the term, he had himself put the premises in the hands of house agents with a view to getting a tenant on terms which would cover his liabilities under the underlease. That he was alive to the presence in the underlease to the company of the option to determine is beyond all doubt. On May 27, 1938, Fishmans sent him the copy of the underlease which they had obtained from the liquidator; and again in Nov., 1938, a series of letters pass which contain references to the underlease, the copy of which was then still in his possession. I draw particular attention to two. On Nov. 4, 1938, the respondent asks Jordan in a postscript:

> Why didn't you call my attention to the fact that I could have got out of this agreement in 1937?

(which imports a complaint that Jordan did not do so at some date before Christmas, 1936). On Nov. 7, Jordan very properly replies, drawing attention to the whole position in relation to the arrears of rent and adds in regard to the postscript:

> It is no part of our duty to keep a record of when each client has to give notice to determine a lease.

Two months later Fishmans warn him of the danger of his position with a heavy claim against him as guarantor for arrears of rent and the risk of the landlords turning out "your prospective tenant." On Jan. 31, 1939, Fishmans ask him to return the underlease to them in order that they may prepare the assignment; and on Feb. 9 he replies:

> Regarding the lease, for the moment I cannot find this, and it is important when preparing the lease for the new tenants to bear in mind the "break" clause, which is about 1941. I will make another search for the lease, to see if it can be found.

That he had the break clause in mind all the time is shown by his letter to Jordan of Aug. 26, 1939:

> I am sorry to have to write you again regarding the shop at Tottenham. A long time has elapsed and I am anxious that we shall not have a recurrence of what happened before, namely, to have to pay rent to the superior landlords. We should also watch our step when we can get rid of the lease; we did have a chance at one time, but as you know, that went by.

The inference is irresistible that Jordan was justified in assuming throughout that the respondent was alive to the option terms of the underlease. To my mind any other assumption by Jordan would have been ridiculous. If the respondent at any stage forgot the date for notice to the landlord, as is possible, it was his duty to tell Jordan so in plain language; the more so as he was not the kind of client to pay his solicitor for unasked advice. I have no doubt that he was equally alive to the fact that by appropriate legal steps he could get the term legally vested in himself. But at any rate until at least Oct., 1940, I am satisfied that as a business choice he was still wanting to get a tenant and not to get the underlease brought to an end. Indeed, from first to last, I infer from the correspondence that he was a business man who took his own business decisions, and did not ask advice on them from his lawyers. He was quite well able to decide for himself whether it was better policy to get rid of the underlease and cut his loss, or to get hold of it for himself, and recoup himself by subletting. It was only on legal questions that he turned to his lawyers.

The action was tried exclusively on the correspondence contained in an agreed bundle. Neither the plaintiff nor anyone from either firm of solicitors gave evidence. The burden of proof in both his claims was heavy on the plaintiff; and I do not think it was possible to draw a satisfactory judicial inference in his favour on either claim, and certainly not on the claim against Fishmans, without seeing and hearing the plaintiff himself in the box under cross-examination. The same observation applies to the allegations of the statement of claim against Teffs.

Although there is no appeal in regard to the period down to June 24, 1940, with which alone the claim against Fishmans was concerned, it is necessary for two reasons to consider quite shortly what happened in that period; first, because the respondent's attitude during it, as manifested in his letters to Jordan, throws light on the later period, with which alone we are directly concerned; and, secondly, because the claim against Teffs raises the question of what knowledge Jordan already possessed of the matters he had in hand for the respondent when he took the business to Teffs. The claim against Fishmans in the statement of claim was for delay in taking legal action to get the tenancy of one Hammerson, the respondent's "proposed tenant," put on to a proper legal footing, the respondent himself having, in Nov., 1938, rashly let him into possession of the shop in question, when he, the respondent, still had no legal right to do so. The claim against Teffs in the action was quite different and on a directly opposite (and I think unfounded) assumption, viz., that the respondent had instructed them to abandon the previous plan of acquiring the legal title to the term, for the purpose of making Hammerson his real sub-tenant, and instead to bring the term to an end by the exercise of the option before Christmas, 1940. On this issue of a radical change of front by the respondent, it is vital to have in mind the two important facts which emerge from the first period, viz., (i) that the respondent knew all along, probably from the time when he gave his guarantee, but certainly from the year 1938, that the underlease contained an option to determine it; and (ii) that, when Jordan went to Teffs, he was aware of the fact that the respondent had that knowledge.

It is unnecessary to go into the details of Hammerson's occupation. Having been allowed by the respondent himself to go in, he stayed there, paying no rent, until June, 1940, when he was called up for some war service, and left the place empty. By letter of June 20, 1940, pleaded in the statement of claim against Teffs, the respondent informed Jordan and asked him "What he proposed doing in the matter ?" On June 21, the solicitors who had been acting for Hammerson in respect of the intended sub-lease reported the position to Fishmans. It was at this juncture that, on June 24, Teffs took over from Fishmans. About the same time Hammerson's reference had proved unsatisfactory ; and a debt to the landlords of £225 for six quarters' arrears of rent was still unpaid by the respondent. The arrangements for getting the term vested in the respondent and the tenant legally established as his sub-lessee were by June 24 almost completed by Fishmans. The letters from the respondent to Jordan of June 20 and July 2 (which are also pleaded in the statement of claim against Teffs) are quite incapable of bearing the construction put on them by the pleader. If they had meant what is alleged, the respondent would have said it in very different and quite clear language. They are a continuance of the position which Jordan brought with him to Teffs, viz., to get the underlease transferred to the respondent and to see that Hammerson's tenancy was given effective legal clothing. The contention of the respondent's counsel at the trial, that those letters meant what the statement of claim alleges, seems to me untenable as he did not put the respondent in the box. I regard the allegations against Teffs as an improper attempt by the respondent to invent a retainer which in the existing circumstances was most improbable. Quite shortly, I do not believe that the respondent intended Jordan to understand any such thing. In any case neither of the letters pleaded is sufficient to import any such instruction and request. The judge had already come to the conclusion that Fishmans had failed gravely in their duty of carrying out the respondent's instructions to get the Hammerson position regularised by getting (i) a licence from the landlord for an assignment by the liquidator to the respondent ; (ii) the assignment ; (iii) the landlord's approval of Hammerson as a tenant ; and (iv) the execution of a sub-underlease to him. These findings presupposed definite instructions from the respondent, and assumed also that he was not responsible for the delay. I do not discuss those findings or assumptions, but it is impossible to regard the letter of June 20, 1940, addressed to Jordan whilst still in the employ of Fishmans, as intended to withdraw the existing instructions to him.

The complaints made by the respondent in his statement of claim against Fishmans relate to matters of legal machinery to enable him to achieve a legally effective sub-letting of the premises ; and the complaint against Teffs is similarly limited to a failure by them to carry out the legal steps required to bring about the termination of the underlease in accordance with an alleged instruction to that effect. There is no allegation in the statement of claim against either firm of any request by the respondent for advice upon any question of business as distinct from law—in particular upon the question whether it would be better business for the respondent on the one hand to try and get out of the underlease liability even at the expense of paying all arrears of rent, and accepting liability for dilapidations, or, on the other hand, to maintain the underlease and find a tenant whose rent would cover his current and future financial liability to the landlords. To impose on a solicitor the legal responsibility of answering such a business question would require both unequivocal instructions and unqualified acceptance ; for it is no part of a solicitor's normal duty to profess the skill and experience for giving such advice. On what the position would be if he with his eyes open were to accept such a responsibility, I express no opinion. The question does not arise in this appeal. In my opinion, the correspondence does not disclose any such question put by the respondent to Jordan, with whom alone he seems to have been in personal touch, either before or after he left Fishmans. Indeed, I think that the respondent throughout acted on the footing that he was deciding all questions of money liability for himself. In so far as Jordan was quite properly treated by the judge as carrying forward into Teff's service the knowledge he had acquired in the service of Fishmans, I feel bound to say that I feel great difficulty in finding sufficient material in the correspondence for putting the blame for delay on Jordan, even during the Fishman period. That there was in fact great delay is obvious, but how far the blame for the delay was Jordan's and how far it was the respondent's is, to my mind, a very moot matter even in the earlier period. To carry forward into the consideration of the Teff period an impression that Jordan was to blame for this delay in the earlier period would be most unfair to Jordan as well as to Teffs. Against the former it would be like giving evidence of a previous conviction—and a very doubtful conviction at that. But, in any case, having regard to the respondent's decision not to go into the witness-box, I think it would be wrong to start the inquiry into the second part of the story, when Teffs had become Jordan's employers, with any assumption that any blame for previous delay rested upon Jordan rather than on the respondent himself. The relevance in the appeal of the fact that the respondent did not give evidence A is that the judge's judgment against Teffs rests on a finding of fact that Jordan accepted in effect an instruction to inform the respondent of the contents of the underlease. Indeed, the judge interpreted the letter of Oct. 15, 1940, from the respondent to Jordan as in itself an instruction to advise him as to whether he could get the underlease brought to an end; in spite of the fact that that letter had not been pleaded with the two letters of June and July. That it was not susceptible of that interpretation is, I think, shown plainly by the intervening B correspondence which all relates to getting the underlease vested in the respondent for the same reason as before the change of solicitors; viz., to enable the respondent to sublet effectively, and also to sue Hammerson. The answer from Jordan personally on Oct. 18 criticised by the judge, was a perfectly correct statement of the legal position; for there was no way "at present" for the respondent to get out of his liabilities under the guarantee. Even if the letter of Oct. 15 had been addressed to the question of terminating the under- C lease, that result could not be achieved before June, 1941. But I am satisfied that Jordan was justified in thinking that the respondent's letter of Oct. 15 was never intended to raise the question of the option at all. The judge, however, seems to have treated it as conveying a request to advise on the fundamentally business question to which I have referred above. I respectfully think that that interpretation was not justified. No negligence was established. D

For these reasons the appeal of Teffs must be allowed with costs here and below.

Goddard, L.J.: While it does not, of course, affect their legal position it is, I think, only fair to the two firms of solicitors concerned as defendants in this action to say that, throughout this long and involved story, the plaintiff was dealing direct with Jordan, who was a managing clerk to Messrs. Fishman till June, 1940, and thereafter entered the service of Messrs. Teff and E Teff. Such letters as the plaintiff wrote are all, I think, addressed to Jordan direct, who seems to have been a friend of his; it appears that whatever interviews there were took place between him and Jordan; and Teff and Teff only became concerned in the matter because, when Jordan entered their service, he took with him this piece of business. The plaintiff authorised them to take over the papers from Fishmans because, I infer, he desired Jordan to continue F to act for him. It was Jordan with whom he was dealing throughout.

I think, also, it was unfortunate that the plaintiff was not called as a witness. I appreciate that his counsel was placed in some difficulty owing to the view which the judge somewhat pointedly expressed, that he could be of no material assistance; but it does seem to me that, when solicitors are charged with negligence, it is material to know a good deal about the extent of the client's knowledge and experience. He seems to have been a director of the London Plywood and G Timber Co. and of the H. Yager Investment Trust; and must at some time have had an interest in or connection with the Euston Furniture Co., for whom he was guarantor; so I infer that he was a man of considerable business experience.

The nature and amount of advice which, in a matter of this sort, a solicitor would be expected to give to a person wholly unacquainted with business may differ very materially from what he would offer to an experienced business man, who would naturally decide for himself the course he thought it in his interest H to take. Whether, for instance, it was desirable to arrange to take advantage of an opportunity to get a lease determined, or whether to get a new tenant to take over the remainder of the term, was a matter of business on which, I should think, Yager would desire to follow his own opinion.

Though Fishmans have not appealed against the finding of the judge that they were guilty of negligence (and it may be that they could not, as they got judgment) it is necessary to examine quite shortly what the position of affairs was at the time they ceased to act for the plaintiff and their place was taken by Teff and Teff. It is clear that what Yager was desirous of effecting was that the liquidator of the Euston Furniture Co. should assign the lease to him so that he could sublet to Hammerson, whom he was willing to accept as tenant. So long as someone paid the rent and performed the covenants, the plaintiff would not then be called upon as guarantor. It is clear that the plaintiff had in mind that notice to break the lease could be given; and he had been warned by the letter of Nov. 7, 1938, that his solicitors did not undertake to inform him of the precise date on which he had to give notice. It was he who decided to let Hammerson into possession in Dec., 1938, though at that time the lease had not been assigned to him by the liquidator; and, considering that arrears of rent were accumulating, he could not expect that the landlords would consent to a sub-letting by him till the arrears were paid. This was clearly pointed out to him by Fishmans on Jan. 12, 1939; and the letter of Feb. 9, 1939, shows that the plaintiff had the break clause in mind. The matter then seems to have gone to sleep, for reasons which no one explained, till May, 1940, when the plaintiff executed his part of the assignment from the liquidator; but no progress could be made with the sublease to Hammerson, as the landlords were dissatisfied with his references.

About this time Hammerson vacated the shop. He had been in occupation about 17 or 18 months; and Yager never seems to have asked for any payment from him for his use and occupation, though I am not saying that he could legally have done so before the lease was vested in him. The liquidator could have done so; but did not.

This was the position when Jordan left Fishmans and entered the service of Teff and Teff. When they came on the scene, it seems clear that the only instructions given by the plaintiff were to get the lease assigned to him and sublet the premises to Hammerson. Meanwhile, no rent was being paid to the landlords; and by Aug., 1940, there were arrears for six months amounting to £225; and the September rent was accruing. Yager at this time seems, not unnaturally, to have been more concerned in seeing whether something could not be got out of Hammerson than with anything else, although, no doubt, he was fully conscious of his liability to the landlords under his guarantee. But he had not paid, and showed no inclination to pay, the arrears of rent; and in that respect the position was just as it had been in Jan., 1939, when he was advised that it was hopeless to expect he would get a licence to sublet while arrears were outstanding. Thereupon he wrote his letter of Oct. 15, 1940, on which the judge laid such stress, and which counsel for the respondent admits is the real foundation of his case against Teff and Teff.

He contends that, on receipt of that letter, it became their duty to advise the plaintiff to go to the liquidator and ask him to exercise the option to break the lease by giving six months' notice in Dec., 1940. At this time, however, there was a binding agreement with the liquidator for him to assign the lease to Yager, who was anxious to pursue his remedies against Hammerson, if he had any or could get them. As a mere guarantor of the Euston Furniture Co., he would have no right to sue Hammerson for use and occupation; and, if he gave up the idea of getting the lease assigned to himself, he would have no remedy, nor could he give the requisite notice to break the lease. The letter of Oct. 15 seems to me to show that the plaintiff thought he could get his liability under the guarantee for the Euston Co. postponed by availing himself of some war-time legislation, either with regard to the disclaimer of leases of damaged property or with regard to the payment of compensation for damage after the war. In fact he had no clear idea what he wanted, except that he wished to have his liability postponed for the time. I do not read his letter as an instruction to abandon the whole scheme of getting the lease vested in him and pursuing his remedy against Hammerson; and to substitute for that some method by which the lease could be terminated.

It is quite clear that Jordan did not so understand it, as is shown by his answer of Oct. 18. The advice given in that letter was perfectly accurate; nothing had arisen which gave, or could give, the plaintiff any release or postponement of his obligation as guarantor. If he wanted to abandon the whole scheme on which he had been working and see if he could get the lease determined by notice, which would have involved getting the agreement made with the liquidator rescinded, he should have so instructed his solicitors. I can well believe that other solicitors might have suggested this course to a client; but I cannot see that there was any duty on them to do so: that would be advising on a matter not of law but of business; and it was essentially for Yager to decide for himself whether he preferred the lease left in existence or determined. His letter of Oct. 15 indicated that what he wanted was his liability as guarantor postponed till the end of the war, not that he desired the lease determined. This letter was apparently followed by some interviews about which no evidence was given, and the subsequent letters throw no light on what took place at them.

I cannot hold that the letter in question placed any duty on these defendants of advising Yager that he ought to go to the liquidator and ask him to give notice to determine the lease; and as that is really the only thing that can be suggested as negligence in Teff and Teff, it follows that this appeal should be allowed.

du Parcq, L.J.: I have read, and agree with, the judgments of Scott and Goddard, L.JJ. As the argument proceeded, counsel for the respondent was, in the end, constrained to rely on the letter of Oct. 15, 1940. He contended that, if the appellants had shown reasonable care and skill, they would have responded to the request for advice which it contained, by reminding their client that he would escape future liability if he persuaded the liquidator to give a notice to terminate the underlease in June, 1941. Counsel admitted, however, as the facts compelled him to admit, that the appellants' representative, Jordan, was fully justified in believing that the respondent was already well aware that the liquidator had a right to give such a notice.

He was then left with the argument that at least the respondent ought to have been reminded of the date when such a notice ought to be given. The answer to that is that the respondent's solicitors were not bound to supply deficiencies in their client's memory unless they were clearly requested to do so. I am by no means sure that Yager would have welcomed a bill of costs which included charges for reminding him unasked of dates which he might be assumed to have in mind.

The appeal must be allowed and judgment entered for the defendants.

Appeal allowed.

Solicitors: *Hair & Co.* (for the appellants); *Goodwins* (for the respondent).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

HARMAN *v.* BUTT AND OTHERS.

[King's Bench Division (Atkinson, J.), **March 30, 1944.**]

Theatres—Licence—Conditions—Sunday opening—Cinema—"No child under 16 *shall be admitted"—Whether ultra vires or unreasonable—Sunday Entertainments Act,* 1932 (*c.* 51), *s.* 1—*Defence* (*General*) *Regulations, reg.* 42B.

The plaintiff was the licensee of a cinema situated in an area for which the defendants were the licensing authority. The competent military authority issued a certificate in accordance with the Defence (General) Regulations, reg. 42B, that it was desirable that cinemas in the area in question should be open on Sundays. Consequent upon this certificate the defendants, under the Sunday Entertainments Act, 1932, s. 1, as extended by the Defence (General) Regulations, reg. 42B, granted the plaintiff permission to give performances on Sundays provided that no child under the age of 16 should be admitted. The plaintiff contended (i) that the condition was *ultra vires* inasmuch as the defendants' power to impose conditions was limited to those relating to the use of the premises and did not extend to conditions relating to public interest; and (ii) that the condition was invalid because it was unreasonable:—

Held: (i) the discretion of licensing authorities to impose such conditions as they shall think fit when granting Sunday permits under the Sunday Entertainments Act, 1932, s. 1, as modified by the Defence (General) Regulations, reg. 42B, is unlimited except that it must be reasonable.

(ii) in the circumstances the condition was not unreasonable.

[**EDITORIAL NOTE.** The main point here is whether the discretion of the justices is a limited one. The authorities on the matter are fully considered, and the *Halifax* case (2), which has given most difficulty, is shown to be a decision under the 1909 Act and not under the 1932 Act.

As to Sunday Opening of Cinemas, see HALSBURY, Hailsham Edn., Vol. 32, pp. 75-76, paras. 96, 97; and for Cases, see DIGEST, Vol. 42, pp. 920-922, Nos. 160-175.]

Cases referred to:

(1) *Ellis* v. *Dubowski*, [1921] 3 K.B. 627; 42 Digest 921, *162*; 91 L.J.K.B. 89; 126 L.T. 91.

*(2) *Theatre de Luxe* (*Halifax*), *Ltd.* v. *Gledhill*, [1915] 2 K.B. 49; 42 Digest 920, *160*; 112 L.T. 519; *sub nom. Halifax Theatre de Luxe, Ltd.* v. *Gledhill*, 84 L.J.K.B. 649.

(3) *London County Council* v. *Bermondsey Bioscope Co., Ltd.*, [1911] 1 K.B. 445; 42 Digest 921, *164*; 80 L.J.K.B. 141; 103 L.T. 760.

(4) *Kruse* v. *Johnson*, [1898] 2 Q.B. 91; 13 Digest 326, *631*; 67 L.J.Q.B. 782; 78 L.T. 647.

(5) *Ellis* v. *North Metropolitan Theatres*, [1915] 2 K.B. 61; 42 Digest 919, *148*; 84 L.J.K.B. 1077; 112 L.T. 1018.

(6) *R.* v. *London County Council, Ex p. London & Provincial Electric Theatres, Ltd.*, [1915] 2 K.B. 466; 42 Digest 920, *154*; 84 L.J.K.B. 1787; 113 L.T. 118.

(7) *R.* v. *Burnley JJ., Ex p. Longmore* (1916), 115 L.T. 525; 42 Digest 921, *161*; 85 L.J.K.B. 1565.

(8) *Mills* v. *London County Council*, [1925] 1 K.B. 213; 42 Digest 922, *171*; 94 L.J.K.B. 216; 132 L.T. 386.

(9) *R.* v. *London County Council, Ex p. Entertainments Protection Association, Ltd.*, [1931] 2 K.B. 215; Digest Supp.; 100 L.J.K.B. 760; 144 L.T. 464.

Action by a licensee of a cinema for a declaration that a condition attached to a permission granted by the licensing authority for Sunday performances was *ultra vires* and unreasonable. The facts are fully set out in the judgment.

F. W. Beney, K.C., and *S. H. Lamb* for the plaintiff.

F. A. Sellers, K.C., and *Vernon Gattie* for the defendants.

Atkinson, J.: The question in this case concerns the validity of a condition imposed by the licensing authority for Weston-super-mare, under the Cinematograph Acts, when allowing cinematograph entertainments on Sundays. The plaintiff is the licensee of the Regent Picture House, Weston-super-mare, and the defendants are the Somerset County Council, the licensing authority for the county of Somerset, and the justices to whom the county council have delegated their powers under the Cinematograph Act, 1909, s. 5.

The claim is for a declaration that a condition excluding children under the age of 16, attached to a permission to open the Regent Picture House on Sundays, was *ultra vires* and unreasonable, and, therefore, invalid. I think that it was not necessary for the county council to be joined, and that they should be dismissed from the action. There is no question that they have properly delegated their powers under s. 5 of the Act.

By the Cinematograph Act, 1909, s. 2, the county council may:

> . . . grant licences for cinematograph exhibitions on such terms and conditions and under such restrictions as, subject to the regulations of the Secretary of State, the council may by the respective licences determine.

This Act has no relation to entertainments on Sundays, and the power to impose conditions, therefore, related only to performances on the 6 days of the week other than Sundays.

The Sunday Observance Act, 1780, has at all material times been in force. By that Act a house open for public entertainments on a Sunday, to which admission is by payment, is to be deemed a disorderly house. By the Sunday Entertainments Act, 1932, s. 1, the licensing authority has power to permit cinematograph entertainments in places licensed under the Act of 1909 on Sundays, subject to such conditions as the authority thinks fit to impose; but the power to permit Sunday performances was strictly limited. There were some picture houses, I do not know how many, which had been granted licences to open on Sundays. These permissions were contrary to law. There is no question about that.

Sect. 1 (5) recognised the position of such picture houses, and the subsection runs in this way:

> This section extends to every area in which places licensed by the authority having power in that area to grant licences under the Cinematograph Act, 1909, were, within the period of 12 months ending on Oct. 6, 1931, opened and used on Sundays for the purpose of cinematograph entertainments, in pursuance of arrangements purported to have been made with the authority, and shall also extend to any borough or county district to which it may be extended by an order laid before Parliament in accordance with the provisions of the Schedule to this Act, and approved by a resolution passed by each House of Parliament.

There is no suggestion that this picture house came within the first part of that subsection, and, therefore, any power to permit Sunday openings under that Act in this picture house would have to be in accordance with the provisions contained in the Schedule. I do not want to read more of the Schedule than I need, but the substance of it is that a council may submit a draft order to the Secretary of State, but before submitting that draft order for his approval certain procedure has to be adopted, and in the case of boroughs and urban districts, a notice of the proposal to submit the draft order has to be advertised and a public meeting has to be called, and a majority of the ratepayers, either by a vote at the meeting or by a vote obtained by means of a poll, must have voted in favour of it.

In other words, the order can only be submitted if the majority of the electors, which I suppose means the ratepayers, have expressed a desire for Sunday opening. At Weston-super-mare no such desire has ever been expressed, and no draft order has, therefore, been submitted, and at all material dates, as far as that Act was concerned, there was no power to permit Sunday opening.

Before I leave that Act I must say this: It seems to me that, in considering applications under that Act, the power to impose conditions related only to performances on Sundays. The wording of sect. 1 (1) is:

> The authority having power, in any area to which this section extends, to grant licences under the Cinematograph Act, 1909, may . . . allow places in that area licensed under the said Act to be opened and used on Sundays.

So that even without the final words, "subject to such conditions as the authority think fit to impose," any discretion to impose conditions allowed by the Act of 1909 would apply here. The final words, "subject to such conditions as the authority think fit to impose," give a further discretion, and I think must relate to opening on Sundays and to opening on Sundays only, and it is a further discretion to that which is granted by the earlier Act.

The next inroad into the observance of Sundays was contained in the Defence (General) Regulations, reg. 42B, and that provided that, if the competent naval, military or air force authority was of opinion that, having regard to the fact that large numbers of members of His Majesty's Forces were quartered in, or in the neighbourhood of a particular area, it was expedient that places in that area licensed under the Cinematograph Act, 1909, should be opened on Sundays for the purpose of cinematograph entertainments, that authority might furnish a certificate stating that the authority was of that opinion, and specifying the area in question and the council of the borough or county district in which the area was situated, and where such a certificate was so furnished, a draft order providing for the extension of the Sunday Entertainments Act, 1932, s. 1, in the area specified therein may be submitted by the council to the Secretary of State for the purposes of subsect. (5) of that section, without compliance, save as thereinafter provided, with the provisions of the Schedule to the Act.

On Apr. 25, 1940, a certificate was issued in accordance with that regulation, relating to the neighbourhood of Weston-super-mare, and on June 17, an order was submitted and was approved by Parliament and the Home Secretary, and such proceeding was notified on Aug. 21. Then in Oct., 1942, the licensing authority granted to the plaintiff permission to have performances on Sundays. I think at first it was one performance, and later it was altered to two performances, and the justices insisted on an undertaking that no child under the age of 16 should be admitted.

On Feb. 5, 1943, application was made for renewal of that Sunday licence. Strong objection was taken to the undertaking by the plaintiff, and in the result the licence was granted for a month subject to the same undertaking. On Mar. 5, 1943, the justices were informed that the plaintiff was not prepared to give the required undertaking, and would withdraw his application if the condition was insisted on. Certain local associations interested in the well-being of the neighbourhood supported the condition. The justices adhered to their view, and no licence was issued.

On June 11, 1943, the application was renewed. The justices adhered to their view, and in the end the licence was given and accepted by the plaintiff subject to the condition stated, it being understood that the applicant intended to test the validity of the condition.

A The mere fact that a licence has been accepted subject to a condition does not prevent the licensee attacking the legality of the condition. That was determined in *Ellis* v. *Dubowski* (1), where, at p. 627, SANKEY, J., dealt expressly with the point. This action is brought to test the question of the validity of this condition, and a declaration is sought to the effect that the condition was not within the power of the defendants to impose, and was unreasonable.

It is apparent that there are at least three totally different occasions on which B licensing justices may be called upon to exercise their discretion to issue a licence and to determine on what conditions the licence shall be issued. The application may be one under the Act of 1909 relating only to the six days in the week, excluding Sundays. It may be one relating solely to Sundays under the Act of 1932, where the majority of the ratepayers have expressed a desire for Sunday performances. Thirdly, it may be one where the ratepayers have expressed C no such wish, but where the application is made for the benefit of those members of the forces who are stationed in the neighbourhood for the time being.

The main contention of the plaintiff is that the condition is *ultra vires*, and that contention rests upon a majority decision of the Divisional Court in *Theatre de Luxe* (*Halifax*), *Ltd.* v. *Gledhill* (2), to the effect that, under sect. 1 of the Act of 1909, the power of the licensing authority to impose conditions is limited to the imposing of conditions which relate to the exercise of the powers granted D under the licence, and does not extend to imposing conditions relating to the public interest, however necessary they may be. A secondary contention is that, if he is wrong as to this, at any rate the conditions must be reasonable, and that this condition is unreasonable.

There are several authorities which were referred to with which I want to deal, and the first one in order of date is *London County Council* v. *Bermondsey Bioscope Co., Ltd.* (3). The decision there was that a county council, in granting E a licence under the Act of 1909 to use premises for cinematograph exhibitions for the purposes of which inflammable films are used, have power to insert therein a condition that the premises shall not be opened under the licence on Sundays, Good Friday or Christmas Day. Of course, the precise point is not very relevant here, but what is of interest is the broad statement of the measure of the discretion which was made by LORD ALVERSTONE, L.C.J., and F PICKFORD, J., and assented to by AVORY, J.

On p. 451 LORD ALVERSTONE, L.C.J., said :

> It has never yet, however, been laid down that, if the language of an Act is clear, full effect is not to be given to it because it goes beyond the title. The language of sect. 2 (1) seems to me to be quite clear, and we must therefore construe it according to its plain meaning. In my opinion that section is intended to confer on the county council a discretion as to the conditions which they will impose, so long as those conditions are not unreasonable.

G Then on p. 452, after referring to one or two decisions, LORD ALVERSTONE, L.C.J., said :

> That decision . . . seems to me to be only an illustration of the recognised principle that when powers are entrusted to a public body the court will be slow to interfere with the exercise by them of those powers. With regard to the case of *Kruse* v. *Johnson* (4), that decision again shows that the court ought to be slow to hold that a by-law made by a public representative body is void for unreasonableness. The H question which we have in this case to consider is simply whether the condition is beyond the powers of the county council.

Then at p. 453, PICKFORD, J., said :

> . . . I do not see how it could be denied that, subject to the regulations of the Secretary of State, the county council might impose such conditions, so long as they were not unreasonable, as they thought right.

We start with a very plain declaration that this discretion means what it says, and that the only limitation is that of reasonableness. I may say that, in a later case which I will come to, in the Court of Appeal, that decision was referred to with unqualified approval.

The next case in order of date is the one upon which the plaintiff relies. It is *Theatre de Luxe* (*Halifax*), *Ltd.* v. *Gledhill* (2), and it is again, of course, relating simply to performances on 6 days in the week, and there, as stated in the headnote, the licence was granted subject to the following condition, that:

> Children under 14 years of age shall not be allowed to enter into or be in the licensed premises after the hour of 9 p.m. unaccompanied by a parent or guardian. No child under the age of 10 years shall be allowed in the licensed premises under any circumstances after 9 p.m.

As stated in the headnote, it was held by Lush and Rowlatt, JJ.:

> . . . that the condition was *ultra vires* inasmuch as there was no connection between the ground upon which the condition was imposed, namely, regard for the health and welfare of young children generally, and the subject-matter of the licence, namely, the use of the premises for the giving of cinematograph exhibitions.

The principle laid down was that conditions must relate to the use of the premises, and that conditions relating to the public interest were *ultra vires*.

The judgments of those two judges was dissented from by Atkin, J., and he said that the restriction upon the power of the licensing authority to impose conditions is that the conditions must be reasonable; that they must be in respect of the licensed premises or in the public interest, and subject to that restriction he thought that there was no fetter upon the power of the licensing authority. I do not think I need refer to the reasons given. The judgments, I think, show that the headnote correctly represents the point. Atkin, J., took a very strong view about it; he thought that the justices were entitled to consider the interests of the community, or of any section of the community. I do not think it is unfair to say that, whenever that case has been referred to by judges it has been, to put it mildly, never referred to with unqualified approval.

The next case, which followed immediately after the one that I have just read, was *Ellis* v. *North Metropolitan Theatres* (5). That case again referred to Sundays, and the licence was granted subject to the condition that the theatre was not to be opened on Sundays, and the point that was taken was that on Sundays they were not showing inflammable films, and, therefore, they were not subject to the Act at all; but, notwithstanding that, it was held that the condition was a good one.

I think the only reason why that case was cited was to get the expression of opinion from Bray, J., when he referred to the *Halifax* case (2), and said, on p. 68:

> The ground upon which the court there proceeded was that sect. 3, which makes it an offence in the occupier of the licensed premises to allow them to be used in contravention of the conditions on which the licence was granted, was dealing with conditions which affect the user of the premises by the licensee.

Beyond that, I do not think that case is very helpful.

Then there came *R.* v. *London County Council* (6), where the point was that the London County Council, as the licensing authority, had refused to grant the renewal of a cinematograph licence to a limited company registered in England, on the ground that the large majority of its shares were held by alien enemies; and it was said that that refusal was *ultra vires*, and that they had no right to consider matters of that sort. It was held that they had a discretion as to the person or persons to whom they should grant licences, and the claim was dismissed. There are a few passages in that case which seem to me to be of interest, and the first one to which I want to refer is on p. 472, in the judgment of Lord Reading, L.C.J., where he said:

> The question for the consideration of the council subject to a point hereinafter mentioned upon the Cinematograph Act, was whether, acting with due regard to the public interest, the renewal of the licences should be granted to the secretary of the company on behalf of the company.

And he held that they could have due regard to public interest, so that, at any rate in his view, the question that he was determining, or one of the questions that he had to consider, was whether they had power to have regard to public interest. Then on p. 475, he said:

> It must be borne in mind that this court, in determining whether or not the *mandamus* should issue, is not exercising appellate jurisdiction. We are not entitled to decide

> according to the view we should have taken in the first instance had the matter come before us. We should only order the *mandamus* to issue if we came to the conclusion that the council, by taking into consideration the enemy character of the constitution of the company, had allowed their minds to be influenced by extraneous considerations.

Then there comes this very important line :

> The council in these matters are the guardians of the public interest and welfare.

At p. 476, he said :

> I cannot hold that such considerations are extraneous or extra-judicial. These exhibitions exercise a powerful influence, often too powerful an influence, upon the minds of the young ; sometimes also upon the minds of others. I cannot think that a court of law would be justified in treating such considerations as beyond the limits to which a man could look who was desirous of discharging his duty honestly to the best of his ability and with his mind directed solely to the public interest of the realm at a critical period of its history.

On p. 477, he said :

> . . . it was urged by Sir Edward Carson that, under the Cinematograph Act, 1909, the powers vested in the council are restricted to making provisions and imposing conditions for securing the safety of the public and other persons at the exhibition of inflammable films, and that therefore, the council could not take into consideration the enemy character of the directorate or shareholding of the company.

Then he went on to dissent from that view.

That case went to the Court of Appeal, and the views expressed by Lord Reading, L.C.J., were approved unreservedly, and on p. 488 Buckley, L.J., said this :

> If acting *bona fide* they thought that was a circumstance which ought to guide them in the exercise of their discretion, it was for them and not for us to determine. The only question we have to determine is whether the body with whom exclusively the determination of that matter lies has acted fairly and according to law.

That seems to me to be a very strong authority for saying that, even under the Act of 1909, the justices are entitled to consider matters of public interest.

The next case was *R.* v. *Burnley Justices* (7). There, again relating, of course, to the 6 days a week, conditions were imposed as to hours of opening, and there was a condition that no film should be shown if it was objected to by three justices. In addition to that, two undertakings were demanded, namely, that children should not be tempted to spend time in the cinematograph exhibition by gifts of sweets, souvenirs, etc., and that, on the notification by a medical officer of health that any department of a public elementary school had been closed owing to the prevalence of an infectious disease, the licensee should exclude from the cinematograph exhibition all children attending school. It was sought to get it declared that those conditions were *ultra vires*, and the application failed, except that that final condition was modified so that it related solely to the school at which the disease was prevalent.

At the bottom of p. 528, Darling, J., said this :

> Now, what is the position of the justices ? Are they fettered in any way, except so far as the regulations of the Secretary of State are concerned ? In my view they are not. It seems to me that the justices are absolutely free as to the grant or the refusal of a licence. It is clear that they are under no obligation to grant a licence to any person at all. The section which I quoted says that the licensing authority " may grant licences to such persons as they think fit " for the purpose of cinematograph exhibitions. This leaves the justices a very free hand in the matter of imposing conditions or asking for undertakings when an application is made for a licence.

Then, referring to the *Halifax* case (2), he said, at p. 529 :

> It has been argued before us that they would be bad as conditions, and reliance has been placed upon the decision in *Theatre de Luxe* (*Halifax*), *Ltd.* v. *Gledhill* (2). Speaking for myself, I prefer the judgment of Atkin, J., to the judgments of the other two members of the court, and, if I was at liberty to follow the judgment of Atkin, J., I should most certainly do so. But when the judgments of the majority are closely examined, it is clear that they only apply to conditions and not to undertakings. The view which was taken by the justices in the present case was undoubtedly a reasonable one.

I have read enough to show that Darling, J., did not like that decision. I do not think there is any difference between conditions and undertakings.

Then, at p. 530, Avory, J., said :

As to the undertakings, I think that both of them would be good as conditions. And if they are good as conditions, they are also good as undertakings. It does not seem to me that they in any way violate the principle laid down in the case of *Theatre de Luxe* (*Halifax*), *Ltd.* v. *Gledhill* (2). That case has been criticised, and I must say that I think that it is only an authority which should be followed when the same facts are in question as they were there. We are bound by the decision there given if the same state of facts exists, but the present case is different.

Again, I have difficulty in following that, because I think the *Halifax* case (2) laid down a principle, and did not depend upon the precise facts, but at any rate it is clear that that court, a court of co-ordinate jurisdiction, was not inclined to feel bound by the *Halifax* case (2) unless they were driven to it.

Then we come to *Mills* v. *London County Council* (8). There, as stated on p. 214, the condition was :

> That no film . . . which has not been passed for universal exhibition by the British Board of Film Censors shall be exhibited in the premises without the express consent of the council during the time that any child under or appearing to be under the age of 16 years is therein : Provided that this condition shall not apply in the case of any child who is accompanied by a parent or *bona fide* adult guardian of such child.

If the *Halifax* case (2) was to be followed—and it was cited and dealt with by counsel on both sides—one would have thought that that condition would have been held to be bad, but the strange thing is that in not one of the judgments of LORD HEWART, L.C.J., SHEARMAN or SALTER, JJ., was the decision even mentioned ; it was simply ignored, and it was held that the condition was a good one.

The only other case is *R.* v. *London County Council* (9). In that case a licence had been granted, including permission to perform on Sundays. It was, of course, before the Act of 1932. It was there held that there was no power to dispense with the provisions of the Sunday Observance Act, 1780. I do not think there is anything of importance there, except the importance which was attached to the fact that the Sunday Observance Act was still the law of the land, and that the county council had no power to dispense with the provisions of that Act.

I think those are all the cases which bear in any way upon the topic with which I am dealing. I can see no justification, myself, for cutting down the discretion, unlimited in terms, which is given to the licensing authority. As to the *Halifax* case (2), I merely say this, that it was a decision upon the 1909 Act, and I am dealing with an application which rests, not upon that Act at all, but upon the Act of 1932 ; and, bearing in mind what the later Divisional Courts have said, that the *Halifax* case (2) applied only where the facts are precisely the same, I think that I am at liberty to hold that it has no bearing upon an application for leave to show on Sundays under a different Act. I do not think I have any difficulty about that.

In my judgment, the discretion which the justices are free to exercise is not limited in the way indicated in that case, but is unlimited subject to this, that it has got to be exercised in a reasonable way, and I am satisfied that the justices were entitled to consider matters relating to the welfare, including the spiritual well-being, of the community and of any section of the community, and I hold that the condition is not *ultra vires* for the reason contended, namely, that it is not confined to the user of the premises, but relates to the interest and well-being of a section of the community.

Then it remains to consider whether the condition has been proved to be unreasonable. The courts, as the cases show, ought not lightly to declare conditions unreasonable when the authority to whom the power of imposing conditions has been given has, after much thought and argument, come to the conclusion that they are reasonable and proper.

The justices know the neighbourhood and the people who inhabit it, and they know far more about their wishes and habits than any court can know, and they know the relevant circumstances ; the Sunday Observance Act is still law, and it is not still law because it has been forgotten or overlooked. It is law by the deliberate desire of Parliament, and there it is, in the background of any question arising relating to Sunday performances, and *prima facie* the law is that performances on Sundays are illegal.

Parliament has given to the local authority power to go behind that Act only if the majority of the ratepayers desire it. Those at Weston-super-mare have not desired it. The application in this case was made with reference to a locality where, in accordance with the wishes of the ratepayers, it was against the law to hold Sunday cinema performances.

I am entitled to assume that there were and are in Weston-super-mare a number of people who believe in the observance of Sunday, who want their children to grow up with a reverence for Sunday, who want them to go to church, to Sunday schools, to children's services and the like, and who do not want to substitute films, and in particular films chosen not because of their suitability for children but because of their suitability for members of H.M. Forces. There may also be people who want their children to attend training corps, scout movements, and people who want their children to get into the open air all that they can, instead of spending several hours in an atmosphere hazy to an unusual extent with the smoke of many hundreds of smokers.

Can anyone doubt that it is for the good of the health of children under 16 to keep out of cinemas on Sundays ? I certainly have no doubt about that. Again, the licence was granted solely because it was certified to be for the benefit of members of His Majesty's Forces.

I gathered that it was conceded that a condition limiting audiences to the services would be unobjectionable, but I am not sure that that admission was made in any binding way, and I do not wish to hold counsel to it. But be that as it may, why is it unreasonable for justices to say : we feel that we must accede to the wishes of the commanding officer as to members of the forces, but that we must not make a greater inroad into the observance of Sunday as desired by Parliament than is reasonably necessary, and in particular we must not let our licence operate to the disadvantage of the young ?

That it is believed by the applicant that an appreciable number of children would be induced to come to the picture house is plain ; otherwise there would not be all this litigation. I am not prepared to hold that the justices were acting unreasonably when they said : We will grant this privilege for the pleasure of the services in our neighbourhood, but only if it is not permitted to cause children of an age at which they are easily influenced to act otherwise than in accordance with the general law of the land, and only in accordance with what we have reason to believe are the wishes of the majority of the ratepayers, or in a way which would be detrimental to the health of the children.

There are other considerations. The Sunday audiences are almost entirely men of the forces. They are not a suitable environment for girls under 16. It is no use shutting one's eyes to the distressing facts with which no judge of assize, nor any magistrate, can fail to be familiar.

In this case the justices had a further reason. In February, their information was, from a letter which was in evidence, that the great majority of the audiences were soldiers, and, if children were admitted, you would find soldiers being turned away ; and in the minutes of their meeting of June 11 that is referred to again, and there was evidence as to the number of seats of the varying prices, and the average attendances, and it was clear from the information that they had, and from the evidence of Rowland of the Odeon Theatre, that there will be occasions, with specially attractive films, when, if children are admitted, members of the services may well be either turned away or have to go to the more expensive seats. In the Regent Theatre there are only 210 one shilling seats. At any rate, when the justices said that no case had been made out for the admission of children, I understood them to mean that they were satisfied that, in the true interests of the children, no change should be made. I think their decision was well within their powers, and I think it is quite impossible to say that the condition was an unreasonable one.

In my judgment, it was a perfectly reasonable one, but I apprehend that the law is that, unless I am prepared to say affirmatively that it was unreasonable, it must stand. I am certainly not prepared to say that, and I think the action fails.

Action dismissed with costs.

Solicitors : *Norman Hart & Mitchell* (for the plaintiff) ; *Sharpe, Pritchard & Co.*, agents for *Harold King*, Taunton (for the respondents).

[*Reported by* P. J. JOHNSON, ESQ., *Barrister-at-Law.*]

CRADDOCK *v.* ZEVO FINANCE CO., LTD.

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and Luxmoore, L.JJ.), **March 6, May 2, 1944.**]

Income Tax—Opening stock—Value—Cost—Speculative shares taken over on reconstruction of company.

A company was formed for dealing in investments. The investments were those of the late Sir Otto Beit, and, after his death, of the beneficiaries under his will. Both before and after the death of Sir Otto Beit in 1930, the investments greatly depreciated in value. In Dec., 1931, this company went into voluntary liquidation and two new companies were formed. The first took over the sounder investments and the second, the respondents, took over the more speculative ones. This reconstruction was undertaken for the purpose of securing an assured income for the widow of Sir Otto Beit. The second company had a share capital of £620,030. Its assets were the shares taken over and in its accounts these were entered as of the value at which they were originally purchased, viz.: £1,029,958 15*s.* 4*d.* The market price of those shares at about the time the respondent company was formed was £363,173 2*s.* 11*d.*, so far as it could be ascertained. The respondent company, however, took over liabilities of the original company amounting to £409,928 15*s.* 4*d.*, and the beneficiaries took up all the shares of the company as fully paid shares. The Crown contended that the investments should be entered in the books of the company at their market value:—

HELD [LUXMOORE, L.J., *dissenting*]: the company was entitled to enter the investments at their cost to the company which was the £409,928 15*s.* 4*d.*, liabilities taken over together with the nominal value of the shares, £620,030, making a total of £1,029,958 15*s.* 4*d.*

[**EDITORIAL NOTE.** In determining the profit made by a company it is of great importance to fix the figure entered in its accounts as the value of its stock in trade. If stock is bought, the figure to be entered is not the market value of the goods, but the actual price paid by the company. The difficulty here is that, apart from taking over certain liabilities, the amount of which was known, the residue of the consideration consisted of the issue of shares in a new company. A further complication arises from the fact that the stock in trade here being speculative investments the market value was not ascertainable with certainty. LUXMOORE, L.J., in a dissenting judgment, treats the transaction as one entered into for an illusory consideration and upon the figures there is much to support this conclusion. The majority of the court, however, consider that the correct figure is the cost of these investments to the company, which is the amount of the liabilities taken over together with the nominal value of the shares, for the latter were by the terms of the reconstruction agreement to be issued as fully-paid shares.

AS TO OPENING STOCK, see HALSBURY, Hailsham Edn., Vol. 17, p. 124, paras. 229, 230; and FOR CASES, see DIGEST, Vol. 28, pp. 39-42, Nos. 205-214.]

Cases referred to:

(1) *Inland Revenue Comrs.* v. *Duke of Westminster*, [1936] A.C. 1; Digest Supp.; 104 L.J.K.B. 383; 153 L.T. 223; 19 Tax Cas. 490.

(2) *Re South African Supply & Cold Storage Co., Wild* v. *South African Supply & Cold Storage Co.*, [1904] 2 Ch. 268; 10 Digest 1016, *7056*; 73 L.J.Ch. 657; 91 L.T. 447.

(3) *Re Theatrical Trust, Ltd., Chapman's Case*, [1895] 1 Ch. 771; 9 Digest 309, *1924*; 64 L.J.Ch. 488; 72 L.T. 461.

APPEAL by the Crown from a decision of MACNAGHTEN, J. The facts are fully stated in the judgments.

The Solicitor-General (*Sir David Maxwell Fyfe, K.C.*), *J. H. Stamp* and *Reginald P. Hills* for the appellant.

J. Millard Tucker, K.C., and *Terence Donovan* for the respondents.

LORD GREENE, M.R.: The Zevo Syndicate, Ltd. (which I will call "the syndicate") went into voluntary liquidation with a view to a reconstruction on Dec. 21, 1931. Its issued capital at that date was £1,600,000, divided into £60,000 in 25 per cent. preference shares, £40,000 in ordinary shares and £1,500,000 in deferred shares, all fully-paid. Of this capital the preference shares and the deferred shares were held in equal proportions by Sir Alfred Beit, Mrs. Bull and Miss Lilian Muriel Beit, while the ordinary shares were held by the executors of the late Sir Otto Beit. There were outstanding at the date of the liquidation second debentures amounting to £400,000.

The business of the syndicate was that of dealing in investments, and it was assessed to income tax on that basis. The assets consisted of a large number of investments of various kinds, a considerable proportion being of a more or less speculative character. All these investments were carried in the books of the syndicate at cost. Both before and after the death of Sir Otto Beit in the year 1930, serious depreciation had taken place in the value of the investments held by the syndicate. For the years 1930-31 and 1931-32, the losses of the syndicate attributable, as I understand it, to the depreciation were computed for income tax purposes at £1,117,777 ; and it obtained relief under the Income Tax Act, 1918, s. 34, to the extent of tax on £386,645. The balance, namely, £731,132, was carried forward and, if the syndicate had not gone into liquidation, would have been set off for tax purposes against its future profits for the next six years. There is no finding as to what part of this loss was attributable to the investments purchased by the respondents on the reconstruction.

The reconstruction contemplated by the winding-up resolution was effected in the following manner. Two new companies were formed, Zevo Trust, Ltd. (which I will call " the trust company ") and the respondents, Zevo Finance Co., Ltd. The aggregate capital of the two companies was, for practical purposes, the same as that of the syndicate (namely, £1,600,000 for the new companies as against £1,600,000 for the syndicate). In the case of each of the new companies the capital was divided into preference, ordinary and deferred shares, and amounted in the case of the trust company to £980,000 and in the case of the respondents to £620,030. The capital of the trust company was divided into £60,000 in 25 per cent. preference shares, £20,000 in ordinary shares and £900,000 in deferred shares ; while that of the respondents was divided into £30 in 25 per cent. preference shares, £20,000 in ordinary shares and £600,000 in deferred shares. The preference and deferred shares in each of the new companies were allotted equally between Sir Alfred Beit, Mrs. Bull and Miss Beit ; while the ordinary shares of both companies were allotted to the executors of Sir Otto Beit. The result was that Sir Alfred Beit, Mrs. Bull and Miss Beit each received £20,000 in preference shares in the trust company and £10 in preference shares in the respondents in place of their holdings of £20,000 each in preference shares in the syndicate ; and £300,000 in deferred shares in the trust company and £200,000 in deferred shares in the respondents in place of their holdings of £500,000 each in deferred shares in the syndicate. Similarly, the executors received £20,000 in ordinary shares of the trust company and £20,000 in ordinary shares of the respondents in place of their holding of £40,000 in ordinary shares of the syndicate. As the liquidator said in his evidence before the commissioners, the shareholdings in the respondents (and the observation was obviously true as to both the new companies) were arranged so as to keep the interests of Sir Otto Beit's family in the assets of the syndicate unaltered by the reconstruction. It does not appear to me that the finding has anything to do with the method of fixing the purchase price : it is only concerned with the distribution among the shareholders.

The trust company, which was to operate as an investment holding company, took over the sounder investments of the syndicate and assumed all the liabilities of the syndicate other than those in respect of the £400,000 second debentures of the syndicate and the interest thereon as from Jan. 1, 1932. The respondents took over the more speculative investments, which stood in the books of the syndicate at their cost value of £1,029,958 15*s.* 4*d.* The relevant agreement in the case of the respondents (with which alone we are directly concerned) provided (by cl. 1) that the syndicate should " sell " and the respondents should " purchase " these investments ; (by cl. 2) that, as part of the " consideration for the said sale " the respondents should undertake to discharge the liability of the syndicate on the £400,000 debentures and interest from Jan. 1, 1932 ; (by cl. 3) that, " as the residue of the consideration " the allotments of fully-paid shares in the respondents to the shareholders of the syndicate should be made as above stated ; (by cl. 4) that dissentient shareholders should have the rights reserved to them by the Companies Act, 1929, s. 234, and that the respondents should be entitled to rescind the agreement if the liquidator had to purchase the interests of members of the syndicate amounting to £1,000 or upwards.

The liability in respect of interest on the debentures was adjusted at the figure of £9,928 15*s.* 4*d.* and the first balance sheet of the respondents as at June 15, 1932, accordingly stood as follows: share capital £620,030; debentures £400,000; liquidator of Zevo Finance Syndicate, Ltd., £9,928 15*s.* 4*d.*; making a total of £1,029,958 15*s.* 4*d.*; and on the other side investments £1,029,958 15*s.* 4*d.*

It is to be observed at the outset that there is nothing whatever unusual about the scheme of reconstruction thus carried into effect. It was the obvious way of bringing about the desired result of segregating the sounder investments from those which were more speculative and placing the former in the hands of a holding company and the latter in the hands of a trading company, which could sell and buy when favourable opportunities offered. There is no question of any impropriety from any point of view; nor is it suggested that it was in any way colourable or a device to circumvent the Revenue, or anybody else.

The question raised by this appeal relates to the basis upon which the investments acquired by the respondents should be valued for income tax purposes. Having regard to the nature of the respondents' business, these investments are to be regarded as their stock in trade; and the question what value should be placed upon them as an opening figure is of importance alike to the respondents and to the Revenue. On the basis of the value adopted for the purposes of the reconstruction, namely, £1,029,958 15*s.* 4*d.*, the result of the respondents' trading for the period ended Mar. 31, 1933, showed a loss of over £80,000. On the basis contended for on behalf of the Crown before the commissioners, the trading results would show a profit of over £31,000. In order to raise the point, an assessment was made on the respondents for the year ended Apr. 5, 1934, in the estimated sum of £10,000; and it was against this assessment that the respondents appealed to the General Commissioners for the city of London. The commissioners allowed the appeal; and their decision was affirmed by MACNAGHTEN, J.

It was common ground before the commissioners that the transaction by which the respondents acquired the shares was one of sale and purchase and that the proper figure to be debited in respect of the investments was the cost thereof to the respondents. The sole question propounded for the decision of the commissioners was: What was the right figure to debit as the cost? On behalf of the respondents it was contended that this figure must be the price which they paid, namely, £1,029,958, made up as to part by the liability on the debentures which they took over, and as to the residue by the issue of fully-paid shares. The Crown's argument proceeded on an entirely different basis. A list was produced which purported to show the market values of the investments at the date of acquisition by the respondents (June 15, 1932) or, where no prices were available for that date, the price at Mar. 31, 1933, nine months later. The aggregate values so ascertained amounted to £363,173; and it was contended that this figure, at the most, ought to be treated as the cost to the respondents of the investments which they had purchased.

The argument as it was developed before us by the Solicitor-General proceeded on the following lines. He began with the proposition that the value of the investments must be taken as having been at the most £363,173. The £620,000 shares allotted to the shareholders of the syndicate must, he argued, be regarded as a payment in kind: payments in kind must be valued at their money value: accordingly, the shares were issued at a discount, the shareholders were liable to pay the amount of the discount to the respondents, and the cost to the respondents accordingly was not more than £363,173. This argument, as originally presented by the Solicitor-General, ignored the liability undertaken by the respondents in respect of the debentures; and in the end he agreed that the cost of the investments must be placed at the lowest at the nominal amount of this liability. The result, of course, is that on his argument the shares must be taken to have been issued for no consideration, and the shareholders remain liable to pay up their nominal amount in full.

This argument is met at the outset by an insuperable difficulty of fact; for the Crown entirely failed to prove by how much, if at all, the value of the investments fell short of the sum of £1,029,958. The case of the Crown, and the only case before the commissioners, was that the value must be ascertained by reference to the Stock Exchange quotations on which the list above referred to was based. The commissioners refused to accept this basis of valuation and found that it was impossible to say how much prices would have risen against the respondents if they had attempted to purchase these investments in the market. Published market quotations, which often relate to quite small and isolated transactions, are notoriously no guide to the value of investments of this character, particularly when the amounts involved are large. The Crown, therefore, failed before the commissioners to establish the only measure of value for which it was contending. It was, however, suggested that this difficulty could be avoided by sending the matter back to the commissioners, A so as to give the Crown an opportunity of setting up a different measure of value supported by different evidence. Even assuming that this was the only difficulty in the way of the Crown's argument, it would not, in my opinion, have been proper to take this course. The Crown failed in its contention on a matter of fact and it must abide by the result: it would be contrary to all principle to give it another chance to establish by fresh and different evidence a quite different contention which, if it was desired to rely upon it, ought to B have been advanced in the first instance. Our task is to deal with the case on the basis of the facts as found by the commissioners upon the submissions made to them; and on this basis the value of the investments has not been established.

But the argument of the Solicitor-General is open to a fatal criticism of a different character altogether. It is founded on, or necessarily leads to, the proposition that the shares were issued at a discount. This seems to me an impossible contention. First of all, upon the facts as found by the commissioners, C it is impossible even to say that the consideration for which the respondents acquired the investments, namely, £409,928 in respect of the debentures and the allotment of shares amounting to £620,030, exceeded in nominal amount the real value of the investments. But what is even more conclusive is that on no possible view can the shares be regarded as having been issued otherwise than as fully-paid. The agreement of June 15, 1932, in terms provides that the D shares should be allotted to the shareholders of the syndicate as fully-paid. It was on these terms, and these terms alone, that they were accepted by the shareholders: they clearly could not have been accepted and the reconstruction scheme could never have been carried through, if the shares had been allotted as partly-paid. The terms on which the syndicate and its liquidator agreed to part with these investments were (i) that the respondents should take over the liability on the debentures; (ii) that the respondents should issue fully-paid E shares to the shareholders of the syndicate. It was with these terms and none other that the respondents had to comply in order to acquire the investments. By no possible means can this arrangement be varied so as to leave the shareholders with shares on which only part of the nominal amount (or, indeed, nothing) is to be treated as having been paid.

The fallacy, if I may respectfully so call it, which underlies the argument, is to be found in the assertion that where a company issues its own shares as F consideration for the acquisition of property, those shares are to be treated as money's worth as though they were shares in another company altogether, transferred by way of consideration for the acquisition. This proposition amounts to saying that consideration in the form of fully-paid shares allotted by a company must be treated as being of the value of the shares, no more and no less. Such a contention will not bear a moment's examination where the G transaction is a straightforward one and not a mere device for issuing shares at a discount. In the everyday case of reconstruction, the shares in the new company allotted to the shareholders of the old company as fully-paid will often, if not in most cases, fetch substantially less than their nominal value if sold in the market. But this does not mean that they are to be treated as having been issued at a discount; or that the price paid by the new company for the assets which it acquires from the old company ought to be treated as something less H than the nominal value of the fully-paid shares. The Crown in this case is in fact attempting to depart from the rule (the correctness of which it itself admits) that the figure at which stock in trade is to be brought in is its cost to the trader and to substitute the alleged market value of the stock for its cost. Of course, in a case where stock which a company proposes to acquire for shares is deliberately over-valued for the purpose of issuing an inflated amount of share capital, very different considerations apply. But nothing of the kind is present in this case which, as I have already pointed out, is a perfectly proper and normal reconstruction. The propriety of the course adopted is manifest when the uncertainty as to the value of the investments, which is pointed out by the commissioners, is borne in mind. It is, I think, true as a general proposition that, where a company acquires property for fully-paid shares of its own, the price paid by the company is, *prima facie*, the nominal value of the shares. It is for those who assert the contrary to establish it, as could be done, for example, in the suggested case of a deliberately inflated valuation. In the present case the Crown has failed to establish the contrary on the facts as found; and there is no justification for the proposition that, on these facts, the commissioners were bound in law to decide the appeal in favour of the Crown.

This, then, was the argument advanced by the Solicitor-General; and these, in my opinion, are the reasons for rejecting it. But Mr. Stamp presented to us an argument of a totally different character, and one which was not presented either before the commissioners or before Macnaghten, J. In the course of the discussion the question was addressed to counsel whether, in the case of assets acquired on a reconstruction, the transaction ought to be regarded as one of sale and purchase at all. This suggestion was taken up by Mr. Stamp and embodied in a very subtle and ingenious argument. I do not think that he ought to have been allowed to do this. No such argument had been suggested below; and it was based on propositions directly contrary to those accepted by his leader. Moreover, it was based on an assumption of fact as to which there was no finding by the commissioners, for the simple reason that no such point was taken before them. This assumption was, that there was no element of bargaining between the respondents and the liquidator of the syndicate. This may well have been so; but it is not so found in the case stated, nor was any evidence directed to the point because it was not relevant to the Crown's case: and I do not see that we should be justified in assuming it merely in order to allow the Crown to present an entirely new argument, which is in fact an afterthought. But be this as it may, the argument which I shall now proceed to summarise is, in my opinion, ill-founded. Before doing so I should, perhaps, point out one more reason for thinking that the argument ought not to be allowed. The case for the Crown before the commissioners was based on the acceptance of the view that the transaction was one of sale and purchase and on the proposition that the proper figure to take was the cost of the investments to the respondents. It was conceded that they cost the respondents something. The only controversy was as to what the real cost was. The Crown contended that it could not be put at a higher figure than the alleged value of the investments, the theory being that the shares were, in the circumstances, issued at a discount. But as will be seen, Mr. Stamp's argument rejects the whole basis of cost, and asserts that the transaction was not (as the Crown before the commissioners agreed and the commissioners found that it was) one of sale and purchase, that there was no such thing as cost, that the investments cost the respondents exactly nothing and that a different basis to that of cost must, therefore, be adopted.

The argument was opened with an analogy. The case was taken of a trader who receives by way of legacy an article of a kind in which he deals and brings it into his trading stock. In such a case, it was said, the value at which, for income tax purposes, the article must be brought in is its market value—presumably what it would cost to buy in the wholesale market. The reason for this was that, the article not having been acquired at any cost to the trader, some basis other than cost must be taken and the only possible basis would be that of market value. The argument then proceeded to assert that a reconstruction such as that now in question is in substance merely a private transaction between shareholders in which no element of bargaining or valuation is present; that there is no contract of sale; that what purports to be the price paid by the new company is no price at all; that the new company must be treated as having paid nothing for the investments; that a basis of valuation other than cost must, therefore, be looked for; and that the only basis which can be accepted is that of market value.

I am not concerned to dispute the correctness of the principle advanced by Mr. Stamp in connection with his analogous case. But I am bound to say, with all respect to the ingenuity of its inventor, that this analogy is as misleading as any analogy that I have heard. It seems to me quite impossible to say that there is any analogy to be found between the case where a trader acquires a piece of stock in trade for nothing and the case where a company acquires its stock in trade upon the terms of a contract under which it provides consideration. The argument, so far as it deals with the facts of the present case is, as it appears to me, nothing but an attempt to revive the "supposed doctrine" of substance and form. That argument, one had hoped, had been decently interred by the decision in *Commissioners of Inland Revenue* v. *Duke of Westminster* (1). However, its ghost still walks on occasions; and this, it appears to me, is one of them. As LORD TOMLIN said, in the *Duke of Westminster's* case, at p. 20:

> . . . the substance is that which results from the legal rights and obligations of the parties ascertained upon ordinary legal principles . . .

What, then, was the substance of the transaction under which the respondents acquired these investments? First of all, they acquired them by virtue of a contract of sale and purchase the validity of which, as importing legal rights and obligations between the parties to it, cannot be impugned; and (until Mr. Stamp's argument was presented in this court) had always been accepted by the Crown. If the contract had been broken by either of the parties, it could have been enforced in the usual way by the other. There can be no possible question as to this. The contract is described in cl. 1 as a contract of sale and purchase. It is a contract under which the respondents acquired the investments in consideration of their undertaking to the syndicate and its liquidator, to assume the liability on the debentures and to issue the fully-paid shares. These were the rights and obligations imported by the contract. Their legal effect is beyond dispute. By what process of reasoning they are to be disregarded and treated as non-existent I am at a loss to understand. The respondents did in fact, as they were bound to do, take over the liability and issue the shares. It was on these terms, and these terms alone, that they acquired the investments: the carrying out of these terms was in law the price which they paid for the investments; and it seems to me quite impossible to accept the view upon which Mr. Stamp's whole argument was based that they must be taken as having acquired the investments in a manner which was not in law contractual and for no consideration at all. Mr. Stamp went so far as to say that not even the liability undertaken in respect of the debentures ought to be regarded as an item of cost, contrary to the position accepted by the Solicitor-General. This is the "supposed doctrine" of substance with a vengeance.

When asked whether it was the practice of the Crown to apply the principle for which he contended to all cases where, on a reconstruction, a new company acquires stock in trade against an issue of fully-paid shares, Mr. Stamp replied that it was not. I am not surprised. Reconstructions would be seriously impeded if it were. But in the present case Mr. Stamp contended that his argument was justified by the fact that, if it were wrong, the respondents would gain certain advantages which had already been granted to the syndicate in respect of the depreciation of the assets of the syndicate in past years. He was referring to the relief given under the Income Tax Act, 1918, s. 34, which I have already mentioned earlier in this judgment. This appears to me to be quite irrelevant. The respondents are a new entity and their position cannot be affected for better or for worse by the fiscal history of the syndicate from whom they acquired their assets. Indeed, to say that the fiscal position of the syndicate ought in some way to be taken over by the respondents, is merely another example of the "substance" argument. It is not even consistent; for while asserting that the Revenue is entitled to insist on the respondents writing down their assets to an alleged (but, be it observed, wholly unproved) value, Mr. Stamp maintained with equal vigour (and this time correctly) that the respondents are not entitled to take over any part of the benefit of the depreciation which was carried forward for the relief of the syndicate during the six ensuing years. It is no doubt unfortunate from the point of view of the Revenue; but the result, as it seems to me, flows inevitably from the facts (*a*) that the respondents are a different fiscal entity from the syndicate, and (*b*) that they acquired the investments under a *bona fide* and unchallengeable contract. The consideration provided by the respondents for the purpose of that acquisition was a genuine consideration; and the Crown's attempt to attack it fails, in my opinion, both on the facts and on the law.

I would dismiss the appeal.

MACKINNON, L.J.: I agree with the conclusion arrived at by LORD GREENE, M.R., and I do not desire to elaborate or repeat the reasons that he has given for that conclusion.

Luxmoore, L.J. [read by MacKinnon, L.J.]: I find myself unable to agree with the conclusion arrived at in the judgment which has been read and which I have had the opportunity of considering.

The question to be determined is whether an assessment to income tax under Sched. D made upon the Zevo Finance Co., Ltd. (hereinafter called the finance company) for the year ending Apr. 5, 1934, in an estimated sum of £10,000 ought to be upheld. It was discharged by the General Commissioners for the city of London and, on the Crown's appeal from this decision, Macnaghten, J., affirmed the discharge and dismissed the appeal.

It is necessary to state the facts set out in the case stated with some particularity. They are as follows. In 1927 the late Sir Otto Beit caused to be incorporated a company under the name Zevo Syndicate, Ltd. (hereinafter called the syndicate). This was a private company. It was formed to take over a number of investments belonging to Sir Otto Beit at their respective market values at the date of incorporation. The capital of the syndicate was £1,600,000 divided into 60 cumulative 25 per cent. preference shares of £1,000 each, 40 ordinary shares of £1,000 each, and 1,500 deferred shares of £1,000 each. In addition to the share capital the syndicate issued first and second debentures: the latter being for a total sum of £400,000. Sir Otto Beit died in 1930 leaving an estate valued for probate at approximately £5,000,000. Of this about £3,000,000 was represented by shares and debentures in the syndicate. Before his death the investments belonging to the syndicate had depreciated greatly in value and such depreciation continued after his death to such an extent that his executors were unable to pay in full the bequests made by his will.

The syndicate had always been assessed for income tax as carrying on the trade of dealing in investments. For the tax years 1930-31 and 1931-32, the losses of the syndicate were computed at an aggregate sum of £1,117,777 and the syndicate obtained relief under the Income Tax Act, 1918, s. 34, to the extent of tax on £386,645, leaving the balance of the loss, viz., £731,132, to be carried forward and available to be set off for income tax purposes against future profits to be earned during the next 6 years.

Owing to these losses the shareholders in the syndicate decided to reconstruct the syndicate so that an assured income could be paid to Sir Otto Beit's widow. The reconstruction was carried out by incorporating two new companies one of which is Zevo Trust, Ltd. (hereinafter called the trust company) and the other is the finance company. It was a term of the arrangement that the trust company should take over what are described in the case stated as the sounder investments held by the syndicate and should be an investment holding company, while the finance company should take over the more speculative investments and should be an investment dealing company. To carry into effect these proposals it was resolved to wind up the syndicate voluntarily, Mr. Louis Henry Weatherley being appointed liquidator. In due course the trust company and the finance company were incorporated. The capital of the trust company was £980,000 and that of the finance company was £620,030: the last mentioned capital being constituted as follows: 30 cumulative 25 per cent. preference shares of £1 each, 20 ordinary shares of £1,000 each, and 600 deferred shares of £1,000 each. The whole of the shares in the syndicate at the date of its reconstruction were held as to the 60 preference shares by the three children of Sir Otto Beit, viz., Sir Alfred Beit, Mrs. Bull and Miss Beit in equal shares, as to the ordinary shares by the executors of Sir Otto Beit and as to the 1,500 deferred shares by Sir Otto Beit's three children in equal shares. The reconstruction was carried into effect by two agreements each dated June 15, 1932. These agreements provided for the transfer by the syndicate to the trust company and the finance company respectively of the whole of the assets and liabilities of the syndicate in return for the allotment credited as fully paid of the whole of the capital of each of the two last-named companies. The finance company duly acquired the more speculative investments of the syndicate and took over the liability of the syndicate to the executors of Sir Otto Beit in respect of the second debentures of the syndicate, securing £400,000 and the interest thereon then accrued due, viz., £9,928 15*s*. 4*d*., and issued to the shareholders in the finance company, who were also the sole shareholders in the syndicate, the whole of the authorised capital of the finance company, viz., £620,030, in accordance with their respective holdings in the syndicate.

The total value of the shares taken over by the finance company, computed in accordance with the values at which they stood in the books of the syndicate, was £1,029,958 15*s.* 4*d.* This was not fixed as the purchase price as between independent vendors and independent purchasers, but, as is found by the General Commissioners, was fixed for the purpose of convenience on the transfer of the investments and liabilities of the syndicate to the finance company and in order to keep the interest of Sir Otto Beit's executors and family (i.e., the sole shareholders in the three companies) in the assets of the syndicate unaltered by the reconstruction. The General Commissioners also found that the investments transferred, or to be transferred, by the syndicate to the finance company stood in the books of the syndicate on June 15, 1932, at the aggregate sum of £1,029,958 15*s.* 4*d.*, which sum coincides with the aggregate nominal value of the finance company's issued share capital and the liabilities taken over in respect of the second debenture issued by the syndicate and the interest due thereon, viz., £400,000 and £9,928 15*s.* 4*d.* respectively. In this connection, it must be borne in mind that the values of the syndicate's investments, including those transferred to the finance company, are found by the case to have fallen in value in the tax years 1930-31 and 1931-32 by a total sum of £1,117,777. Taking into account the set-off allowed for these years, as already mentioned, it would appear that a substantial part of the outstanding loss of £731,132 carried forward was attributable when the reconstruction took place to the speculative investments which were transferred to the finance company. It is said that the fact that the agreements for reconstruction are, in form, agreements for sale and purchase prevents any question being raised as to the adequacy of the so-called purchase consideration. In my judgment, this is not the correct view. The subject-matter of the agreements of June 15, 1932, was a reconstruction of the syndicate.

The court in this case is only concerned with the agreement of June 15, 1932, between the syndicate and the finance company. In my judgment, this agreement cannot be treated as if it were a sale agreement between an independent vendor and an independent purchaser. The avowed object of the agreement is a reconstruction of the syndicate. BUCKLEY, J., pointed out the difference between what he calls a mere sale and a reconstruction in *Re South African Supply and Cold Storage Co., Wild* v. *The Company* (2), at p. 286, where he says :

> What does " reconstruction " mean ? To my mind it means this. An undertaking of some definite kind is being carried on, and the conclusion is arrived at that it is not desirable to kill that undertaking, but that it is desirable to preserve it in some form, and to do so, not by selling it to an outsider who shall carry it on—that would be a mere sale—but in some altered form to continue the undertaking in such a manner as that the persons now carrying it on will substantially continue to carry it on. It involves, I think, that substantially the same business shall be carried on and substantially the same persons shall carry it on. But it does not involve that all the assets shall pass to the new company or resuscitated company, or that all the shareholders of the old company shall be shareholders in the new company or resuscitated company. Substantially, the business and the persons interested must be the same.

In the present case, the whole of the assets and liabilities of the syndicate have been transferred to the trust company and the finance company—the finance company taking the part of the assets which are more suited to its objects and assuming liability only for the second debenture. The shareholders in the finance company have precisely the same beneficial interest in the investments taken over by the finance company as they in fact had as shareholders in the syndicate. The General Commissioners have found that the so-called purchase price was not fixed with reference to the value of the assets taken over, for it is stated in the case that

> . . . the shareholdings in the finance company were arranged so as to keep the interests of Sir Otto Beit's family in the assets of the syndicate unaltered by the reconstruction.

This must be read in conjunction with the other material findings, viz., that the original cost to the syndicate of the assets taken over by the finance company was £1,029,958 15*s.* 4*d.*, which was also their market value at the date when they were acquired by the syndicate, and that, on the date when the reconstruction agreements were entered into, those assets stood at the same price in the books of the syndicate, although the losses of the syndicate, agreed for income tax purposes for which no relief had been obtained, amounted to £731,132, a sum which may, I think, be not unfairly contrasted with the difference between the book value of the assets transferred and their market value on June 15, 1932. It seems reasonably clear that the so-called purchase price of £1,029,958 15*s*. 4*d*. must be far in excess of the commercial value of the assets transferred, and that, if the transfer of those assets had been made by a promoter to the company promoted by him for fully-paid shares to the nominal value of £1,029,958, the consideration would, I think, undoubtedly have been held to be illusory. In this connection I would call attention to a passage from the judgment of VAUGHAN WILLIAMS, J., in *Chapman's* case (3), at p. 774:

> When one has to consider what is payment, it is plain that the moment the shareholder is relieved from the obligation of paying in cash, he may pay in goods, or in things without a physical existence, such as a goodwill or a licence. But the cases decide that a man must really pay for the shares, and, further, that, if the contract makes it manifest on its face that the taker of shares is paying less than their nominal cash value, he may be liable for the balance. I do not think the cases go further than that. They do not say that the court can take each contract and say whether the price given was fair and reasonable, or whether the thing given for the shares had a cash value in the market equal to the nominal value of the shares. . . . But, if the consideration is illusory, or, if it permits an obvious money measure to be made showing that discount was allowed, or, if the shares were openly issued at a discount, the mere fact that the contract has been filed will not put the allottee in a position to relieve himself from the payment which the Act of 1862 requires to be made for the shares.

It is said that the so-called consideration in the present case cannot be treated as illusory because the shareholders would not, or might not, have agreed to the reconstruction except on the basis of receiving fully-paid shares, but the shareholders in the present case were responsible for the reconstruction with knowledge of the facts and brought it about because of the losses caused to the syndicate by the fall in value of its assets.

It was argued that it was not permissible to take the market value on June 15, 1932, of the assets to be transferred, viz., £363,173 2*s*. 11*d*., as the value for income tax purposes, because, had the finance company attempted to purchase the assets concerned on the Stock Exchange, the price would have risen, owing to the personality of those interested in the finance company, and that this was a fact within the knowledge of the General Commissioners, but this argument neglects the other side of the picture, which I think must be equally within the knowledge of the General Commissioners, namely, that, if it was known that the syndicate was proposing to sell the same assets on the market, the prices would have fallen. Here the vendors and purchasers are in effect the same, for it is the shareholders in each case who effected the reconstruction.

The findings of the commissioners seem to me to support the view that the so-called consideration was not in reality a purchase price and that the transaction was a transfer of assets and liabilities from the syndicate to the finance company without reference to value. It is true that this point of view was not raised either before the commissioners or on appeal from them to MACNAGHTEN, J., but the question is one of law and on the findings of fact I see no adequate ground for refusing to consider it in this court. In truth there is no practical difference in treating the transaction as a sale for an illusory consideration, or as a transfer of assets and liabilities without consideration. In the former case the commissioners' findings leave but little doubt in my mind that the consideration was illusory, and, therefore, for income tax purposes, the real value of the investments transferred to the finance company ought to be substituted for the so-called consideration. In the latter case there is no consideration and, for income tax purposes, the value of the assets transferred must be ascertained. The question remains, how is this to be effected? Surely the practice of commerce and of accountants and the necessity of the case are the true criteria. If this be the correct view, the market value of the assets transferred is the only available basis. On either view, I think the contention of the Crown is correct and, consequently, the estimated assessment ought to be upheld. For these reasons, I would discharge the order of MACNAGHTEN, J., and allow the appeal, with costs here and below, restoring the estimated assessment.

Appeal dismissed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the appellant); *Coward, Chance & Co.* (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Re FURNESS, WILSON *v.* KENMARE.

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and Luxmoore, L.JJ.), **April 19, 1944.**]

Settlements—Forfeiture—Forfeiture only in case of acts done without the consent of the covenantor or his representatives—Forfeiture by reason of legislation—No consent given or possible—Trading with the Enemy Act, 1939 (*c.* 89) —*Trading with the Enemy* (*Specified Areas*) *Order*, 1940 (*S.R. & O.*, 1940, *No.* 1219).

By a settlement dated June 16, 1938, Lord Furness covenanted to pay to his wife, the respondent, an annuity during their joint lives and an annuity after his death for the remainder of her life. Both annuities were payable by monthly instalments and subject to a forfeiture clause in the following terms: "Provided always in respect of each of the said monthly sums that such sum shall be payable only if and so long as no act or event shall at any time have been done or happened without the consent in writing of the covenantor or his personal representatives whereby any of the said sums (or any part of them) if belonging absolutely to Lady Furness would have become vested in or payable to or charged in favour of some other person or persons or a corporation and the covenantor's personal representatives may in each or any case give or withhold any such consent as aforesaid for any reason (whether or not disclosed) in any manner and upon any terms or conditions whatsoever without themselves incurring any liability in the matter and any such consent may be given (by them or the covenantor) with full effect in respect of any act or event then already done or happened." On July 10, 1940, Lord Furness and the respondent were living in unoccupied France when the Trading with the Enemy (Specified Areas) Order, 1940, extended the provisions of the Trading with the Enemy Act, 1939, to unoccupied France. Lord Furness died on Oct. 6, 1940. The appellant, a son of Lord Furness, claimed that the coming into force of the Order of 1940 was an event which had the effect of making the annuities payable to the Custodian of Enemy Property and, therefore, the forfeiture had taken place:—

HELD: upon the true construction of the forfeiture clause, the acts or events which effected a forfeiture only included such acts or events as could be effectively consented to by the covenantor or his personal representatives, and it could not be said that any consent could be given to an act of the legislature. There had, therefore, been no forfeiture in this case.

[**EDITORIAL NOTE**. The forfeiture clause in this case is in rather unusual terms since the covenantor or his personal representative by consenting to the act can avoid the forfeiture. There are, however, some matters giving rise to a forfeiture which operate quite irrespective of any consent and in a case such as the present such matters are, therefore, not included in those giving rise to a forfeiture.

AS TO FORFEITURE CLAUSES, see HALSBURY, Hailsham Edn., Vol. 29, pp. 597-600, para. 870; and FOR CASES, see DIGEST, Vol. 40, pp. 558-562, Nos. 987-1009.]

APPEAL by the defendant to a summons taken out to decide a question of construction arising out of a forfeiture clause. The facts are fully set out in the judgment of LORD GREENE, M.R.

Charles Harman, K.C., and *F. McMullan* for the appellant.

Raymond Jennings for the executor.

Hon. Charles Romer, K.C., and *E. M. Winterbotham* for the respondent.

H. O. Danckwerts for the Custodian of Enemy Property.

LORD GREENE, M.R.: On June 16, 1938, the late Lord Furness entered into a covenant with his wife, the present respondent (who is now the Dowager Lady Kenmare, she having married again after the death of Lord Furness). Under that deed Lord Furness covenanted to pay two annuities, one of them an annuity to Lady Furness during their joint lives, and the other an annuity to Lady Furness after the death of Lord Furness for the remainder of her life. Those annuities were payable on the 1st of each month. The amounts were different, but each of those annuities was expressed to be "subject as hereinafter provided", that being a reference to a forfeiture clause, upon the construction of which the present controversy turns. Before I read that clause it will be convenient to mention certain facts. The appellant, who is the infant defendant—and a son, and probably the only surviving son, of the late Lord Furness—claims that the forfeiture clause contained in the proviso has come into operation. Lady Kenmare disputes that. FARWELL, J., held that Lady Kenmare was in the right. The testamentary dispositions of Lord Furness are not relevant to any question we have to decide, save in so far as they affect the beneficial title to the residue of his estate, and the infant appellant is interested in that. A

Lord and Lady Furness were living in the South of France, in what afterwards became unoccupied France, at the time of the armistice between France and Germany, and on July 10, 1940, there came into force the Trading with the Enemy (Specified Areas) Order, 1940, which extended the provisions of the Trading with the Enemy Act, 1939, to unoccupied France. The result of that was that both Lord and Lady Furness became enemies for the purpose of the Trading with the Enemy Act. The effect of that position was that under the B joint operation of sect. 7 (1) of the Trading with the Enemy Act itself and of the Trading with the Enemy Custodian Order, 1939, the sums payable by Lord Furness under the deed of covenant became payable to the Custodian, assuming that no forfeiture had taken place. Lord Furness died on Oct. 6, 1940, in the South of France. In July, 1942, Lady Furness succeeded in returning to England and subsequently issued the summons out of which this appeal arises. C That summons, by direction of the master, was served on the Custodian of Enemy Property. The position with regard to the payments under the deed is a little obscure, but it would appear that since June 30, 1940, no payment had been made in respect of the annuity, which was then payable, by reason of the fact that the Trading with the Enemy (Specified Areas) Order, 1940, came into operation before the next instalment became due to Lady Furness.

I should mention that there is pending an administration suit in respect of D the estate of the late Lord Furness, and an order has been made for general administration, but the taking of accounts and inquiries have been stayed, save with regard to the inquiry as to debts. The summons asked that notwithstanding the administration order:

> . . . the trustees be at liberty to pay to the said the Right Honourable Enid Viscountess Furness all moneys due to her under the deed of covenant dated June 16, 1938. E

As I have said, the Custodian of Enemy Property, being obviously interested in the matter, was added pursuant to an order of the master.

Having stated the relevant facts, I think it is now time to read the proviso, the operation of which, in relation to those facts, has to be considered. It is as follows:

> Provided always in respect of each of the said monthly sums that such sum shall be F payable only if and so long as no act or event shall at any time have been done or happened without the consent in writing of the covenantor or his personal representatives whereby any of the said sums (or any part of them) if belonging absolutely to Lady Furness would have become vested in or payable to or charged in favour of some other person or persons or a corporation and the covenantor's personal representatives may in each or any case give or withhold any such consent as aforesaid for any reason (whether or not disclosed) in any manner and upon any terms or conditions whatsoever without themselves incurring any liability in the matter and any such consent G may be given (by them or the covenantor) with full effect in respect of any act or event then already done or happened.

On the construction of that forfeiture clause one point has been raised which I can conveniently deal with at once because, having regard to the view I take, it is not necessary for us to decide it. It was this: a question was discussed in argument as to whether this forfeiture clause is to be read distributively H in the sense that each monthly sum must be looked at and that the forfeiture clause operates only with regard to such monthly sums as would by reason of the act or event in question become payable to some person other than Lady Furness. The point of that, of course, if it had become material, would have been that when Lady Furness returned to England she ceased to be an enemy for the purposes of the Trading with the Enemy Act, and accordingly, but for the forfeiture clause, all subsequent instalments of the annuity would have been payable to her. On one construction it would have been important to know whether an event which affected only one or two, or a limited number of instalments, had the effect of causing a forfeiture of all subsequent rights in respect of the annuity. But, as I have said, I do not find it necessary to discuss that question.

The real question, to my mind, turns simply on the language of this clause, and may be stated as follows: Does the clause refer only to such acts or events as are susceptible of receiving at the hands of Lord Furness or his executors A an effective consent, or does it extend to a case where no such consent can ever be given? The latter view is put before us by counsel for the appellant. He says that the coming into force of the Trading with the Enemy (Specified Areas) Order, 1940, was an event which had the effect of making the sums payable under the deed to Lady Furness payable to the Custodian of Enemy Property, and therefore, he says, forfeiture has taken place because the language of the forfeiture clause has been completely satisfied. FARWELL, J., took B the view that the forfeiture clause, on its true construction, contemplated only a limited class of event as capable of creating a forfeiture, namely, a class of event which in its nature is susceptible of receiving an effective consent from the covenantor or his personal representatives. As I see it, that is the real point of this appeal.

It has often been said (and such observations have been criticised) that C forfeiture clauses are to be construed strictly. It is, perhaps, preferable to say that forfeiture clauses must, like any other clauses, be construed according to the language used in the context; but I think it right to say that in approaching the consideration of a forfeiture clause the court ought not to make assumptions as to the probable intention of the settlor or covenantor, or be affected by any consideration as to the class of event which the settlor or covenantor might be thought probably to have contemplated. It frequently happens, D in the construction of wills particularly, that the court approaches a matter of doubtful construction with certain assumptions in its mind as to what the testator probably would have done, and what sort of provision a reasonable testator might be expected to make, for example, for his family. Considerations of that kind are always matters which the court (of course, within proper limits) is entitled to take into account. But, when one is considering a forfeiture clause, the precise scope of which must always be a matter of taste or even E caprice on the part of the testator, and in regard to which no preconceived ideas as to his probable intentions can have any application, it seems to me that one must not approach it in that way. I say that because at one point in his argument counsel for the appellant did suggest that the construction which FARWELL, J., thought was the right one was one which would exclude from the operation of the forfeiture clause the common event of bankruptcy, other than bankruptcy on the petition of Lady Furness herself, and that bankruptcy F is just the sort of thing to which a forfeiture clause is generally expected to be directed.

It seems to me that there is nothing to prevent a person who is minded to insert a forfeiture clause into the provisions which he makes limiting it in any way he pleases, and if he chooses to use the language which is not sufficient to cover the common case of bankruptcy, then that cannot be helped. The case G of bankruptcy is not before us, and I am not deciding anything about it. I am simply saying that, if a consequence of the view of FARWELL, J., would be to exclude bankruptcy, that is really no answer to the argument on which his decision rested. We must, therefore, examine this clause without any preconceived ideas as to the probable intention of the covenantor. It seems to me that the language which he has used makes it clear that he was contemplating that any of the acts or events which he was dealing with will be capable of being H dealt with effectively by a consent in writing. The clause is very inartistically drawn, but it seems to me that that is the true effect of it. The monthly sums are expressed to be payable

> . . . only if and so long as no act or event shall at any time have been done or happened without the consent in writing of the covenantor or his personal representatives . . .

That, counsel for the appellant says, can be given full effect to notwithstanding the fact that certain acts or events may be incapable of receiving any effective consent, such as, for example, the legislation with which we have to deal in the present case.

Although the matter might be said to remain in doubt down to that point, I find in the latter part of the clause language which, to my mind, makes the matter quite clear. Later on the covenantor says:

> . . . and the covenantor's personal representatives may in each or any case give or withhold any such consent as aforesaid . . .

He is there saying, as it seems to me, that the provision for forfeiture which he is making is one that can be effectively nullified by the giving of a consent in each or any case where it would otherwise take effect. That view is, I think, confirmed by the last phrase in the deed:

> . . . and any such consent may be given (by them or the covenantor) with full effect in respect of any act or event then already done or happened.

Applying those words to the present situation and the basis of the argument of counsel for the appellant, no consent can be given with full or any effect to the act of the legislature. Therefore, those words, which are in terms extended to any act or event, can, according to the argument, have no effect whatsoever in the particular event which has in fact taken place. In the result I am satisfied that the view of Farwell, J., was right for the reasons which he gives on that matter of interpretation, to which I have ventured to add some observations of my own. I do not myself attach importance, as Farwell, J., appears to have done, to the fact that there is no gift over and no provision for objects of a discretionary trust, such as are normally found in wills or settlements. That circumstance does not appear to me to have any real weight. I base my decision entirely on the language of the proviso which seems to me to have the effect of including only such acts or events as can be effectively consented to by the covenantor or his personal representatives.

In the result, therefore, the judgment of Farwell, J., in my opinion, was right, although the actual form of the order which he made requires a little consideration. He declared that the trustee should pay to the applicant all moneys payable to her under the deed of covenant dated June 16, 1938, from the date in July, 1942, when she returned to England.

As I have said, there is pending a general administration action. A general order for administration has been made, and the effect of the order of Farwell, J., if acted upon, would be that this particular debt would be paid without reference to the question of whether the estate was solvent or not. There appears to be no reason to suppose that it is insolvent, but the object of the inquiry as to debts is to ascertain, among other things, whether it is or not. So far as the instalments payable between July 10, 1940, and the date when Lady Furness on her return to England ceased to be an enemy for the purposes of the Trading with the Enemy Act are concerned, admittedly, on the basis that there was no forfeiture, they are payable to the Custodian. The order of Farwell, J., although it does not in terms so declare, says so inferentially, by directing the Custodian's costs to be paid out of those moneys which are described as money payable to the Custodian.

We are informed that, in the events which have happened, the Custodian will make no claim for those two years' instalments and, therefore, his appearance here is merely formal.

MacKinnon, L.J.: I agree, and I do not think it necessary to add anything.

Luxmoore, L.J.: I also agree.

Appeal dismissed. Costs to be borne by infant appellant's next friend.

Solicitors: *Dollman & Pritchard* (for the appellant); *Middleton Lewis & Clark* (for the executor); *Theodore Goddard & Co.* (for Lady Kenmare); *Solicitor to the Board of Trade* (for the Custodian of Enemy Property).

[*Reported by* R. L. Ziar, Esq., *Barrister-at-Law.*]

TRANSVAAL & DELAGOA BAY INVESTMENT CO., LTD. *v.* ATKINSON AND WIFE.

[KING'S BENCH DIVISION (Atkinson, J.), **April 25, 1944.**]

Contract—Constructive contract—Money had and received—Cheques obtained by fraud and paid into wife's account—No privity of contract between wife and plaintiff—Wife agent of husband—Money paid out by wife without notice of fraud and under instructions of husband.

The plaintiffs were a South African company which had a London committee for the purpose of distributing dividends to shareholders in Europe. The first defendant was the secretary of the committee who by fraudulent means had obtained cheques which were intended for shareholders and paid them into a banking account of his wife, the second defendant. By an arrangement between the two defendants half the moneys so paid into the account were paid out to the first defendant. At no time was the second defendant aware that the moneys so paid into the account belonged to the plaintiff company. The plaintiff company brought an action for damages for fraud or, alternatively, to recover the money as money received for the use of the plaintiffs or, alternatively, as money paid under a mistake of fact :—

HELD : (i) the plaintiff company were entitled to judgment against the first defendant.

(ii) no contract to repay the money could be implied between the second defendant and the company. Nor could the company recover against the second defendant on the grounds of unjust enrichment at their expense unintended by them, for the second defendant received the money as agent for the first defendant and, before notice of the company's rights, had paid it away to her principal or on his instructions.

[**EDITORIAL NOTE.** The judgment herein considers the present position of the law on unjust enrichment and particularly the statement of the law in *Sinclair* v. *Brougham* (1). It was contended that money is recoverable where there has been unjust enrichment of the defendant unintended by the plaintiff. It is held, however, that the plaintiff must go further and prove that it is fair and right that the money shall be repaid and that the circumstances are such that the law will imply a contract to repay.

AS TO MONEY HAD AND RECEIVED, see HALSBURY, Hailsham Edn., Vol. 7, pp. 247-293, paras. 382-405 ; and FOR CASES, see DIGEST, Vol. 12, pp. 539-567, Nos. 4478-4725.]

Cases referred to :

*(1) *Sinclair* v. *Brougham*, [1914] A.C. 398 ; 12 Digest 540, *4487* ; 83 L.J.Ch. 465 ; 111 L.T. 1.

(2) *Colonial Bank* v. *Exchange Bank of Yarmouth, Nova Scotia* (1885), 11 App. Cas. 84 ; 35 Digest 156, *524* ; 54 L.T. 256.

(3) *Prince* v. *Oriental Bank Corpn.* (1878), 3 App. Cas. 325 ; 6 Digest 263, *1715* ; 47 L.J.P.C. 42 ; 38 L.T. 41.

(4) *Banque Belge Pour L'Etranger* v. *Hambrouck*, [1921] 1 K.B. 321 ; 35 Digest 168, *9* ; 90 L.J.K.B. 322.

(5) *Moses* v. *Macferlan* (1760), 2 Burr. 1005 ; 12 Digest 539, *4478*.

(6) *Re Simms, Ex. p. Trustee*, [1934] Ch. 1 ; Digest Supp. ; 103 L.J.Ch. 67 ; *sub nom., Re Simms, Ex p. Trustee* v. *Williams, Simms, Ltd. & Gillett*, 149 L.T. 463.

(7) *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour, Ltd.*, [1943] A.C. 32 ; [1942] 2 All E.R. 122.

(8) *Baylis* v. *London (Bp.)*, [1913] 1 Ch. 127 ; 35 Digest 156, *526* ; 82 L.J.Ch. 61 ; 107 L.T. 370.

(9) *Holt* v. *Markham*, [1923] K.B. 504 ; 35 Digest 157, *533* ; 92 L.J.K.B. 406 ; 128 L.T. 719.

(10) *Deutsche Bank (London Agency)* v. *Beriro & Co.* (1895), 73 L.T. 669 ; 21 Digest 313, *1154*.

(11) *R. E. Jones, Ltd.* v. *Waring & Gillow, Ltd.*, [1925] 2 K.B. 612.

(12) *Kerrison* v. *Glyn, Mills, Currie & Co.* (1911), 81 L.J.K.B. 465 ; 1 Digest 670, *2826* ; 105 L.T. 721.

(13) *Continental Caoutchouc & Gutta Percha Co.* v. *Kleinwort, Sons & Co.* (1904), 90 L.T. 474 ; 3 Digest 179, *382*.

(14) *Kleinwort Sons & Co.* v. *Dunlop Rubber Co.* (1907), 97 L.T. 263 35 Digest 156, *530*.

(15) *Lloyd* v. *Grace, Smith & Co.*, [1912] A.C. 716 ; 34 Digest 129, *991* ; 81 L.J.K.B. 1140 ; 107 L.T. 531.

(16) *Farquharson Brothers & Co.* v. *King & Co.*, [1902] A.C. 325 ; 21 Digest 289, *1021* ; 71 L.J.K.B. 667 ; 86 L.T. 810.

(17) *London Joint Stock Bank* v. *Macmillan & Arthur*, [1918] A.C. 777 ; 30 Digest 192, *603* ; 88 L.J.K.B. 55 ; 119 L.T. 387 ; s.c. *sub nom. Macmillan* v. *London Joint Stock Bank, Ltd.*, [1917] 2 K.B. 439.

Action by the company for damages for fraud, or, alternatively, to recover certain sums of money received for the use of the plaintiffs, or as money paid under a mistake of fact. The facts are fully set out in the judgment.

Valentine Holmes for the plaintiffs.

The first defendant did not enter an appearance.

Herbert Malone for the second defendant.

Atkinson, J. : In this case the plaintiffs, the Transvaal and Delagoa Bay Investment Co., Ltd., are claiming from the defendants, Arthur Roy Atkinson, and his wife, Mary Gwendolen Atkinson, payment of certain sums of money as damages for fraud or, alternatively, as money received for the use of the plaintiffs or as money paid under a mistake of fact. Arthur Roy Atkinson has not entered an appearance ; there is no question about his liability for the money claimed ; he has not pleaded even the Statute of Limitations ; and there must be judgment against him for the amount claimed. I shall in future refer to Mrs. Atkinson as the defendant.

The facts are as follows. The plaintiffs are a company registered in South Africa and carry on business there. They have a large number of shareholders in this country and the rest of Europe. For the purpose of dealing with transfers of shares in Europe and paying dividends to European shareholders there is a London committee and a London secretary. At all material times until 1938 the committee consisted of the chairman, Dereham, Frank Smith and Dereham junior. The chairman died in 1938, and then, as I understand it, the committee consisted of Smith, van der Felt and Humphrey Lake.

The defendant Arthur Roy Atkinson was appointed secretary in 1925 in succession to his father. There was no office belonging to the company till 1938. The office used was a room belonging to Dereham, then until after the last war a room in Africa House, and after that what work there was was done at Atkinson's home at Petts Wood.

The practice as to the paying of dividends was as follows. Shortly before a dividend was to be paid a list of shareholders was made up by Atkinson and sent to South Africa to the head office there. The head office then transmitted the amount required to pay the contemplated dividend to European shareholders, and this sum so remitted was paid to a special account with Barclays Bank, Ltd. Shares were of two kinds, shares issued to registered shareholders and bearer shares with coupons attached. After the receipt of the money from South Africa a member of the committee attended at the office with Atkinson to sign dividend warrants. The signatures of one member of the committee and of the secretary were necessary. The member would find several hundreds of cheques already drawn and signed by the secretary, and he proceeded to sign them. Those were mainly for registered holders. Of those, some cheques were drawn payable to the shareholders personally, and some were drawn payable to some bank for account of a named shareholder. This could be done only if the necessary authority had been received from the shareholder. On the cheques payable to a bank was a place for the name of the shareholder on whose account the payee bank was to receive the money. Dividends payable on bearer shares were usually paid to a bank collecting for a customer. A bank submitted the pink form, which has been produced, with the coupons in respect of which it wanted payment attached. Such demands might come, but seldom did, before the date for sending the big batch of cheques, and these would be dealt with at the same time, but in practice such demands used to come in driblets for several weeks after the due date for payment. The secretary did not trouble a member of the committee to come to his house to sign the dividend cheques for these late dividends ; he posted them to a member, usually Smith, for signature, and having received the warrants signed, he distributed them to the receiving banks. His practice was to cancel the coupons before posting to a member of the committee, but he always sent to the member of the committee the pink form and the coupons along with the cheque for signature.

The secretary soon discovered that the system adopted by the London committee was extremely lax. The committee was supposed to check warrants and transfers; that was why they existed. Smith was the member of the committee who usually signed cheques. He had been the secretary from 1895 to 1912; he is now 82 and very deaf. There was no system of checking whatever, no audit, and he signed any cheques put before him without checking their accuracy or asking any questions.

In 1931 Atkinson conceived, and for 11 years carried out successfully, an ingenious fraud, but a fraud made easy by the want of diligence on the part of the committee. In October, 1931, he placed among the dividend warrants to be signed a cheque payable to the National Provincial Bank for £157 4*s*. Some member of the committee probably Smith signed it. Atkinson then placed his wife's name on the warrant as the person for whose account the bank was to receive the money; he took it to the bank and opened with it an account in his wife's name; he then told his wife that the company were paying him, and going to pay him, a commission on all dividends paid, as in fact the company had paid his father, and that he had received a cheque for £157 4*s*., and had opened an account with it in her name, and that he proposed to go on paying his commission cheques into this account, but he was always to have half of any payment paid out to him, and she was to pay all household expenses out of the rest, and spend any balance on herself, meaning that it was to cover such expenditure on herself as a husband usually provides for his wife.

A cheque for £75 was at once paid by his wife to him, and she proceeded to pay the household bills. In June, 1932, a further sum of £186 12*s*. 8*d*. was paid in, and thereafter, every half-year or thereabouts, the National Provincial Bank received for her account substantial cheques, the proceeds of which were dealt with in the same way. By January, 1942, sums amounting to £4,908 had been received and credited to her account. I have traced cheques paid out within a day or two of the receipt of these sums to the husband Roy Atkinson: they amount to £1,656. That figure must not be taken as an accurate figure; I have not checked it very carefully, but at any rate it is approximately correct. These were paid out under what one of the witnesses called the 50-50 arrangement.

During the 11 years Roy Atkinson paid into the same account fairly regularly sums out of his salary in order further to provide for household expenses. Again, quite roughly, I make the figure that he paid in in this way £1,815. He seemed to begin with £16 a month, then £20 a month, and later £30 a month, not with perfect regularity, but with reasonable regularity. Throughout the whole period the defendant believed that these cheques, the big cheques which her husband was paying into this account, were his cheques paid to him for commissions which were being credited to this account on his instructions. If the bank sent her periodically, as banks usually do, with returned cheques the dividend counterfoils, they must have been extracted by her husband; I am satisfied that she never saw one, and at no time had any reason to doubt the truth of what her husband was telling her. Except for two matters which were touched upon the money was spent as arranged. In December, 1923, a house was bought in her name through a building society, and £9 11*s*. 9*d*. a month was paid out of the account. She also bought a second-hand car on the instalment system. This was not investigated, and I do not know when it was. The only payments I can find to a garage, which were very early on at the very beginning of the account, are certain payments amounting to roughly £40 to the defendant's garage account. Those may, or may not be—I do not know—the payments for the car.

It cannot be said that the building society was paid, or at any rate paid only out of the plaintiffs' cheques. There were something like 100 of such payments. I have roughly checked them all, and I should say at least half of them could not have been paid out of moneys of the plaintiffs, and others may or may not. To explain what I mean I will take the second, third, fourth fifth and sixth payments. Admittedly, the house was bought some time in December, 1933, because the first payment was in January, 1934, and the second payment, on Feb. 1, of £9 11*s*. 9*d*., I say could not have been paid out of the plaintiffs' money for this reason, that on Jan. 31, the balance to the credit of the account was only £4 4*s*. 3*d*. On that date a sum of £30 was paid in out of Atkinson's salary, so that the balance became £34, and out of that the sum of £9 11*s*. 9*d*. was paid. On Feb. 21 the credit balance had fallen to £4 5*s*. 1*d*.; then two sums, one of £8 and one of £30, were paid in, bringing the balance up to just over £40; and on Mar. 1 there was the instalment £9 11*s*. 9*d*. So again with the next instalment it will be seen that between the two instalments the accounts fell to £4 4*s*. 11*d*.; then £40 was paid in out of salary and the instalment was paid, and so on with the next two. Those five I take as examples of what I mean, and I say many of these payments could not have been paid out of the plaintiffs' moneys. A

In April, 1942, Page, a chartered accountant, was instructed by the committee to look into some matter quite unconnected, as I understand, with these frauds, and during his investigation he discovered this fraud. Besides the half-yearly payments of substance there were four smaller payments of £45, £65, £53 and £47, and the probability is that these cheques were signed as a result of Atkinson sending to Smith one of the pink forms and some cancelled coupons, and after getting back the cheques Atkinson filled in his B wife's name as in the case of the larger cheques.

There is only one matter about which there is any conflict of evidence. Atkinson says that his wife's name was on the cheques when signed by Smith. Smith is quite sure that it was not. He is confident that he would have noticed the name if it had been there. I must and do accept his evidence about that. At any rate, he is honest, and I cannot say that, of course, for the defendant Roy Atkinson. C Further it seems to me very unlikely that Atkinson would put his wife's name on the cheque before signature, because at any time the member of the committee might notice the name and ask about it, and it is difficult to see what possible explanation could have been given consistent with innocence.

As to the cheques which went with coupons attached, of course the name would not be there, because it would have been very noticeable, as normally D the names of holders of unregistered shares simply sending in coupons would not even be known. But what seems again pretty strong evidence is this. A few of the cheques, the later ones, have been produced to me, and the last cheque, one for £257, has not got her name on even now. It was payable to the Westminster Bank. How it got into the defendant's account I do not know, and no explanation has been given, but it is significant that even now, after the cheque has been paid into her account, her name is not on the cheque. E The only other fact of importance is that when the fraud was discovered and inquiries made the account was not in credit.

The claim against the defendant based on fraud fails. There was no evidence that she was in any way party to it and I am satisfied that she was not.

It may be difficult to regard the payments as money paid by the plaintiffs to the defendant, whether under a mistake of fact or at all. The plaintiffs never consciously paid the defendant anything; F the defendant never consciously received anything from the plaintiffs. Indeed, I doubt whether strictly she received anything from them. What happened was that her husband stole certain signed cheques, and forged them by making false alterations, and instructed the bank to receive and deal with the proceeds. The bank had no authority from the defendant to receive anything on her behalf, nor had the plaintiffs any authority to pay anything to the National Provincial Bank G for her account or on her behalf. The passage from LORD SUMNER's opinion in *Sinclair* v. *Brougham* (1), at p. 453, seems very relevant. Adapted to this case it would read as follows: "The money no doubt reached the defendant's coffers. She had the money in that sense of possession which is necessary to found 'tracing orders,' but she did not get it, and there was no receipt of it, in the sense which is necessary to raise the implication of a promise to repay. Receipt and privity are essential to found such an implication": H see *The Colonial Bank* v. *The Exchange Bank of Yarmouth, Nova Scotia* (2), and *Prince* v. *Oriental Bank Corpn.* (3).

So far as I can see, it makes no difference whether the payments be claimed as payments made under a mistake of fact, or whether they are more properly claimed as money received for the use of the plaintiffs; the conditions under which the law will impose an obligation to restore them seem to be the same. They depend partly on the rules of the common law and partly upon the rules of equity. The former rules give a personal remedy; the latter a proprietary remedy. Equity allows the money to be followed, not only if it is still in existence in its original form, but also if it has been converted into another form, provided that it is clearly identifiable in its changed form. It is clear in view of the decision in *Banque Belge* v. *Hambrouck* (4) that, if, when the claim was made, there had been money in the defendant's account clearly attributable to the stolen cheques, that money could have been followed and claimed. In that case a man had stolen money from the plaintiffs by means of forged cheques, and given the proceeds to his mistress who paid them into her account. She was innocent of fraud. When the matter came to light there was £300 to the credit of the account. This sum was successfully claimed by the plaintiffs. It was not claimed nor suggested that there was any personal liability in the defendant, or that she could have been held liable for payments to her which had been expended. But I need say no more about the proprietary remedy, as it forms no part of the claim, and there was in fact no money whatever to the credit of the account when the claim was made, nor has there been any attempt to establish conversion clearly identifiable into another form of any of the money received.

The principle upon which the personal remedy for what has been called unjustifiable enrichment is based is perhaps not finally settled. Everyone is familiar with the description of the action of *indebitatus assumpsit* given by LORD MANSFIELD in *Moses v. Macferlan* (5). After saying that the claim for money paid by mistake or money got through imposition, extortion, or an undue advantage of the plaintiff's situation, he added, at p. 1012:

> In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.

Later judges limited the remedy to cases where they could say that it was fair that the law should imply a promise by the defendant to repay, and this view was affirmed by the House of Lords in *Sinclair* v. *Brougham* (1). In that case a building society with power to borrow only for the proper objects of the society started and developed a banking business which was in fact *ultra vires*. A number of depositors opened accounts and banked money in the usual way. The society was wound up, and in the winding up the depositors, clients or customers claimed the return of their money as money had and received to their use or as money paid under a mistake of fact. It was held that the basis of any such action was an implied promise to repay, and that such promise whether express or implied would have been part of an *ultra vires* contract of loan, and the depositors could not recover.

At p. 415, LORD HALDANE said that to hold that a remedy would lie *in personam* against a statutory society, which by hypothesis could not have become a debtor or enter into any contract for repayment, would be to strike at the root of the doctrine of *ultra vires*, and that this doctrine excluded from the law of England any claim based even on the circumstances that the defendant had been improperly enriched at the expense of the plaintiff. He said:

> All analogies drawn from other systems, such as that of the Roman law, appear to me to be qualified in their application by two considerations. The first is that, broadly speaking, so far as proceedings *in personam* are concerned, the common law of England really recognises (unlike the Roman law) only two actions of two classes, those founded on contract and those founded on tort. When it speaks of actions arising *quasi ex contractu* it refers merely to a class of action in theory based on a contract which is imputed to the defendant by a fiction of law.

And lower down:

> Consideration of the authorities has led me to the conclusion that the action was in principle one which rested on a promise to pay, either actual or imputed by law.

At p. 440, LORD PARKER said:

> It is not, therefore, open to the House to hold that in such a case the lender has an action against the company or association for money had and received. To do so would in effect validate the transaction so far as it embodied a contract to repay the money lent. The implied promise on which the action for money had and received is based would be precisely that promise which the company or association could not lawfully make.

And at much greater length, LORD SUMNER dealt with the same point at pp. 452 to 456. He said at p. 452:

> . . . no such actions could succeed. To hold otherwise would be indirectly to sanction an *ultra vires* borrowing. All these causes of action are common species of the *genus*

> *assumpsit.* All now rest, and long have rested, upon a notional or imputed promise to repay. The law cannot *de jure* impute promises to repay, whether for money had and received or otherwise, which, if made *de facto* it would inexorably avoid.

Then at the top of p. 453 came a passage I have already referred to, that although the money was in the company's coffers it really had not been received by the company, and at pp. 454, 455 and 456 he considers a great many of the cases, and ends up :

> There is now no ground left for suggesting as a recognisable " equity " the right to recover money *in personam* merely because it would be the right and fair thing that it should be refunded to the payer.

So too ROMER, L.J., in *Re Simms* (6), at p. 31 :

> Now the nature of the action for money had and received was clearly explained by the House of Lords in *Sinclair* v. *Brougham* (1). " There is now," said LORD SUMNER, after an examination of the authorities, " no ground left for suggesting as a recognisable ' equity ' the right to recover money *in personam* because it would be the right and fair thing that it should be refunded to the payer." The action, said LORD HALDANE, was in principle one which rested on a promise to pay either actual or imputed by law ; and he subsequently added that the remedy must be taken to have been given only when the law could consistently impute to the defendant at least the fiction of a promise. It is by no means clear in what circumstances the law will impute this fiction.

It seems reasonably clear that such a promise will not be implied unless it is inequitable or contrary to natural justice that the payee should retain the money as against the plaintiff in the action.

The late SIR WILLIAM HOLDSWORTH in 1939 wrote :

> It would seem, therefore, that there is overwhelming authority for saying that the common law personal remedy of unjustifiable enrichment depends both on the question whether in the circumstances it is fair and right that the defendant should pay and on the question whether the relations of the defendant and the plaintiff to each other are such that the law can imply a contract to repay.

However, this view has lately been challenged by LORD WRIGHT. He had attacked it in the CAMBRIDGE LAW JOURNAL, Vol. 6, p. 305, and in the recent case of *Fibrosa* v. *Fairbairn* (7), at p. 62 ([1942] 2 All E.R., at p. 137), a case dealing with the position created by the termination of a contract as a result of the frustration of its purpose, where money had been paid, expressed a strong dissent from the view taken in *Sinclair* v. *Brougham* (1), and a strong opinion in favour of the obligation to repay arising solely from an unjust enrichment of the defendant unintended by the plaintiff. VISCOUNT SIMON, L.C., left it open. He said, in effect, at p. 47 ([1942] 2 All E.R., at p. 128) : " Once it is realised that as LORD SUMNER said in *Sinclair* v. *Brougham* (1)," and he might have added, as LORD HALDANE and LORD PARKER also said in *Sinclair* v. *Brougham* (1), " the action rests on a notional or imputed promise to repay, or, if it is preferred to omit reference to a fictitious promise, upon an obligation to repay arising from the circumstances, etc." And LORD MACMILLAN, on p. 59 ([1942] 2 All E.R., at p. 135), left it open as well. At any rate, I am sure that LORD WRIGHT would accept one sentence of the judgment of HAMILTON, L.J., as he then was, in *Baylis* v. *Bishop of London* (8), at p. 140 :

> The question is whether it is conscientious for the defendant to keep the money, not whether it is fair for the plaintiff to ask for it back.

A judge of first instance is necessarily in some difficulty in reconciling such divergent views, but it seems to me that the law as laid down in *Sinclair* v. *Brougham* (1) is that which is binding upon him, and if that be so, I fail to see how the law can imply a promise by the defendant in this case to repay money to the plaintiffs where she never had the faintest idea that she was receiving anything from them at all. If A. steals a £5 note from me and gives it to his wife, asking and receiving £2 10*s.* by way of change, and instructing her to spend the rest in paying a coal bill, and buying herself a pair of shoes, those she was wearing being full of holes, even the law could not imply a promise by the wife to repay me my £5 note. There is no privity on which to found such a promise.

But for all that, I think it right to deal with the case on the view held by LORD WRIGHT, that the real basis of law in such an action as this is that of an unjust enrichment at the plaintiffs' expense unintended by them, and on that view the question I have to ask myself is this : do the circumstances of the case oblige by the ties of natural justice that the defendant should have a judgment against her for the money which found its way into her account ? I think that by the many cases involving questions of this sort it has been established that there are, at any rate, two sets of circumstances which deny a personal remedy, and which entitle a defendant to resist a demand for repayment. One, which I do not think is of help to the defendant in this case as she never acted on nor indeed received any representation by the plaintiff, is based on equitable estoppel, whereby, when the plaintiff has expressly or impliedly represented to the defendant that the money paid was truly due and owing to the defendant, the plaintiff is estopped from denying the truth of that representation, if the defendant has in reliance upon the representation changed his position for the worse by spending the money : see, for example, *Holt* v. *Markham* (9), and *Deutsche Bank* v. *Beriro* (10).

The other set of circumstances which I think is very material to this case is that where the money has been received by an agent for a principal he cannot be sued for its return if before notice he has paid it away to his principal or on his principal's instructions. In this case counsel for the plaintiffs advances the proposition that once it is established that the plaintiffs' money has reached the defendant's account by mistake the plaintiffs are entitled to judgment, whether she has paid it away or not, or in whatever capacity she received it, and he relied on *Jones* v. *Waring & Gillow* (11). I cannot think that that case has anything to do with this one. There a man named Bodenham owed Waring & Gillow £5,000 under a hire purchase agreement. Because of his default they resumed possession of his furniture. He went to R. E. Jones, Ltd., and represented to them that he represented the manufacturers of a new car, and offered to them an agreement as sole agents for the sale of it if they were ready to pay a deposit of £5,000 on 500 cars. He said Waring & Gillow's were financing his scheme, and if they chose to come into it they could, if they liked, make their cheque payable to Waring & Gillow, which they did. Bodenham then took the cheque to Waring & Gillow, represented it as money owing to him which he had asked Jones to make payable to them, paid them the cheques which they cashed, and the money found its way into their account, and they then let Bodenham resume possession of his furniture. The truth was later discovered, and Jones brought this action against Waring & Gillow and succeeded. By a majority of three to two they were held entitled to recover, but nothing was said in that case which threw any doubt upon the propositions which I have enunciated. LORD CAVE and LORD ATKINSON thought the plaintiffs were estopped by what they had done ; they thought that their conduct amounted to a representation which they were estopped from denying. LORD SUMNER and the other two members of the court, LORD SHAW and LORD CARSON, thought there was no estoppel, and LORD SUMNER in terms, said that he could not see that there was any representation made or implied by anything that the plaintiffs had done, or that the defendants had acted on any such supposed representation, and he said that he need not discuss how the case would have stood had those things been proved.

I do not think that case helps me here at all. Certainly the proposition of counsel for the plaintiffs is too wide. For example, it is not the rule of law as expressed by LORD LOREBURN, quoted with approval by LORD MERSEY, in *Kerrison* v. *Glyn Mills Currie & Co.* (12), that when money paid under a mistake of fact is re-demanded from that person before his position had been altered to his disadvantage the money must be repaid in whatever character it was received, but I think the law is more clearly and fully expressed by COLLINS, M.R., as he then was, in *Continental Caoutchouc and Gutta Percha Co.* v. *Kleinwort, Sons & Co.* (13), at p. 476, and I take this to be the law :

> It is clear law that *prima facie* the person to whom money has been paid under a mistake of fact is liable to refund it, even though he may have paid it away to third parties in ignorance of the mistake. He has had the benefit of the windfall and must restore it to the true owner. On the other hand, it is equally clear that an intermediary who has received money for the purpose of handing it on to a third party, and has handed it on, is no longer accountable to the sender. In such case he is a mere conduit-pipe, and has not had the benefit of the windfall.

In the same case, ROMER, L.J., says, at p. 477 :

> When the mistake in fact was discovered the plaintiffs became entitled to recover the moneys from the defendants, unless the defendants could show that they had received the moneys as agents, and before notice of the mistake had parted with them

to their principal, or so dealt with them by mandate of their principal as to render it unjust to call upon them to repay the moneys to the plaintiffs.

In *Kleinwort* v. *Dunlop* (14), Lord Atkinson says in effect precisely the same thing. There certain questions had been put to the jury, and one question that the jury had answered was that the money had been received by the defendants in their capacity as principals, but Lord Atkinson fully recognised, and dealt with at some length—I need not read what he said—the position of a person who came within those words which I have just read from the judgments of Lord Collins, M.R., and Romer, L.J.

I am satisfied in this case that the defendant did not receive the money for her own benefit or personal enrichment, but merely as her husband's agent. The husband was not a thief in order to benefit her but himself, and so far as she was concerned the money came not from the plaintiffs but from her husband on the terms that part was at once to be returned, and that household and her personal expenses (for which as a husband he would be bound to provide) were to be paid out of the rest. Regular payments from his salary were later made into the account, and it is plain that she was in truth but her husband's agent for the distribution of the money. Where is the unjust enrichment in this case? What are the circumstances which make it *ex aequo et bono* that the defendant ought to refund? I can see none. The position, therefore, is that it is impossible to imply a promise to repay, that it would be unjust to imply such a promise even if it were possible, and that there are no circumstances which make it unconscientious for the defendant to resist a personal judgment against her, and I think the defendant is entitled to judgment.

This view is in harmony with a principle which I take from *Lloyd* v. *Grace Smith & Co.* (15), at p. 727:

> He that employs and puts a trust and confidence in the deceiver should be a loser.

The defendant may also possibly be able to pray in aid the principle that when one of two innocent persons must suffer a loss, he whose negligence is the cause of the loss must bear it. In *Farquharson* v. *King* (16), and *Macmillan* v. *The Joint Stock Bank* (17), the conditions for the application of this principle are laid down very clearly.

There is one other matter with which I ought to deal. It is pleaded that in any event the plaintiff cannot recover more than the moneys paid into the defendant's account during the 6 years immediately preceding the action. In reply to the defendant's plea of the Statute of Limitations the plaintiffs rely upon the Limitation Act, 1939, s. 26, which is as follows:

> Where, in the case of any action for which a period of limitation is prescribed by this Act, either (a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent, or (*b*) the right of action is concealed by the fraud of any such person, or (*c*) the action is for relief from the consequences of a mistake, the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it.

I think 6 years is the limit. I think the plaintiffs with reasonable diligence could and must have discovered it. They signed warrants with the space for the shareholder's name not filled in. Smith admits negligence. There was no system of check; there was no supervision; there was no audit of any kind. The committee were supposed to check, according to Atkinson—and I see no reason for disbelieving him on this point—the transfers and warrants, and they did nothing of the sort. There was in fact a complete absence of diligence and that is really not challenged. The accountant called by the plaintiffs said he was surprised to find there was no system of check, and that any system of check would have discovered the fraud right away. I find, indeed I am bound to find, that there was no diligence exercised, and that with reasonable diligence these frauds, or the long series of mistaken payments would have been discovered at or very soon after their inception.

Therefore I give judgment for this defendant with costs, but for the plaintiffs against the first defendant for the full amount claimed.

Judgment accordingly.

Solicitors: *Lawrence Jones & Co.* (for the plaintiffs); *S. Myers & Son* (for the defendant).

[*Reported by* R. Boswell, Esq., *Barrister-at-Law.*]

BLYTH *v.* APPEAL COMMITTEE OF LANCASTER.

[KING'S BENCH DIVISION (Hallett, J.), **April 24, 1944.**]

Criminal Law—Bail—Conviction by quarter sessions—Appeal to High Court by way of case stated—Application for bail pending hearing of appeal—Jurisdiction of judge to grant bail.

The appellant had been convicted by a court of summary jurisdiction of offences under the Consumer Rationing Order, 1941. His appeal against the convictions was dismissed by the appeal committee of quarter sessions, the imprisonment was confirmed and heavy fines were imposed on him. Later, the appeal committee imposed a further sentence of imprisonment on the appellant for non-payment of the fines. From this sentence the appellant appealed by way of case stated to the High Court. Pending the hearing of the appeal the appellant applied for bail to a judge in chambers. It was contended on behalf of the prosecutor that the judge had no jurisdiction to grant bail in a case of this kind :—

HELD : a judge of the King's Bench Division has no inherent jurisdiction to grant bail to convicted persons. Such jurisdiction exists only under statutory provisions and there are no such provisions in regard to appeals by way of case stated by quarter sessions.

[**EDITORIAL NOTE.** The court grants bail to a convicted person only in exceptional cases and has no jurisdiction to do so unless such jurisdiction is granted by statute. In most cases there is statutory authority, but it is here shown that on an appeal from quarter sessions there is no statutory provision, and, therefore, no power to grant bail to a convicted person.

AS TO GRANTING BAIL, see HALSBURY, Hailsham Edn., Vol. 9, p. 268, para. 385.]

Cases referred to :

(1) *Anon* (*Case* 55) (1705), 11 Mod. Rep. 45.

(2) *R.* v. *Brooke* (1788), 2 Term Rep. 190 ; 33 Digest 306, *244*.

(3) *Kendall* v. *Wilkinson* (1855), 4 E. & B. 680 ; 38 Digest 89, *655* ; 3 C.L.R. 668 ; 24 L.J.M.C. 89 ; 24 L.T.O.S. 309.

*(4) *Hope* v. *Hope* (1854), 4 De G.M. & G. 328 ; 28 Digest 336, *2036* ; 2 Eq. Rep. 1047 ; 26 L.J.Ch. 682 ; 24 L.T. 29.

(5) *Ex parte Lees* (1858), E.B. & E. 828 ; 16 Digest 401, *2444* ; 27 L.J.Q.B. 403 ; 31 L.T.O.S. 247.

*(6) *R.* v. *Willmott* (1861), 1 B. & S. 27 ; 33 Digest 397, *1078* ; 4 L.T. 208 ; *sub nom. Ex p. Willmott*, 30 L.J.M.C. 161.

(7) *R.* v. *Reader* (1722), 1 Stra. 531.

(8) *R.* v. *Spilsbury*, [1898] 2 Q.B. 615 ; 17 Digest 470, *352* ; 67 L.J.Q.B. 938 ; 79 L.T. 211.

APPLICATION for bail pending the hearing of an appeal from a sentence of imprisonment imposed by the appeal committee of the Quarter Sessions for Lancaster on Nov. 16, 1943. The facts are fully set out in the judgment. The application was made to the judge in chambers, but was adjourned into open court for judgment.

A. H. Bryant, solicitor, appeared for the appellant.

Valentine Holmes for the prosecutor.

HALLETT, J. : This is an application for bail made to me in chambers on behalf of one Wilfrid Percival Blyth, hereinafter called the appellant. Ordinarily the jurisdiction of a judge in chambers to grant such an application is not in doubt, and the sole question is whether in the exercise of his discretion upon the particular facts he ought to grant or to refuse it. But in the present case counsel who appeared on behalf of the prosecutor submitted that I had no jurisdiction to grant bail to this appellant, and that, if in analogous cases either the Divisional Court or a judge of this Division has granted bail, it has been because the jurisdiction to do so has not been the subject of any challenge, and consequently of any investigation. Counsel for the prosecutor conceded, I think, that the absence of jurisdiction in this and analogous cases may be regarded as an anomaly; and he urged that the point should now be the subject of decision in order that the matter might receive consideration in the proper quarters. Submitting then that this was a point of practical and general importance, he was anxious that I should give my decision, when I had arrived at it, in open court so that it might be reported for the assistance of anyone who may have to consider the point in question hereafter.

The solicitor for the appellant, who argued this matter before me in chambers in an extremely able and thorough manner, had no objection to that course being adopted; and I therefore adjourned the application into court, a practice which is, I believe, followed in the Chancery and Probate, Divorce and Admiralty Divisions, but is unusual, if not unprecedented, in the King's Bench Division.

The relevant facts are set forth in an affidavit of the appellant sworn on Apr. 14, 1944, and are undisputed. On May 27 and 28, 1942, the respondents, the appeal committee, heard an appeal brought before them by the appellant against certain convictions and sentences passed upon him by a court of summary jurisdiction in respect of offences under the Consumer Rationing Order, 1941. The appeal was dismissed by the appeal committee. A sentence of twelve months imprisonment was confirmed and fines amounting to over £27,000 were imposed upon the appellant. After certain other proceedings, on Nov. 16, 1943, the appellant was again brought before the committee to show cause why he should not be committed to prison for non-payment of the fine, and the committee upon proof of the non-payment alleged imposed a sentence upon the appellant of twelve months' imprisonment. That was a sentence in addition to the sentence of twelve months which I have previously mentioned. The appellant, thereupon, applied to the committee in writing pursuant to the Criminal Justice Act, 1925, s. 20, to state a case for the opinion of the High Court of Justice, and the committee expressed their willingness to do so. There was delay caused, I am told, by the appellant's financial position, but on Apr. 13, 1944, the appellant entered into the necessary recognisances to prosecute the appeal. On Apr. 14, 1944, he swore the affidavit to which I have already referred, and on Apr. 17, he issued the summons for bail returnable last Friday with which I am now dealing.

In those circumstances the solicitor for the appellant contends that I have an inherent jurisdiction as the judge in chambers to grant bail to the appellant pending the determination of his appeal by way of case stated. Counsel for the prosecutor, on the other hand, as I have already said, contends that I have no such jurisdiction. Now, in the first place, a clear distinction must be drawn between granting bail before conviction and granting bail after conviction. In CHITTY ON CRIMINAL LAW, 2nd Edn. (1826), Vol. 1, the author says, at p. 93:

> . . . by the ancient common law, all felonies were bailable, till murder was excepted by statute; so that persons might be admitted to bail before conviction in almost every case.

By the Statute of Westminster, 3 Edw. I, c. 15, the power of justices of the peace to bail in certain cases was removed. That statute has now been repealed by the Sheriffs Act, 1887, s. 39; but the position even before it was repealed is thus stated in CHITTY, at p. 97:

> The Court of King's Bench, or any judge thereof, in vacation, not being restrained or affected by the statute 3 Edw. I, c. 15, in the plentitude of that power which they enjoy at common law, may, in their discretion, admit persons to bail in all cases whatsoever, though committed by justices of the peace or others, for crimes in which inferior jurisdictions would not venture to interfere, and the only exception to their discretionary authority is, where the commitment is for a contempt, or in execution.

I draw attention to the exception "where the commitment is . . . in execution," because it emphasises the distinction to which I have referred. At p. 93, CHITTY says:

> With respect to the cases in which bail is allowable, it is observable that at common law no justice, or, indeed, any court, could bail a person in execution on a judgment or conviction for any offence . . .

The same distinction seems to be recognised in the Habeas Corpus Act, 1679, where one finds these words in sect. 2:

> And if any person or persons shall be or stand committed or detained as aforesaid for any crime [with certain exceptions] it shall and may be lawful to and for the person . . . so committed or detained (other than persons convict or in execution) by legal process [to apply for bail].

So that once more the exception "other than persons convicted or in execution" is recognised.

There are other authorities which seem to me to point in the same direction. In *Anon* (*Case* 55) (1), the following appears, at p. 45:

> A man brought to this court by *habeas corpus*, upon a commitment by the justices of peace, who have cognizance of the cause, is not bailable until the order is quashed; because until then he is in execution.

The next case is *R.* v. *Brooke* (2), in 1788, the most material passage being at p. 196, in the judgment of BULLER, J., where he says:

> It is said that it is strange that the party should suffer the punishment while the appeal is pending; but we are to consider it like the case put at the bar of a writ of error, which does not suspend the execution of a judgment which it is brought to reverse. It would be absurd to put a contrary construction upon this Act of Parliament, for if the appeal were to put an end to the imprisonment by entitling the party to be bailed, the consequence would be that, although the conviction were affirmed, the party would escape from punishment and laugh at justice; for the imprisonment is to run from the time of the conviction; and here the parties having been sentenced to be imprisoned for fourteen days, the time would be expired before the appeal was determined.

A much later case is to be found in 1855, in *Kendall* v. *Wilkinson* (3). At p. 688 LORD CAMPBELL, C.J., says:

> There is no universal juridical maxim or rule that an appeal or writ of error is a stay of execution pending the appeal or writ of error. In our courts of equity, an appeal is no stay of execution without a special order for that purpose, as has been lately authoritatively declared in the case of *Hope* v. *Hope* (4), by the present Lord Chancellor, for the information of the tribunals of France. According to the common law of England, a writ of error, even when allowed and returnable, is no *supersedeas* of execution in criminal cases. Where there has been sentence of imprisonment, if the party convicted was in prison under his sentence when the writ of error was sued out, he continued in prison pending the writ of error; and, if he was not, he might still be taken and imprisoned pending the writ of error. Some statutes giving an appeal against summary convictions stay execution pending the appeal: but the statute which gives the appeal in the present case has no enactment to this effect; and (as was pointed out by my brother ERLE during the argument) the forms adapted to it rather indicate a contrary intention.

LORD CAMPBELL, C.J., then goes on to discuss what might be the result if the appeal there had the effect of working a stay of execution. In *Ex p. Lees* (5), at p. 836, a similar opinion is expressed as regards release pending the writ of error. Lastly, as regards authority, I desire to refer to *R.* v. *Willmott* (6), in 1861. At pp. 39, 40, CROMPTON, J., says:

> Then, however, comes the further question, suppose an appeal is given, can we discharge the prisoner? The late cases are very clear that, although an appeal against a conviction is given by statute, it does not in general suspend the effect of the warrant of commitment; for that we need only look to *Kendall* v. *Wilkinson* (3). No doubt it is a great hardship on a party that the law should be so, especially where his liberty depends on the construction of a statute drawn as this is.

The last few words refer to the fact that the court was of opinion that it was an extremely badly drawn Act of Parliament. COCKBURN, C.J., had already made some criticisms about the drafting. In the judgment of BLACKBURN, J., the following appears, at pp. 40, 41:

> But there is great difficulty in construing the 21st section. I am inclined to think that its effect is to give an appeal in all cases; but, even if that be so, an appeal has not in general the effect of suspending the sentence; at all events there is nothing in this statute which gives it that effect. According to *Kendall* v. *Wilkinson* (3) it is a question of great general importance whether statute 11 & 12 Vic., c. 43, gives such effect to an appeal; and if I thought that that statute applied I should like to take further time for consideration. But here the conviction is not before a justice of the peace, but before a superintendant . . .

If the position is as described in those cases, it would appear that there are two results. On the one hand, if bail is not granted pending an appeal and the appeal succeeds, an innocent man may have served the whole sentence by the time the conviction is quashed. On the other hand, if bail is granted pending an appeal and the appeal fails, a guilty man may have escaped his whole sentence by the time the conviction is affirmed. The legislature has not been blind to that position and has dealt with it in a series of statutory provisions. Counsel for the prosecutor with his usual industry has excavated three special provisions, namely, the Bread Act, 1836, s. 25, the Larceny Act, 1861, s. 110, and the Public Health Act, 1875, s. 99, which suspend the operation of an order pending an appeal; but I regard as very much more important the general provisions to the same effect which are to be found in the four statutes to which I am now going to refer.

First of all, as regards Crown Cases Reserved, in the Crown Cases Act, 1848, s. 1, there is a provision enabling the court of trial "to respite execution of the judgment on such conviction, or postpone the judgment, until such question"—that is the question reserved for the Court of Crown Cases Reserved—"shall have been considered" and in either case to commit the person convicted to prison or admit him to bail. A

The next statute is the Summary Jurisdiction Act, 1857, s. 3, and it is to that statute that the court was referring in the case of *R.* v. *Willmott* (6), which I have already cited. That deals with the stating of cases by petty sessions. It lays down the procedure and it then says:

> . . . and the appellant, if then in custody, shall be liberated upon the recognizance being further conditioned for his appearance before the same justice or justices, or, if that is impracticable, before some other justice or justices exercising the same jurisdiction who shall be then sitting, within ten days after the judgment of the superior court shall have been given, to abide such judgment, unless the determination appealed against be reversed. B

It will be seen that there is an express provision for granting bail pending the appeal and for ensuring that, if the appeal should be unsuccessful, the appellant will not be benefited by obtaining any remission of his sentence merely as a result of having made an unsuccessful appeal. C

The third statute is the Summary Jurisdiction Act, 1879, s. 31, and more particularly subsect. (4). That has been re-enacted with some amendments by the Summary Jurisdiction (Appeals) Act, 1933, s. 1. By sect. 31 (1) (iv), as so re-enacted it is provided as follows:

> . . . where the appellant is in custody, the court who fix the recognizance to be entered into, or the other security to be given, under the preceding paragraph, or any other court of summary jurisdiction acting for the same petty sessional division or place, may, if they think fit, release him from custody on his complying with the provisions of the preceding paragraph . . . D

Lastly, by the Criminal Appeal Act, 1907, s. 14, it is provided that, when an appeal to the Court of Criminal Appeal is pending, that court, acting sometimes under sect. 17 by a single judge thereof, may grant bail; and by sect. 14 (3), it is laid down: E

> The time during which an appellant, pending the determination of his appeal, is admitted to bail, and subject to any directions which the Court of Criminal Appeal may give to the contrary on any appeal, the time during which the appellant, if in custody, is specially treated as an appellant under this section, shall not count as part of any term of imprisonment or penal servitude under his sentence . . .

The practice of the Court of Criminal Appeal with regard to that is, I think, well known, namely, that, if the appellant's appeal comes on in the ordinary course—that is to say, without any extraordinary delay—speaking generally, time is not allowed to count in the case of an unsuccessful appeal even though the appellant has been detained in custody; and, of course, when he has been on bail time is never allowed to count if the appeal subsequently fails. F

The legislature, therefore, has made at least those four general provisions, if I may recapitulate. The first deals with an appeal by way of the old procedure of a crown case reserved. I should perhaps have mentioned that in the Criminal Appeal Act, 1907, s. 14 (4), the section is expressly made applicable if the old procedure by the reservation of a case is followed. By the second statute provision is made in the case of appeals from petty sessions by case stated; in the third statute provision is made in the case of appeals from petty sessions to quarter sessions; and in the fourth statute provision is made in the case of appeals from any court to the Court of Criminal Appeal. But, whether by inadvertence or not I do not know, no similar provision appears to have been made in respect of appeals from quarter sessions—that is to say, from the appeal committee of quarter sessions—by way of case stated. Such appeals are now regulated by the Criminal Justice Act, 1925, s. 20. I need not read the section because it is sufficient to say, as is apparent on a perusal of the section, that it contains no provision corresponding to the provision to be found in the Summary Jurisdiction Act, 1857, s. 3, or in the Summary Jurisdiction Act, 1879, s. 31. It seems, then, that so far as statutory G H provision is concerned, there is no provision authorising either the justices or any court to grant bail to an appellant pending the determination of his appeal by way of case stated from quarter sessions. It has been pointed out to me, however, that occasionally bail has been granted either by a divisional court or by a judge of the King's Bench Division to an appellant to the divisional court by way of an application for *certiorari*. The matter is dealt with in SHORT & MELLOR'S PRACTICE OF THE CROWN OFFICE, 2nd Edn., at pp. 58, 59, where A this appears:

> When a defendant is in custody on a conviction, this recognizance does not operate to release him pending the proceedings in the superior court; but there are instances in which the court or a judge on granting the writ of *certiorari* have so admitted prisoners to bail upon the authority of *R.* v. *Reader* (7), that if the conviction were affirmed they could recommit the prisoners to undergo the residue of the sentence; but strong doubts have been cast upon the expediency of this practice, because should B the natural term of the sentence expire pending the proceedings in this court, and the prisoner be not rendered in accordance with the recognizance upon the affirmance of the conviction, it would seem that there is no process by which he could be taken and recommitted, and the only punishment that could follow would be the estreating of the recognizance; moreover, there is authority for saying that a defendant in execution of a sentence is not bailable, and there is no rule or maxim of law that an appeal is of itself a stay of execution. Where it is intended that it should be so, the legislature has thought it necessary to provide for it by Act of Parliament, as, for instance, upon C writs of error upon indictments for misdemeanour: see 16 and 17 Vic., c. 32, ss. 4, 6 (now repealed); and upon a case stated for the opinion of the King's Bench: see 20 and 21 Vict., c. 43, s. 3. In a case which occurred before ERLE, J., where a defendant under such circumstances failed to surrender himself, that learned judge stated that he would never again discharge a defendant out of custody pending an appeal by *certiorari* to this court.

D None the less, it does appear that on occasions bail has been granted, including at least two modern occasions about which I have been able to obtain some information. I have been informed that, according to a note in the records of the Crown Office, CHARLES, J., in April, 1938, after consultation with LORD HEWART, L.C.J., did grant bail on an order *nisi* for *certiorari*. I can say nothing more about the facts of that case except that the sentence is said to have been one of four months for poaching.

E I have, however, some information about a more recent case. On May 29, 1942, a man named Sinnott was ordered by the stipendiary magistrate at Bow Street to pay a certain fine forthwith or in default to be imprisoned for six months. On July 24, 1942, a divisional court gave leave under the modern procedure to move for *certiorari* to quash the order, and then granted bail. The application for leave to move was, of course, made *ex parte*; it was made to appear sufficiently attractive to the court for leave to be obtained; and as far F as I can ascertain (and, indeed, it seems obvious) there was no argument and consequently no investigation as to the jurisdiction to grant bail. On July 25 Sinnott was bailed, the condition of the recognisance being that he should prosecute his appeal to the divisional court with diligence and should appear on the hearing of the appeal. On May 4, 1943 (and the date is worth noticing because it was nearly a year after the order that he be imprisoned for six months) G the motion came on for argument before the divisional court and the divisional court decided there was no substance in the point taken, and the motion was dismissed with costs. Thereupon an application was made to the magistrate, as I understand it, that Sinnott should be committed or recommitted to prison. The magistrate consulted certain persons who were well qualified to advise him in the matter and he came to the conclusion that he had no power to commit or recommit Sinnott. That position came to the notice of HUMPHREYS, J., who H made some investigation into it, and he has been good enough to place at my disposal the results of his investigation. I should, however, make it plain that the question of jurisdiction to grant bail was never raised and was not considered by HUMPHREYS, J., and, therefore, I have not been able to profit from his views on that question. The question with which he was concerned was whether, if bail was granted and the period of the sentence had expired by the time the appeal had been dismissed, that had the effect—the wholly unintended and one would think the undesirable effect—of cancelling the sentence which, as events proved, had been rightly imposed. I think HUMPHREYS, J., came to the conclusion that such a cancellation was in fact produced and that, accordingly, the law on the matter required some consideration.

Counsel for the prosecutor did not suggest that for present purposes there was any distinction between the power of the divisional court to grant bail and the power of a single judge in chambers to grant bail, nor did he suggest that there was any distinction in principle between a divisional court granting bail pending the hearing of an application for *certiorari*, and a judge in chambers granting bail pending the hearing of an appeal by way of case stated. Obviously, this case is not entirely on all fours with the cases in which the divisional court has granted bail pending an application for *certiorari* ; but I do not feel myself that there is any real distinction, and counsel for the prosecutor has not suggested that there is.

Accordingly, if after investigation I felt that a practice had been established in the divisional court of granting bail upon applications for *certiorari*, it may be that I should consider that practice to be binding on me, the more so because the jurisdiction of judges of this division to grant bail is obviously of the greatest public importance and it would be wrong for any judge readily to countenance any attempt to whittle it away. So far as I can ascertain, however, there has been no uniform practice either in the divisional court or in chambers. Having considered the matter as best I can with the assistance of able argument on each side, it seems to me that there is no foundation for the contention that a judge of this division has an inherent jurisdiction to grant bail to convicted persons. Where that jurisdiction exists it has been given by statutory provisions to some of which I have already referred. The fact that it is not given by a statutory provision in regard to appeals by way of case stated by quarter sessions may be an oversight, but is none the less a fact.

Now that is the point of importance, as I conceive it to be, with which I desire to deal in open court this morning. I should, however, perhaps add, in order to avoid any misunderstanding, that, having regard to the usual practice of the Court of Criminal Appeal with regard to granting bail, which is conveniently set out in Archbold's Criminal Pleading, Evidence and Practice, 31st Edn., at p. 285, and having regard to the fact that the granting of bail would almost certainly have the effect in the present case of cancelling the whole or almost the whole of the remainder of the sentence imposed upon the appellant even if his appeal should fail, I doubt very much whether I should have thought it right to grant him bail, even if I considered that I had jurisdiction to do so. Nevertheless, it is in my opinion a matter for consideration by the appropriate authorities whether, having regard to the policy of the statutory provisions to which I have already called attention, some alteration is not now desirable so that, upon an appeal from the appeal committee of quarter sessions by way of case stated, bail may in a proper case be granted without producing the undesirable consequences, if the appeal fails, which I have already mentioned.

Upon examination, *R.* v. *Spilsbury* (8), clearly appears to have been a case where the application for bail, which was made by way of alternative to certain other applications, was not made after conviction. It was a case where a magistrate had made an order under the Fugitive Offenders Act, 1881, committing to prison a person accused of having committed an offence within some part of Her Majesty's dominions or within the jurisdiction of a consular court, and merely reading the few lines in the headnote is sufficient to show that the person in question was not a convicted person. In the result the application for bail was not granted, but, in any event, that case seems to me to be entirely in accordance with the distinction which I have drawn between the granting of bail to persons before conviction and the granting of bail after conviction.

Coming to the conclusion that I have no jurisdiction to grant this application, I refuse it.

Application refused.

Solicitors : *J. T. Lewis & Woods*, agents for *A. H. Bryant*, Blackpool (for the appellant) ; *Solicitor to the Board of Trade* (for the prosecutor).

[*Reported by* Hubert B. Figg, Esq., *Barrister-at-Law.*]

Re PASCOE, TRUSTEE IN BANKRUPTCY *v.* THE LORDS COMMISSIONERS OF HIS MAJESTY'S TREASURY.

[CHANCERY DIVISION (Morton and Cohen, JJ.), **April 27, 1944.**]

Bankruptcy—Proof—What debts provable—Fine on conviction—Bankruptcy Act, 1914 (*c.* 59), *s.* 30 (3), (8).

The bankrupt was convicted at assizes and fined. The respondents lodged a proof for the fine, but the trustee refused to admit it on the ground that it was not a debt provable in bankruptcy :—

HELD : the fine was a debt within the meaning of the Bankruptcy Act, 1914, s. 30 (3), and the proof should be admitted.

[**EDITORIAL NOTE.** The substantial question here is whether the fine was a "debt" within the ordinary meaning of the word. After a consideration of the authorities, the court have decided that the fine was a debt within the ordinary meaning of the word and that there was no reason why any other meaning should be attached to the word "debt" in sect. 30 (3) of the Act.

AS TO PROOF OF DEBTS, see HALSBURY, Hailsham Edn., Vol. 2, pp. 262, 263, paras. 338-340 ; and FOR CASES, see DIGEST, Vol. 4, pp. 250, 251, Nos. 2383-2386.]

Cases referred to :

(1) *Earl of Lincoln* v. *Fysher* (1597), Cro. Eliz. 581 ; 16 Digest 17, *120*.
*(2) *R.* v. *Woolf* (1819), 2 B. & Ald. 609 ; 14 Digest 480, *5237*.
*(3) *Re Prince, Ex p. Graves* (1868), 3 Ch. App. 642 ; 4 Digest 330, *3098* ; 19 L.T. 241.
(4) *Linton* v. *Linton* (1885), 15 Q.B.D. 239 ; 5 Digest 1034, *8459* ; 54 L.J.Q.B. 529 ; 52 L.T. 782.
(5) *Re Hawkins, Ex p. Hawkins*, [1894] 1 Q.B. 25 ; 4 Digest 300, *2810* ; 69 L.T. 769.
(6) *Kerr* v. *Kerr*, [1897] 2 Q.B. 439 ; 4 Digest 300, *2811* ; 66 L.J.Q.B. 838 ; 77 L.T. 29.

APPEAL by the trustee in bankruptcy from a decision of HIS HONOUR JUDGE RICHARDSON given at the Newcastle-upon-Tyne County Court. The facts are fully stated in the judgment of MORTON, J.

John Morris, K.C., and *V. R. Aronson* for the appellant.

The Solicitor-General (*Sir David Maxwell Fyfe, K.C.*), and *B. J. M. MacKenna* for the respondents.

MORTON, J. : John Pascoe was adjudicated bankrupt on Aug. 26, 1920, and he has never been discharged from that bankruptcy. He was convicted at the assizes held at Newcastle-upon-Tyne on June 8, 1942, of, among other offences, seven charges of bribery, and he was fined £300 on each charge. He was also sentenced to seven years' penal servitude for certain other offences. On Nov. 24, 1942, a bankruptcy petition was presented by the Northumberland County Council. On Dec. 16, 1942, a receiving order was made against Pascoe, and on Dec. 18, 1942, he was again adjudicated bankrupt. On Dec. 31, 1942, a proof of debt was sworn by Bernard Eustace Browne, who was stated to have been duly authorised by the respondents to this appeal, the Lords Commissioners of His Majesty's Treasury, claiming that at the date of the said receiving order John Pascoe was justly and truly indebted to the respondents in the sum of £2,100, being the aggregate amount of the fines, and that the respondents have not received any satisfaction or security whatever in respect of that amount. This proof of debt was duly admitted to rank for dividend by Mr. Norman Dunn, who had been appointed trustee in bankruptcy on Jan. 25, 1943.

On Nov. 2, 1943, Mr. Norman Dunn wrote to Mr. Browne a letter in the following terms :

> I beg to refer to your proof of debt for £2,100 on behalf of the Lords Commissioners of H.M. Treasury and which I admitted to rank for dividend for the full amount at Jan. 25, 1943. I am now advised that this proof was in fact incorrectly admitted, and I therefore propose to proceed by way of the Bankruptcy Act, 1914, Sched. II, r. 24, to have the proof expunged. I shall be glad to know whether under the circumstances you agree and in any case I shall be obliged if you will accept this letter as formal notice of my intention to proceed.

The Treasury Solicitor was not prepared to agree that the proof put in by Mr. Browne was not admissible. Thereupon the trustee in bankruptcy gave notice of motion in the Newcastle-upon-Tyne County Court, and he asked for a declaration that the proof of debt "was improperly admitted and should be expunged pursuant to the power contained in that behalf in the Bankruptcy

Act, 1914, Sched. II, r. 24." On Feb. 25, 1944, the application made by that notice of motion was dismissed by His Honour JUDGE RICHARDSON. From that decision the trustee in bankruptcy appeals to this court.

What we have to determine is whether the total fine of £2.100 is or is not a debt or liability provable in bankruptcy under the Bankruptcy Act, 1914, s. 30. That section provides as follows :

> (1) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise, or breach of trust shall not be provable in bankruptcy.
>
> (2) A person having notice of any act of bankruptcy available against the debtor shall not prove under the order for any debt or liability contracted by the debtor subsequently to the date of his so having notice.

It is plain that those subsections have no application to the fine in question. Then subsect. (3) says :

> Save as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order, shall be deemed to be debts provable in bankruptcy.

Subsect. (8) says : " ' Liability ' shall, for the purposes of this Act, include "—and there follow three descriptions of matters which are to be included under the word " liability." I think it is clear that the three sub-headings (*a*), (*b*), and (*c*) do not include the fine in question.

It seems to me that, in determining the question which I have stated, we have to arrive at a conclusion on three matters : first, was the fine a debt to which the debtor was subject at the date of the receiving order, according to the ordinary meaning of the word " debt?" Secondly, if so, is there any sufficient reason why the word " debt " should be given any other meaning than its ordinary meaning in this section? Thirdly, if the fine was not a debt within the meaning of the section, was it a liability within the meaning of the section ?

As to the first of these questions, I feel no doubt that the fine was a debt if the word " debt " is to bear its ordinary meaning. It is a debt in the ordinary meaning of a debt of record due to the Crown.

In COKE UPON LITTLETON, Book 3, ch. 8, s. 514, I find this passage :

> In an action of debt for a fine or amerciament in a leete, the defendant shall not wage his law, because the leete is a court of record ; but in an action of debt for an amerciament in a court baron the defendant shall wage his law, for that it is no court of record.

The interesting case of the *Earl of Lincoln* v. *Fysher* (1), says :

> Debt for an amercement in a leet. And counts, that he had a leet within his manor of Fokingham of all resiants within the manor ; and that at such a court holden there before one J. Gustard his steward there, the said steward speaking to the defendant that he was a suitor there, and telling him that he ought to be sworn to enquire, etc., the defendant contemptuously answered him, " In saying so thou lyest:" and for this contempt the steward imposed a fine of 20*s.* upon him ; for which this action was brought. The defendant pleaded *nihil debet* ; and found against him. And after verdict it was moved by Yelverton, Sergeant, that this was not any such contempt for which there ought to be any fine imposed ; for it is no more in effect than " Thou speakest untruly," which one may say to a steward without offence. The court held it to be an apparent contempt, and abuse unto him being a judge, and in his authority; and that he himself might assess a fine for such contempt : and that for such fine assessed by a steward debt lies, without any prescription alleged to assess such fines, or to have such an action.

That is to say, in that case it was held that an action of debt lay although the contempt was of the nature of a criminal contempt.

We were also referred to *R.* v. *Woolf* (2). That case was decided in 1819 before the Queen's Remembrancer Act, 1859, had been passed. The headnote says it was held that, where a defendant in an indictment for a misdemeanour has received judgment of fine and imprisonment, a *levari facias* may issue immediately to take his goods in execution for the fine. In the course of his judgment, ABBOTT, C.J., said this, at pp. 610, 611 :

> The case cited was therefore an authority founded upon the general principle of the law ; and as by that authority it is laid down that a *levari facias* may issue for a fine due to the King, which is a debt on record, I do not entertain any doubt of the legality of this writ.

Then BAYLEY, J., said, at pp. 611, 612:

> Here there is a judgment that the defendant do pay to the King a fine of a certain sum. By that judgment the debt becomes a debt to the King, of record; and it is payable to the King *instanter*. It is true, that part of the judgment is also, that if at the expiration of the imprisonment the fine shall not be paid, he is to continue in prison until it be paid; but that is only for a farther remedy on behalf of the Crown; and, if we were to say, that the Crown shall not be at liberty to issue an immediate execution for its own debt, we should place the Crown in a worse situation than any subject. The case cited shows that the *levari facias* from this court was the proper mode of proceeding.

At p. 613, BEST, J., said:

> I agree, that this is a debt of record, due to the King the instant the judgment is pronounced, and it would be strange to say, where a debt is due, that there is no remedy to recover it for the term of two years.

The Queen's Remembrancer Act, 1859, provided a particular procedure for enforcing payment of a fine, but, in my view, there is nothing in that Act to take away any common law right of the Crown which existed before it was passed. This fine being a debt of record due to the Crown, it seems to me that, unless we are to give a very special meaning to the word "debts" in the Bankruptcy Act, 1914, s. 30 (3), the word "debts" must include the fine in question.

I have, therefore, to consider the second question I have mentioned: Is there any sufficient reason why the word should be given a narrower meaning in this section? Counsel for the appellant argued that the Bankruptcy Act is really dealing with civil debts, leaving criminal matters to be dealt with under the statutes dealing with such matters, and they have directed our attention to a number of sections of the Bankruptcy Act, and of other Acts, and to the Defence (Recovery of Fines) Regulations, 1942. They have also directed our attention to certain authorities. They submitted that these Acts and Regulations contained indications which should lead us to the conclusion that the Bankruptcy Act, 1914, s. 30 (3), was not intended to cover a fine such as the one we are now considering.

For the respondents, the Solicitor-General adopted what he described as the "pedestrian method" of dealing one by one with all the matters relied upon as indications in favour of the view urged by counsel for the appellant. I found the Solicitor-General's method of dealing with the matter most helpful as an argument, but I propose to resist the temptation of following that course myself in this judgment. It seems to me, and it has been borne in upon me more and more during the course of the argument, that, if I do so, I shall be bound to express certain *obiter dicta* as to the meaning and effect of a number of sections of the Bankruptcy Act, which it is not our task to construe. If difficulties arise on other sections as a result of the decision of this court, they will have to be dealt with as and when they arise. I do not think that any of them are insoluble, and I do not think it would serve any useful purpose to deal in detail with the argument based upon sections other than sect. 30. I propose simply to say, upon that aspect of the matter, that, having carefully considered all the matters put before us by counsel for the appellant, I cannot find any sufficient reason for failing to give to the word "debts" in sect. 30 (3), what seems to me to be its ordinary meaning, a meaning which would clearly include this debt of record due to the Crown. I cannot believe that, if the word "debts" in sect. 30 (3) had not been intended to include this particular debt of record, the legislature would have failed to make that matter clear.

With regard to the cases cited by counsel for the appellant, he conceded that there was no decision which was exactly in point, and agreed that the nearest approach to an expression of opinion on the matter is to be found in *Ex p. Graves* (3). The headnote in that case says:

> A debtor was convicted under the Copyright Act, 1862, s. 6, for violations of copyright in engravings, and sentenced to pay a fine, and in default was imprisoned. After the conviction he executed a deed of composition with his creditors, which was duly registered. He then applied for discharge from prison. Held, that the process under which the debtor was arrested was of a criminal nature, and not for a debt, and that he was not entitled to his discharge.

In the course of his judgment, Page-Wood, L.J., said, at p. 645 :

> Whether the penalty would be provable or not under the bankruptcy of the prisoner makes no difference . . .

and he did not express any view as to whether the penalty was or was not provable in the bankruptcy.

Counsel for the appellant referred us to three cases dealing with alimony, and pointed out that, although payments of alimony might be regarded as being debts in the ordinary meaning of the word "debt," yet they were held not to be provable in bankruptcy in the cases to which he referred. Those cases were *Linton* v. *Linton* (4), *Ex p. Hawkins* (5), and *Kerr* v. *Kerr* (6). For my part I think it is sufficient to say that the reasons given for the judgments in these cases supply a wholly sufficient explanation why the claims with which the court was dealing should not have been treated as debts provable in bankruptcy. I do not think they afford any reason why we should come to the conclusion that this fine is not provable in bankruptcy.

As to the Defence (Recovery of Fines) Regulations, 1942, I do not think it would be right to attach any real weight to those regulations for the purpose of construing the Bankruptcy Act, 1914, s. 30 (3). The regulations do not in fact apply to an offence such as the offence committed by Pascoe. But, apart altogether from that, it seems to me that it would be very dangerous to reason as follows : Those responsible for the Order in Council which brought into effect the Defence (Recovery of Fines) Regulations, 1942, appear to have thought that when the Bankruptcy Act, 1914, said X it really meant Y, and, therefore, although the Bankruptcy Act says X we shall construe it as meaning Y. I do not propose to follow that line of reasoning. I think it may well be that certain provisions in the Regulations in question were merely inserted *ex abundantia cautelae*, because those responsible thought that there was a chance that X might be construed as meaning Y.

On the view I take, the third question—If this is not a debt, is it a "liability"? does not arise, but the word "liabilities" seems to me a very wide word, and I think that, if I had come to the conclusion that this fine was not a debt then I might have come to the conclusion that it was a liability.

In regard to this matter, although I am in general agreement with the county court judge, I do not agree with an observation which he made as to sect. 30 (8). He said :

> Every debt is a liability, but every liability is not a debt. That is why it is necessary to specify the liabilities which were to be included in sect. 30 in subsect. (8). But there is no limitation of the word "debt" under the section. It would appear clear that a fine does not come under subsect. (8) as a liability, but this in no way prevents it from being a debt provable in bankruptcy under subsect. (3).

I cannot read subsect. (8) as in any way limiting or cutting down the meaning of the word "liability" as used in subsect. (3). The former subsection does not contain an exhaustive definition of the matters which are "liabilities" within subsect. (3). I entirely agree, however, with the following observation of the county court judge :

> The fact that a fine is also a punishment does not make it any the less a debt ; and I do not see why the Crown should be in a worse position than the subject in regard to proving for that debt in bankruptcy.

In my view this appeal should be dismissed.

Cohen, J. : I agree, and I will add only a few observations.

If the view which my Lord has expressed was not correct, strange results, as it seems to me, would follow. The cases to which my Lord has referred, and the passage in Coke upon Littleton, establish that a fine is a debt of record upon which the Crown can sue at law. Counsel for the appellant, as I followed him, agreed that, if, before the receiving order had been made, the Crown had sued the debtor for the amount of that debt and had obtained judgment, that judgment would have constituted a civil debt which would have been provable in bankruptcy. On this basis, if we were to accept the argument for the appellant and strike out the proof on the ground that the fine *per se* was not provable, there would be nothing in sect. 7 to prevent the Crown instituting proceedings against the debtor and obtaining judgment, and that judgment would be a civil debt.

I now turn back to sect. 30. Under that section it could not be said that the judgment constituted a debt to which the debtor was subject at the date of the receiving order, but I see no reason why it should not be said that the debt is one to which the debtor had become subject before his discharge by reason of an obligation incurred before the date of the receiving order. It seems to me that a fine imposed by a court of criminal jurisdiction does fall within the meaning of the words "any obligation incurred." That being so, when the judgment was obtained it would presumably be provable, and it would seem strange if the legislature had intended a result under which a debt, which was already a debt of record, had to be put in the form of a judgment before it could be proved. This is, of course, not conclusive, because it might be suggested that a claim in tort is a liability, although not provable, but a judgment on such a claim if obtained before the receiving order is provable, being for a sum certain. But I do not think that is a fair analogy, and I think the dilemma I have stated reinforces the view which my Lord has expressed, and which entirely agrees with my own. I agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: *Botterell & Roche*, agents for *Ingledew, Mather & Dickinson*, Newcastle-upon-Tyne (for the appellant); *Treasury Solicitor* (for the respondents)
[*Reported by* R. L. ZIAR, ESQ., *Barrister-at-Law.*]

Re MINNIE MARSDEN (SPINSTER), JACOBS *v.* LLOYD.

[CHANCERY DIVISION (Morton, J.), **March 1, 1944.**]

Practice—Proceedings between trustee in bankruptcy and third party—Bankrupt called as a witness—Whether party calling the bankrupt entitled to cross-examine him without showing that he is hostile—Evidence contrary to statements at public or private examination.

On a motion for a declaration that certain furniture not in the bankrupt's possession formed part of the property of the bankrupt, counsel for the trustee in bankruptcy contended that he was entitled to put to the bankrupt her answers given at the public examination and private examination, notwithstanding that he was calling her as a witness in support of his case:—

HELD: in proceedings between a trustee in bankruptcy and a third party, where counsel for the trustee calls the bankrupt as a witness he should not, in the first instance, put leading questions to the bankrupt, but, if the bankrupt says anything which is contrary to what he has said at his public examination, counsel may put to him what he said at his public examination.

[**EDITORIAL NOTE.** A party is not allowed to cross-examine his own witness unless the witness is shown to be hostile. A rather wider view is taken in bankruptcy matters as stated above. The suggestion was that HORRIDGE, J., who for many years dealt with bankruptcy matters, had departed from this practice, but the court has held that there has been no departure and that the old practice still prevails.

AS TO ADMISSIBILITY OF DEBTOR'S ANSWERS IN OTHER PROCEEDINGS, see HALSBURY, Hailsham Edn., Vol. 2, pp. 103-105, para. 121; and FOR CASES, see DIGEST, Vol. 5, pp. 988-990, Nos. 8083-8094.]

Cases referred to:

*(1) *Re Osborne, Ex parte Lovell* (1899), 43 Sol. Jo. 480; 5 Digest 990, *8093.*

*(2) *Re Cunningham, Ex parte Official Receiver* v. *Cunningham* (1898), 6 Mans. 199; 5 Digest 620, *5575*; 80 L.T. 503.

(3) *Re Fitzgerald, Ex parte Hobbs*, [1916] H.B.R. 157; 4 Digest 336, *3157.*

MOTION by the trustee in bankruptcy against a third party for, *inter alia*, a declaration that certain furniture in the possession of the third party formed part of the property of the bankrupt divisible among her creditors. Counsel for the applicant called the bankrupt as a witness in support of the application and then wished to put to her certain answers given by her at her public examination and private examination. Only so much of the judgment as is relevant to this question is reported.

Neville Laski, K.C., and *A. S. Diamond* for the applicant.

Sir George Jones, K.C., and *G. F. Kingham* for the respondent.

MORTON, J.: The answers of the bankrupt at her private examination and public examination are not evidence against the respondent, and in that connection I think I should deal now with an argument which was presented to me by counsel for the respondent, as it is a point of procedure of some importance. Counsel for the applicant intimated in his opening that he desired to put to the bankrupt her answers given at the public examination and private examination notwithstanding that he was calling her as a witness in support of the applicant's case, and he referred me to three cases. The first is *Re Osborne, Ex parte Lovell* (1). It was a case before WRIGHT, J., and the report, which is a brief one, is as follows, at p. 480 :

> This was a motion by the trustee against a stranger to the bankruptcy. Counsel for the trustee called the bankrupt as his witness and asked leave to cross-examine him and to put the notes of his public examination to him. Counsel for the respondent objected.

At p. 480, WRIGHT, J., said :

> I think the trustee should be allowed to put any fair question to the bankrupt, and confront him with what he has said on his public examination. It is not quite the same as cross-examining one's own witness in a common law action, because in bankruptcy the bankrupt is often the only witness that either side can call to give any information as to the facts of the case.

The next case, which was also before WRIGHT, J., was *Re Cunningham* (2). That was a motion by the Official Receiver, as trustee in the bankruptcy of one Cunningham, to set aside a certain agreement between the debtor and his mother, the respondent, with reference to certain furniture. Counsel for the Official Receiver called the debtor as a witness in support of the application, but, owing to his unsatisfactory answers, proposed to cross-examine him as to answers given by him at his public examination. Counsel for the respondent objected. At p. 200, WRIGHT, J., said :

> I think it is highly desirable that the practice in bankruptcy should be that either party to an application should be at liberty to elicit from the bankrupt when called as a witness what account he has given of a matter on a previous occasion without regard to who calls him. It is important that this practice should be known.

Mr. Kingham informed me that that practice had not been followed by HORRIDGE, J., but he was not able to refer me to any reported case on the subject. However, on the matter being gone into in argument, it appeared that the practice of HORRIDGE, J., was that he would not in the first instance allow the answers of the bankrupt at his public examination to be put to him, but that, if he gave answers which were contrary to what he had previously said, then the answers at his public examination could be put to him. It seems to me that the practice laid down by WRIGHT, J., is a most convenient practice and one which is calculated to lead to the establishment of the truth. If the bankrupt is called as a witness, it is no doubt true that, in the first instance he should not be asked leading questions any more than any other witness should be asked leading questions, and, if counsel started at once by putting to him what he had said in his public examination, it may be that that would be open to objection as a leading question. But, in my view, it is the rule, and it ought to be the rule, that, if the bankrupt says anything which is contrary to what he has already said in his public examination, counsel may put to him what he said at his public examination whether the counsel examining him has called him as a witness, or whether the counsel is cross-examining him. I entirely and respectfully agree with the observations of WRIGHT, J., in the two cases to which I have referred, and I do not think it has been established that there has been any departure from that practice in recent years.

The third case to which counsel for the applicant referred me was a case before HORRIDGE, J., *Re Fitzgerald, Ex parte Hobbs* (3), but that case carries the matter no further than this, that it is the duty of a bankrupt as such to come to the court and give evidence, quite apart from the *subpoena*. I do not think that assists the matter any further.

Solicitors : *J. N. Nabarro & Sons* (for the trustee in bankruptcy) ; *H. H. Lloyd* (for the respondent).

[*Reported by* P. J. JOHNSON, ESQ., *Barrister-at-Law.*]

R. v. JAMES TURNER.

[COURT OF CRIMINAL APPEAL (Viscount Caldecote, L.C.J., Humphreys, Singleton, Tucker and Cassels, JJ.), **April 3, 1944.**]

Criminal Law—Evidence—Admissibility—Rape—Defence of consent—Imputation upon character of prosecutrix—Prisoner's evidence as to prosecutrix's gross indecency at material time—Whether evidence of prisoner's previous conviction admissible—Criminal Evidence Act, 1898 (*c.* 36), *s.* 1 (*f*) (ii).

On a charge of rape the accused put forward a defence of consent and gave evidence to the effect that the prosecutrix committed a gross indecency with him. It was contended that by giving such evidence, the accused had made imputations upon the character of the prosecutrix within the meaning of the Criminal Evidence Act, 1898, s. 1 (*f*) (ii), which made admissible evidence of a previous conviction of the accused :—

HELD : the evidence was directed to the proof of consent and, although it made imputations on the character of the prosecutrix, it did not deprive the accused of the protection given by the Act of 1898. Evidence of a previous conviction was, therefore, inadmissible.

[**EDITORIAL NOTE.** In a charge of this nature a defence of consent necessarily makes imputations on the character of the prosecutrix and the effect of this was left open in *R.* v. *Preston* (1). The matter is here fully decided by the full Court of Criminal Appeal.

AS TO CROSS-EXAMINATION AS TO CHARACTER AND PREVIOUS CONVICTIONS, see HALSBURY, Hailsham Edn., Vol. 9, pp. 215-217, para. 303 ; and FOR CASES, see DIGEST, Vol. 14, pp. 447-449, Nos. 4730-4754.]

Cases referred to :

(1) *R.* v. *Preston*, [1909] 1 K.B. 568 ; 14 Digest 449, *4748* ; 78 L.J.K.B. 335 ; 100 L.T. 303.

(2) *R.* v. *Rouse*, [1904] 1 K.B. 184 ; 14 Digest 447, *4733* ; 73 L.J.K.B. 60 ; 89 L.T. 677.

*(3) *R.* v. *Sheean* (1908), 72 J.P. 232 ; 14 Digest 448, *4744*.

*(4) *R.* v. *Fisher* (1899), *Times*, Jan. 31 ; 14 Digest 448, *4743*.

*(5) *R.* v. *Biggin*, [1920] 1 K.B. 213 ; 14 Digest 449, *4751* ; 89 L.J.K.B. 99.

(6) *R.* v. *Donovan*, 25 Cr. App. Rep. 3 ; [1934] 2 K.B. 498 ; Digest Supp. ; 103 L.J.K.B. 683 ; 152 L.T. 46.

(7) *R.* v. *Cohen and Bateman* (1909), 2 Cr. App. Rep. 197.

APPEAL by the accused on the ground that evidence as to a previous conviction was improperly admitted under the Criminal Evidence Act, 1898, s. 1 (*f*) (ii). The facts are fully set out in the judgment of the court delivered by HUMPHREYS, J.

John Davidson for the appellant.

T. R. Fitzwalter Butler for the Crown.

HUMPHREYS, J. [delivering the judgment of the court] : James Turner was convicted at the Bedfordshire Assizes of the rape of Ivy Muriel King. He appealed to this court on a point of law, the ground as stated being that CHARLES, J., wrongly admitted evidence of the appellant's previous conviction. Such evidence was in fact admitted by CHARLES, J., under the terms of the Criminal Evidence Act, 1898, s. 1, the material parts of subsect. (*f*) of which read as follows :

> A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless . . . (ii) . . . the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution . . .

The appeal came on for hearing on March 6 before a court consisting of HUMPHREYS, STABLE and CASSELS, JJ., when the court was invited by counsel for the Crown to give an authoritative ruling on a question expressly left open for future consideration in *R.* v. *Preston* (1), namely, where a person charged with rape puts forward the defence that the woman consented to the act, is the nature or conduct of the defence such as to involve imputations on her character within the meaning of sect. 1 (*f*) (ii) so as to render admissible cross-examination of the accused as to previous convictions ?

The court accordingly adjourned the hearing of the appeal and admitted the appellant to bail, and the LORD CHIEF JUSTICE convened a court of five judges to hear the appeal.

The appeal was argued on March 20, when the LORD CHIEF JUSTICE announced the decision of the court that the appeal was allowed and the conviction quashed. We now proceed to give our reasons for that decision.

The details of the evidence are of little importance upon this question, but as the facts of the case must be stated for the purpose of a further question which, in our opinion, arises, they may be now shortly summarised.

Ivy Muriel King was a woman who had been married and divorced by her husband. She lived and worked in Middlesex, but was on Oct. 12 last on a A visit to her mother who lived at Tempsford. At about 10.30 on that evening she parted from a friend with whom she had been for a walk, and then met three or four soldiers of whom the appellant was one. She was then on the main road to Dunstable and within 150 yards of her mother's house. The other soldiers walked on while the appellant remained talking to her. According to her evidence the appellant then caught hold of her, kissed her, tripped her up, hit her in the face when she struggled and tore open the zip fastening of the B slacks she was wearing so as to tear the material. He then tore her knickers and succeeded in committing rape upon her. She then went straight to her mother's house.

Her evidence was amply corroborated by other witnesses, including her mother and a witness named Orr, a lodger at her mother's house, both of whom described her as being in a distressed condition with a bruised forehead and cut lip, her clothes stained with mud, her trousers torn and her knickers showing C through the tear, the knickers being also torn. She complained of being assaulted by a soldier, and Orr at once went out and found the appellant about 200 yards away. He denied all knowledge of the affair, but Orr insisted on getting from him his name and official number. The police were informed and the appellant was seen two days later at the camp, when he at once admitted being the man who had been with the prosecutrix on Oct. 12, and admitted having D had connection with her, but alleged that after she had protested against his putting his hand inside her trousers and after what he described as a bit of a struggle, she had given way to him and allowed him to do what he wanted. He added: "I apologised for putting her on the road after we got up. It has worried me since and I am very sorry it has happened."

At the trial the defence put forward was that the prosecutrix consented to the act, and counsel for the appellant cross-examined her as follows: E

> *Q.*—There is one point that I must put to you, because they are my instructions. He took out his penis at some stage of the proceedings? *A.*—Yes. *Q.*—You were aware of that, were not you? *A.*—Yes. I did not see him take it out. *Q.*—You knew he was seeking intercourse with you? *A.*—Naturally, when he was struggling like that at my clothes. *Q.*—Did you offer to relieve him in another way? *A.*—Not in any shape or form.

The trial judge, CHARLES, J., then asked: F

> What does that mean, Mr. Davidson? Do you suggest that she offered to commit a gross indecency? *A.*—It amounts to an offer to masturbate.

The appellant subsequently gave evidence on his own behalf, and in examination-in-chief, counsel for the appellant asked:

> *Q.*—Did she struggle a bit? *A.*—Slightly.

The judge then asked: G

> *Q.*—Why do you say she struggled? *A.*—I don't know. After putting my hand there I unfastened my trousers and took out my penis, but she said: "Don't do it; I can," and she put down her hand and took hold of it. She took hold of my penis and said: "I will do it." That made me worse. Then I went to put my penis to hers and found it awkward, so I laid her down on the ground near the wall. *Q.*—You just laid her down? *A.*—I just gently laid her down. *Q.*—You gently what? *A.*—I just bent her backwards and laid her down.

Counsel for the appellant then continued his examination as follows: H

> *Q.*—Then what happened? *A.*—I asked her if I could have connection. *Q.*—You asked her, did you? *A.*—Yes. *Q.*—What did she say? *A.*—She said: "All right, but promise me you will be careful."

The appellant was then cross-examined, and at what appeared to be the close of his cross-examination CHARLES, J., said:

> There remains now another matter. The jury are asked to believe that the lady not only asked him to do something indecent, but that she took his person in her hand, that is to say, committed an act of gross indecency upon him, indecently assaulted him,

Counsel for the Crown then said :

Yes, my Lord. If the cross-examination had stopped at that point, I should not have objected.

The judge continued :

But it did not. I do not think you can leave it there. The suggestion to the jury was that this woman is a filthy, nasty woman, utterly filthy, who would commit an indecent assault upon that man. I do not think that can be done without the consequence of such a suggestion being incurred.

A After some further argument, CHARLES, J., addressing the jury, explained the ruling which he was about to give, and he said ;

In the ordinary way you cannot put a previous conviction to a man. The jury does not know anything against his character unless he makes an attack upon the character of the prosecutor, prosecutrix or one of the witnesses for the prosecution. Here he has done that and accordingly I rule that counsel for the prosecution is entitled to put any question as to his character.

B Counsel for the Crown then asked this question :

Q.—This is not the first time an allegation has been made against you ? *A.*—No. *Q.*—At the Anglesey Quarter Sessions in June, 1941, you were convicted of an offence of this kind ? *A.*—Yes. *Q.*—You were convicted of an assault upon a female with intent to ravish her and sentenced to 9 months' imprisonment ? *A.*—Yes.

The summing up of CHARLES, J., certainly did nothing to detract from the C serious nature of that evidence which was left to the jury as part of the evidence in the case.

In these circumstances, it appears to us that two questions arise, the first being that referred to earlier in this judgment, and in the event of that question being answered in the negative the further question : Did the appellant go beyond his allegation of consent by the prosecutrix and make imputations on her character so as to render his cross-examination to character admissible by virtue D of the subsection.

On the first question it must be conceded that to allege of a woman that she permitted a man other than her husband to have intercourse with her would be regarded by most persons as an imputation upon her character.

In the same way in former times one of the deadliest insults which could be offered to a gentleman was to call him a liar, and such conduct has often led to a duel with fatal results, but, if an accused person refers to a witness for the E prosecution as a liar, it does not follow that he is making an imputation on his character so as to render himself liable to cross-examination to character : see *R.* v. *Rouse* (2).

We think that wider considerations are involved in the solution of this problem. On a charge of rape the Crown has to prove two things, intercourse and the non-consent of the woman. For centuries the law has jealously guarded F the right of an accused person to put forward at his trial any defence open to him on the indictment without running the risk of his character, if a bad one, being disclosed to the jury. It would be strange indeed if the Act of Parliament which allowed him, in most cases for the first time, to give evidence on oath had virtually deprived him of that right in the case of one serious felony by enacting that he could only do so at the risk of having his character exposed. What is commonly referred to as the defence of consent in rape is in truth G nothing more than a denial by the accused that the prosecution has established one of the two essential ingredients of the charge. It is and must be the prosecution which introduces the question of consent or non-consent. Can the legislature have intended to penalise the accused who avails himself of the right to give evidence conferred by statute by enacting that he may be cross-examined as to previous convictions if he denies one, though not if he only denies the other of the two ingredients of the crime. In our opinion, this is one of the H cases where the court is justified in holding that some limitation must be put on the words of the section since to decide otherwise would be to do grave injustice never intended by Parliament. In *R.* v. *Sheean* (3), the question came before JELF, J., at the Stafford Assizes, in March, 1908. That learned judge held that, where a prisoner in order to clear himself upon a charge to which consent is a good defence in law alleges that the prosecutrix did so consent, such allegation does not expose him to cross-examination as to previous convictions by reason of the Criminal Evidence Act, 1898, s.1 (*f*), and he declined to follow a ruling to the contrary by DAY, J., in *R.* v. *Fisher* (4).

We agree with that ruling of JELF, J., and, accordingly, answer the first question in the negative.

In so holding we are satisfied that we are following the uniform practice of the last 35 years. We know of no authority in which doubt has been cast upon the correctness of the decision of JELF, J.

On the other hand, in *Biggin's* case (5), in which the judgment of the court turned upon another point, AVORY, J., in the course of the argument is reported at p. 217 as observing : A

> In a prosecution for rape the prisoner cannot be cross-examined as to his antecedents and character merely because questions have been put to the woman alleging that she consented.

Again, in *Donovan's* case (6), LORD HEWART, L.C.J., observed during the argument, at p. 3 :

> I thought it had been held again and again that putting forward a defence of consent does not amount to making an imputation on the character of the prosecutrix. B

Finally, it would seem that CHARLES, J., in the present case, would not have permitted the cross-examination of Turner as to his previous conviction but for the introduction of the incident referred to in the cross-examination of the prosecutrix.

Turning to the second point, there can be no doubt that an accused person the nature of whose defence does not of itself involve imputation upon anyone, C may yet, in the conduct of that defence, make imputations which will bring him within the terms of sect. 1 (*f*) (ii). Where, however, as in the present case, the suggested further imputation is upon the character of the woman whose consent would afford a defence to the charge, the accused does not lose the protection of the opening words of sect. 1 (*f*) so long as his questions and evidence are directed to the proof of that consent. It may not always be easy to decide whether the new topic is so closely connected with the defence of consent as in D effect to form part of it. For that reason we agree with the observation to be found in various judgments of the court that the proper course for counsel for the Crown is that followed by counsel in the present case, namely, to obtain the ruling of the court before embarking upon such a cross-examination.

The presiding judge, recorder or chairman of quarter sessions will no doubt remember that any matter of doubt is to be resolved in favour of the accused. If the jury are inclined to believe the woman they are not likely to be swayed E by one more allegation against her made by the accused, whereas the effect of the proof of a previous conviction for a similar offence may, and in most cases probably will, be fatal to any chance of an acquittal. In the present case, we cannot find that the evidence given by the appellant which caused CHARLES, J., to allow the cross-examination to character went one step beyond the defence of consent. That evidence, in our view, did no more than state the details or particulars of the woman's conduct which, according to the witness's version F of the facts, showed that the act of connection was not against her will or without her consent.

On the whole we have come to the conclusion that the conviction cannot stand. We were invited by counsel for the Crown to apply the proviso to the Criminal Appeal Act, 1907, s. 4, on the ground that no miscarriage of justice has actually occurred. The case against the appellant certainly appears to G have been a very strong one, but this is a case of a wrong decision on a question of law as to the effect of which see the considered judgment of this court in *R.* v. *Cohen and Bateman* (7). Indeed, we are not aware of any precedent for applying the proviso in a case where cross-examination to character has been deliberately admitted by the trial judge. We have not had the advantage of seeing and hearing the witnesses and we feel that, without the evidence which was, in our opinion, wrongly admitted, the whole trial and the summing-up H would have been of so different a character that we could not, without substituting ourselves for the jury, hold that the only reasonable verdict would have been one of guilty.

Appeal allowed.

Solicitors : *Registrar, Court of Criminal Appeal* (for the appellant) ; *F. W. F. Lathom* (for the Crown).

[*Reported by* R. BOSWELL, ESQ., *Barrister-at-Law.*]

ied. MINISTRY OF AGRICULTURE
FISHERIES *v.* MATTHEWS. [1949]
E.R. 724.

MAYOR, ALDERMEN AND BURGESSES OF THE BOROUGH OF SOUTHGATE *v.* WATSON

[COURT OF APPEAL (Scott, MacKinnon and Luxmoore, L.JJ.), **May 10, 1944.**]

Landlord and Tenant –Rent restriction Homeless person placed in possession of vacant house requisitioned by local authority—No tenancy created—No protection under Rent Acts.

The clerk of the respondent council had been authorised by the Minister of Health to requisition empty houses as the agent of the Minister, pursuant to the Defence (General) Regulations, for the purpose of providing accommodation for persons rendered homeless by enemy action. The appellant, being such a person, in March, 1941, was provided with a house which had been left vacant by its owner. Shortly after being put into possession the appellant was informed that he would be required to pay a reasonable rent, but no other terms were ever suggested. The rent was fixed at 16*s.* 6*d.* per week and had been paid weekly. In 1944 the owner of the house desired to return and the respondent council brought proceedings to recover possession of the premises. The appellant contended that in the circumstances his occupation was a tenancy and that he was protected by the Rent Acts:

HELD: no tenancy had been created and the appellant was not entitled to the protection of the Acts.

[**EDITORIAL NOTE.** Letting a person into possession and accepting rent is one of the ways in which a tenancy may be created. For these facts to constitute a tenancy the person accepting the rent must be in a position to let the property, that is to say, he must be the freeholder or a superior lessee of the property. The court here seems to have based its decision upon a finding that the clerk to the local authority had no such interest in the property as would give him any right in law to create a tenancy; but the decision may also be explained as based upon a finding that the occupation was under a licence and not under a contract of tenancy.

AS TO CREATION OF RELATIONSHIP OF LANDLORD AND TENANT, see HALSBURY, Hailsham Edn., Vol. 20, pp. 5-13, paras. 1-8; and FOR CASES, see DIGEST, Vol. 30 pp. 343-347, Nos. 16-63.]

APPEAL by the occupier from an order of His Honour JUDGE ALCHIN, at Edmonton County Court, dated Feb. 4, 1944.

On Mar. 15, 1941, the appellant's house was destroyed by enemy action and he was rendered homeless. Under the regulations for providing accommodation for homeless people in similar circumstances the clerk to the respondent council had been authorised by the Minister of Health, as his agent, to requisition empty houses in the Borough of Southgate under the defence regulations. In pursuance of that authority the town clerk had requisitioned a house which had been left vacant, the owner having left the district to avoid air raids. The council offered it to the appellant and he went in on Mar. 24, 1941. About a week later the borough treasurer wrote stating that he would be required to pay a "reasonable rent," and later, after enquiry as to the rent the appellant had been paying before his home was destroyed, the amount was fixed at 16*s.* 6*d.* per week, as from Apr. 12, 1941.

The owner of the house having expressed his desire to return in 1944, the council sued the appellant in the county court for possession.

The defence relied on was that by entry and payment of rent on a weekly basis he became a tenant of a controlled house entitled to the protection of the Rent Restriction Acts. The county court judge held that on the facts there was no tenancy created to which the Rent Restriction Acts applied and made an order for possession.

Robert Fortune and *Henry Harris* for the appellant.

Roland Burrows, K.C., and *W. E. P. Done* for the respondents.

SCOTT, L.J.: In this case a house had to be requisitioned under the Defence (General) Regulations by a borough or, rather, by the competent authority, the clerk of that borough. The question in the case was and is, whether that competent authority had power under the Defence (General) Regulations to create a tenancy, turning himself into a landlord and making the person who was put into the house, because he had by enemy action lost possession of his own, a tenant.

The county court judge gave a very simple, short and entirely sound judgment, saying that no tenancy had been created, and the appeal is from that judgment. I think it was entirely right.

The ground of defence put forward is that, if the tenancy was created, as contended, the house being of a rateable value within the Rent and Mortgage Interest Restrictions Act, 1939, the appellant, as a person accommodated by the local authority, acting as competent authority, by the use of these requisitioned premises, thereby became a tenant within the meaning of the Rent and A Mortgage Interest Restrictions Act, so that he gained the right to remain there until turned out pursuant to those Acts. It would have been a great injustice to the owner of the house, but that is neither here nor there. It is quite clear that no tenancy was created and that defence, the only defence, entirely fails. The appeal must be dismissed with costs.

MACKINNON, L.J.: I agree.

LUXMOORE, L.J.: I also agree. B

Appeal dismissed with costs.

Solicitors: *Joseph Mayorcas* (for the appellant); *Sharpe, Pritchard & Co.* (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

C

R. *v.* JOHN ABRAHAM LINCOLN.

[COURT OF CRIMINAL APPEAL (Humphreys, Lewis and Asquith, JJ.), **February 14, 1944.**] D

Criminal Law—Receiving goods knowing them to have been stolen—Charges both of stealing and receiving—Direction on larceny only—Jury finding verdict of receiving.

At the trial of the appellant on charges alleging alternatively stealing and receiving articles known to have been stolen, the chairman decided that the evidence pointed to larceny rather than to receiving goods knowing them to have been stolen and told the jury to direct their attention to the stealing E charges. As a result, the defence did not deal at all with the accusation of receiving. The jury, however, found the appellant not guilty of stealing, but guilty of receiving an article knowing it to have been stolen:—

HELD: (i) the conviction must be quashed since the defence had not been heard on the charge on which the appellant was found guilty.

(ii) although a judge may state his own view, it is his duty to leave to F the jury everything in the indictment upon which there is evidence to go to the jury, and he must direct the jury upon the law relating to every count in the indictment upon which he is leaving it to them to find a verdict.

[**EDITORIAL NOTE.** In order that a verdict may stand, it is necessary that the parties shall have had an opportunity of dealing with the specific charge of which the prisoner is found guilty. Here, the case proceeding on the footing that the material charge was one of stealing, the charge of receiving was not dealt with by counsel, and G the verdict could not stand.

AS TO RECEIVING STOLEN PROPERTY, see HALSBURY, Hailsham Edn., Vol. 9, pp. 550, 551, paras. 935-937; and FOR CASES, see DIGEST, Vol. 15, p. 977, Nos. 10,922-10,927.]

APPEAL against a conviction by the County of London Sessions. The facts are fully stated in the judgment of the court delivered by HUMPHREYS, J.

Alban G. Gordon for the appellant. H

Frederick D. Levy for the Crown.

HUMPHREYS, J. [delivering the judgment of the court]: In this case the appellant was charged at the County of London Sessions on an indictment which contained three separate allegations against him in regard to three separate matters, and in each of those allegations it was alleged that he stole something and, by way of alternative charge, it was alleged that he received that article well knowing it to have been stolen.

The chairman, who tried the case, came to the conclusion that the evidence in all three cases pointed to the crime of larceny rather than to the crime of receiving goods knowing them to have been stolen. The jury acquitted altogether of stealing and receiving in two of the cases, but in the third case, with which alone we are concerned, the chairman, having summed up to the jury on the question of stealing, the jury (having been told, after they had returned a verdict of not guilty of stealing, that they should return a formal verdict of not guilty on the receiving counts) said : " Oh, no, that is not our view at all." This then took place :

> The chairman : Will you just formally return a verdict on those receiving counts of not guilty ? Members of the jury, what is it you want to say. I want to follow.
>
> The foreman : Well, on one of the counts the jury consider he is guilty.
>
> The chairman : Which one is that ?
>
> The foreman : That is the question of the calculator [a thing alleged to have been stolen and to have been received].
>
> The chairman : Yes, I quite follow. You find him not guilty on all the other counts. You find him not guilty of stealing the calculator.
>
> The foreman : Guilty of receiving it knowing it to have been stolen.
>
> The chairman : Well, there is evidence. All right, members of the jury, if you prefer it that way.

Then the verdict was formally taken in that form. Thereupon counsel for the appellant said :

> I should have submitted, without your Lordship's direction, that that was not open to the jury.
>
> The chairman : Why not ? There is plenty of evidence of receiving. There are alternative counts.
>
> Counsel for the appellant : The whole case has been fought on the basis of stealing. Your Lordship intimated it to the jury in your Lordship's summing-up.
>
> The chairman : I told the jury it would be better to direct their attention to the stealing counts, but they are perfectly entitled to do what they have done.

Our view is that we must quash this conviction on the ground that, upon the charge of receiving stolen property, assuming for the purpose of argument only that there was evidence upon which the jury could properly find that verdict, the defence have never been heard. The defence have never dealt with that accusation, because everybody was told at the commencement of the case that the case was to be tried as a case of stealing or nothing. The appellant has not had an opportunity of giving evidence upon the question of receiving at all, which he never mentioned in the course of his evidence, and counsel has had no opportunity of addressing the jury upon it.

The issues upon a charge of receiving property knowing it to have been stolen are quite different from the issues which have to be considered on a charge of stealing. Therefore, upon that ground our decision must be that the verdict cannot stand, on the ground that the whole proceedings were unsatisfactory. What the chairman was doing from the outset in this case was really usurping the functions of the jury. It is not the business of the trial judge to decide whether, of two alternative verdicts, one or the other is the more appropriate in a case. His duty is to leave to the jury everything in the indictment upon which there is evidence to go to the jury. He may, of course, point out to the jury what his own view is of the matter, but he must direct the jury upon the law relating to every count in the indictment upon which he is leaving it to them to find a verdict. In this case, the action of the chairman, which no doubt will not happen again, was that he was removing from the jury altogether one of the counts of the indictment while still holding the view that there was evidence upon which they could convict upon it. The whole trial, from that point of view, is so unsatisfactory that we feel the only course we can take is to say that this appeal must be allowed and the conviction quashed.

Appeal allowed and conviction quashed.

Solicitors : *Philip Conway, Thomas & Co.* (for the appellant) ; *Director of Public Prosecutions* (for the Crown).

[*Reported by* R. BOSWELL, ESQ., *Barrister-at-Law.*]

CURZON OFFICES, LTD. *v.* INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL (Scott, Goddard and du Parcq, L.JJ.), **April 19, 1944.**]

Revenue—Stamp duty—Transfer of leasehold property from one associated company to another—Purchase price provided by mortgage to bank—Repayment of purchase price guaranteed by third company—Share capital of transferee company acquired by third company—Whether consideration for transfer indirectly provided by third company—Finance Act, 1930 (*c.* 28), *s.* 42—*Finance Act,* 1938 (*c.* 46), *s.* 50.

A parent company transferred certain leasehold property to its subsidiary company, of which it owned the whole share capital, in accordance with an arrangement made with an investment company that the investment company should, on the day following this transaction, purchase the whole of the share capital of the transferee company. The investment company also guaranteed the repayment of a sum advanced by a bank to enable the transferee to repay to the transferor the cash portion of the purchase price of the property together with an existing debt. It was submitted by the Crown that the consideration for the transfer had been indirectly provided by the investment company and that the arrangement came within the restriction imposed by the Finance Act, 1938, s. 50, on relief from stamp duty on transfers from one associated company to another :—

HELD : under the arrangement made with the transferor the investment company had provided the consideration for the transfer of the property. The transfer was, therefore, chargeable with *ad valorem* stamp duty.

Decision of MACNAGHTEN, J. (p. 163 *ante*) *affirmed.*

[**EDITORIAL NOTE.** The Finance Act, 1930, s. 42, gave relief in the matter of stamp duty in the case of transactions between associated companies. The Finance Act, 1938, s. 50, enacted that such relief was not to be given where the consideration for the transfer or conveyance was provided directly or indirectly by anyone other than the associated companies. The transaction here is a little complicated, but in effect it is held that, where a third party arranges credit for the consideration by a guarantee, it indirectly provides the consideration. Here in addition to the guarantee, the third party was purchasing the whole share capital of the transferee company, so that a default by the transferee in meeting its obligations would diminish the value of the purchased shares and this adds a further reason for holding that the consideration is provided by the third party. It has to be noted, however, that these arrangements between the companies took effect on the day after the conveyance was executed.

AS TO TRANSFERS BETWEEN ASSOCIATED COMPANIES, see HALSBURY, Hailsham Edn., Vol. 5, p. 813, para. 1387 ; and FOR CASES, see DIGEST, Supp., Companies 7155a, 7155b.]

APPEAL by the company from a decision of MACNAGHTEN, J., reported p. 163, *ante*, where the facts are fully stated.

Frederick Grant, K.C., and *M. L. Gedge* for the appellants.

The Attorney-General (*Sir Donald B. Somervell, K.C.*), and *J. H. Stamp* for the Crown.

SCOTT, L.J. : In this case I find myself so completely in agreement with the judgment of MACNAGHTEN, J., that I do not think it necessary to go into the facts or his reasons.

The case depends for its decision upon the effect of the Finance Act, 1938, s. 50, which prevented the Finance Act, 1930, s. 42, applying to certain transactions which, by that section of the 1930 Act, were exempted from stamp duty where a transaction was between "associated" companies. Sect. 50 of the 1938 Act says that sect. 42 of the 1930 Act shall not apply to any such instrument of transfer :

> . . . unless it is shown to the satisfaction of the Commissioners of Inland Revenue that the instrument was not executed in pursuance of or in connection with an arrangement whereunder (*a*) the consideration for the transfer or conveyance was to be provided directly or indirectly by a person other than a company which at the time of the execution of the instrument was associated with either the transferor or the transferee . . .

For the purpose of the section a company was to be deemed to be associated with another company if, but not unless, both were companies with limited liability and (so far as concerns this appeal) one of them was the beneficial owner of not less than 90 per cent. of the issued share capital of the other.

In this case Humphreys, Ltd., the transferor of certain property, owned 100 per cent. of the shares of the appellant company; but the party really interested in the transfer was not the appellant company, but a third company called Regis, Ltd., and the reality of the transaction was that it took place between Humphreys, Ltd., and Regis, Ltd. The Commissioners found as a fact that it was not shown to their satisfaction that the transfer was not executed:

> . . . in pursuance of or in connection with an arrangement whereunder the consideration for the transfer of their beneficial interest was to be provided directly or indirectly by a person other than a company which at the time of the execution of the transfer was associated with either the transferor or the transferee.

The finding of the Commissioners is in the exact terms of sect. 50 of the Act of 1938. Macnaghten, J., gave a carefully considered judgment, dealing with the whole of the facts of the case, and came to the conclusion that the correct view of the transaction was that expressed in the opinion formed by the Commissioners of Inland Revenue. I agree with his judgment and have nothing to add.

This appeal must be dismissed with costs.

Goddard, L.J.: I agree. I would like to add one reason of my own to those given by Macnaghten, J.

It seems to me that this is not a transaction which sect. 42 of the Act of 1930 was intended to protect at all. That section in fact says that, where there are two interlocked companies, a conveyance by one to the other shall not attract stamp duty if the beneficial interest is not changed. If company A, which owns the whole or practically the whole of the shares in company B, conveys a property in which company A has a beneficial interest to company B, there is no real change in the beneficial interest at all: there is, of course, a change in form and a change in law, but the beneficial interest really remains where it was. The whole object of this transaction was to get the beneficial interest away from Humphreys, not into a company which Humphreys was still controlling, but a company which was to be controlled by Regis. It is as clear as daylight in this case that the real transaction was that Regis was to acquire, as part of the bargain, the share capital in Curzon, and from that moment Curzon would no longer be an associated company with Humphreys. The beneficial interest, therefore, would go right away from Humphreys, which would have no beneficial interest in the property at all. In those circumstances, I do not think it would be right to say that at the time of the transfer Humphreys was the beneficial owner of the shares in Curzon because an arrangement had been made under which the beneficial interest in the Curzon shares was in Regis. In those circumstances, it is rather surprising, I think, that anybody should have thought that a transaction of this kind was sufficient to avoid the stamp duty which obviously ought to be exigible in respect of the transaction.

I agree, for that reason and the other reasons given by Macnaghten, J., that this appeal fails.

du Parcq, L.J.: I also agree that the judgment of Macnaghten, J., was right and that, as appears from the case, there was ample evidence before the Commissioners entitling them to come to the conclusion at which they arrived.

Appeal dismissed with costs.

Solicitors: *Ashurst, Morris, Crisp & Co.* (for the appellants); *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

INLAND REVENUE COMMISSIONERS *v.* TERENCE BYRON, LTD.

[Court of Appeal (Scott, Goddard and du Parcq, L.JJ.), **April 21, May 4, 1944.**]

Revenue—Excess profits tax—Capital—Theatre destroyed by enemy action—Whether theatre remained "capital employed in the business"—Finance (No. 2) Act, 1939 (*c.* 109), *ss.* 13 (3), 14 (2), *Sched. VII, Pt.* 11, *para.* 1 (1).

The respondent company carried on the business of theatre proprietors. On May 7, 1941, one of the company's theatres was totally destroyed by enemy action, and it was agreed that the War Damage Commission would in all probability make a value payment in respect of that property. The Crown contended that, for the purposes of excess profits tax, as from the date of destruction, the cost of the theatre was no longer "capital employed in the business," within the meaning of the Finance (No. 2) Act, 1939, s. 13 (3), and that the cost of the theatre should be excluded from the computation of the capital of the business :—

Held : notwithstanding its destruction, the destroyed theatre remained "capital employed in the business" within the meaning of the section.

Decision of Macnaghten, J. ([1943] 2 All E.R. 415) *affirmed.*

[**EDITORIAL NOTE.** The statute speaks of capital "employed" in the business. Normally it would be impossible to speak of a theatre which has been destroyed as being employed in the business, but, having regard to what are by the terms of the statute itself described as capital employed in the business, it is held that this phrase must not be construed literally but must be taken to be equivalent to the capital of the business. In this sense, it is further held that the theatre, despite its destruction, is still part of the capital of the business.

For the Finance (No. 2) Act, 1939, s. 13 (3), see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, pp. 1195, 1196.]

Cases referred to :

(1) *Liberty & Co., Ltd.* v. *Inland Revenue Comrs* (1924), 12 Tax Cas. 630 ; Digest Supp.

(2) *Gas Lighting Improvement Co., Ltd.* v. *Inland Revenue Comrs.*, [1923] A.C. 723 ; Digest Supp. ; 92 L.J.K.B. 665 ; 129 L.T. 481 ; 12 Tax Cas. 503.

(3) *Bourne & Hollingsworth* v. *Inland Revenue Comrs.* (1921), 12 Tax Cas. 483 ; Digest Supp.

(4) *Inland Revenue Comrs.* v. *Korean Syndicate, Ltd.*, [1921] 3 K.B. 258 ; Digest Supp. ; 90 L.J.K.B. 1153 ; 125 L.T. 615 ; 12 Tax Cas. 181.

(5) *Inland Revenue Comrs.* v. *Birmingham Theatre Royal Estate Co., Ltd.* (1923), 12 Tax Cas. 580 ; Digest Supp.

Appeal by the Crown from a decision of Macnaghten, J., given on July 20, 1943, and reported [1943] 2 All E.R. 415, where the facts are fully set out.

The Attorney-General (*Sir Donald B. Somervell, K.C.*), and *Reginald P. Hills* for the appellants.

Heyworth Talbot for the respondents.

Scott, L.J. : I have had the advantage of reading the judgments written by both Goddard and du Parcq, L.JJ., and agree with them.

Goddard, L.J. : du Parcq, L.J., deals with this matter more fully than I have done, and I will ask him to read his judgment first.

du Parcq, L.J. : In spite of the attractive simplicity of the argument for the Crown, I have come to the conclusion that the judgment of Macnaghten, J., was right.

We are here concerned with excess profits, that is to say, the amount by which the profits of a trade or business in the chargeable accounting period exceeded the standard profits. The standard profits are to be ascertained by reference to a standard period. A simple comparison of the profits of two contrasted periods, without taking into account the capital employed in the trade or business, might be unfair either to the taxpayer or to the Crown. If, in the chargeable accounting period, the amount of capital at risk in the business is greater than it was in the standard period, it would be unfair to the trader to make no allowance for that fact when the profits of the two periods are compared. If, on the other hand, the trader has withdrawn part of his capital from the business, a comparison which disregarded that fact would be unfair to the Crown. It is not the object of the relevant provisions, as I understand them, to punish, or even to discourage, enterprising traders ; and it is reasonable that, when capital is increased, some part at least of the enhanced profits of the business should be attributed to that increase, and that a withdrawal of capital should be regarded as at least partially explaining a reduction in profits.

The question which Macnaghten, J., had to decide was whether the facts found in the present case justified the conclusion of the commissioners that "the damaged theatre constituted an asset which must be included in the capital computation of the respondents for excess profits tax purposes as if such damage had not arisen." To speak of "the damaged theatre" is, perhaps, an under-statement, since it is found as a fact that the theatre has been destroyed by enemy action; but for practical purposes, the result would be the same if the theatre, though not destroyed, had been so seriously damaged that it could not be used. The respondents have not withdrawn from use in their business any of the capital which was invested in it in the standard period. It is true that the asset which in the standard period was represented by land with a theatre on it is now represented, as I assume, by land with stones and rubble on it: but, for what it is worth, it is still an asset of the business; and any profits or gains that may be derived from it will accrue to the business. It is true that its value as a money-making instrument is greatly reduced; and has, indeed, for the time being disappeared: but there is nothing in the Act of 1939 to suggest that the capital must be gainfully or productively employed in the business during the chargeable accounting period. If one imagines a business established for the purpose of holding an exhibition once every three years, I have no doubt that a building in which the exhibitions were to be held would, if it were a capital asset of the business, represent capital "employed in the business," even during the years in which it stood empty and, in a sense, unused. Similarly, if the respondents had, of their own volition, demolished the theatre with a view to building a more modern building on its site, it would not have been said, in my opinion, that, until the moment arrived when the new theatre was in existence as a going concern, the capital employed in the business must be taken to have been decreased by the amount of the value of the old theatre. Rather would the capital so employed have been increased by any sums invested in the re-building, even though the employment of that capital might for a long time be unproductive.

In the present case, I infer from the statement contained in para. 4 of the case stated, which I understand to be admittedly correct, that it is the intention of the respondents to rebuild the destroyed theatre; and the fact that the demolition was the work of the King's enemies and not of the traders themselves, does not seem to me to distinguish the present case from the hypothetical case which I have put.

For these reasons, I am of opinion that the appeal should be dismissed.

Goddard, L.J.: I am in complete agreement with the judgment of du Parcq, L.J., and desire only to add a few observations on one matter which has assisted me in coming to a decision on what I have found not an easy case.

The year after the tax was imposed, by the Finance Act, 1940, Parliament made a good many alterations to and amendments in the provisions of the Act of 1939. Among them was sect. 31, obviously an amendment of the provisions of the earlier Act as to the computation of capital. It deals with the case where any of the assets of the trade or business were inherently unproductive. In computing the capital employed in the business in the standard period and in the chargeable accounting period, inherently unproductive assets may be disregarded as assets during any part of the period during which the commissioners consider they were unproductive. It is unnecessary to consider whether or what the word "inherently" adds to "unproductive": but this provision seems clearly to indicate that Parliament recognised that assets, though unproductive, nevertheless do form part of the capital employed in the business.

The Attorney-General boldly argued that this section was unnecessary; and that it was a case where an amendment really added nothing to the section which it purported to amend, because on its true construction, it already provided for what was contained in the amendment. It may be that there have been such cases: but they must necessarily be rare. Nor do I understand why this amendment can be said to be unnecessary; for it clearly is intended to confer a benefit on the taxpayer, at whose instance alone it can be put into operation, while the construction of the 1939 Act for which the Crown contends works against him. Parliament is always assumed to be aware of what it has enacted: and when one finds amending legislation, it is only reasonable to suppose that, in the light of experience gained in the working of the Act, Parliament has decided that amendments or additions to the earlier legislation are required, whether to carry out its original intentions, or to remedy unforeseen hardships which have resulted.

I agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the appellants); *Gregory, Rowcliffe & Co.*, agents for *Addleshaw, Sons & Latham*, Manchester (for the respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

Distinguished. *Re* New Rock Colliery Co., Ltd. [1949] 1 All E.R. 613.

JENKINS PRODUCTIONS, LTD. *v.* INLAND REVENUE COMMISSIONERS.

[Court of Appeal (Lord Greene, M.R., MacKinnon and Luxmoore, L.JJ.), **March 17, 1944.**]

Revenue—Excess profits tax—Computation of standard profits—"Accounts made up for successive periods of 12 *months"—Finance Act,* 1937 (*c.* 54), *s.* 20 (2) (*a*)*—Finance* (*No.* 2) *Act,* 1939 (*c.* 109), *ss.* 14 (1), 22 (*f*).

The respondent company, which had selected the year 1935 as its standard period for the purposes of excess profits tax, had, from its incorporation in 1933, made up its accounts for each half year ending June 30 and Dec. 31. These half-yearly accounts were interim accounts and contained no appropriation account. At the annual general meetings of the company held in October or November, the directors presented to the shareholders accounts for the 12 months ending on the previous June 30. These accounts were based upon the half-yearly accounts and contained copies of the words and figures in the half-yearly accounts, but also contained the appropriation account and complied with the statutory requirements. The company contended that the yearly accounts were "accounts made up for successive periods of 12 months" ending on June 30 in each year and that the standard profits should be ascertained by taking half the average profits of the periods from June 1934, to June 1935, and half those from June 1935, to June 1936. The Crown contended that the accounts were made up for successive periods of 6 months and that the two half years of 1935 should be taken as the standard period:—

Held: (i) the twelve-monthly accounts of the company were the accounts of the business "made up for successive periods of 12 months" within the meaning of the Finance Act, 1937, s. 20 (2) (*a*), and the six-monthly accounts could not be properly described as "the accounts of the trade or business."

(ii) since, however, the exact profit of the company for the year 1935 could be ascertained from the six-monthly accounts, it was not right to take one half of the 1934-1935 profit added to one half of the 1935-1936 profit, but to ascertain the real figure from the six-monthly accounts. The existence of these six-monthly accounts was a "special circumstance" within the proviso to the Finance Act, 1939, s. 14 (1).

Decision of Macnaghten, J. ([1943] 2 All E.R. 786) *varied.*

[**EDITORIAL NOTE.** The "account of the trade or business" of a company referred to in the statutory enactments relating to excess profits tax means the account which is submitted to the shareholders. Here the company prepared certain half-yearly accounts for the information of the directors, but also a yearly account for submission to the shareholders. The former did not comply with the Companies Act, 1929, in that it did not include an appropriation account, but the yearly accounts were made up from the six-monthly accounts with the statutory requirements added. It is held to be immaterial that the auditors did not go back to the books and extract again the material for the yearly accounts and that the account of the trade or business for the purposes of excess profits tax was the yearly account. However, the Act of 1939 gives the commissioners, where special circumstances exist, a power to direct some other method of arriving at the profit for the standard period than that of extracting it as nearly as they can from the yearly accounts. The existence of these six-monthly accounts exactly covering the standard period (which the yearly accounts did not) is a special circumstance, and the commissioners should extract from them the precise profit for that period, instead of applying the proviso to sect. 14 (1) of the 1939 Act

Distinguished. *Re* New Rock Colliery Co., Ltd. [1949] 2 All E.R. 1070.

and taking one half of the profit shown in the two yearly accounts.

Appeal by the Crown from a decision of Macnaghten, J., dated Oct. 25, 1943, and reported [1943] 2 All E.R. 786. The facts are fully stated in the judgment of Lord Greene, M.R.

The Attorney-General (*Sir Donald B. Somervell, K.C.*), and *Reginald P. Hills* for the Inland Revenue Commissioners.

N. E. Mustoe for the respondent company.

Lord Greene, M.R. : This appeal raises a short point in connection with the statutory provisions relating to excess profits tax. The substantial question arises in this way. The respondent company selected as its " standard period " the calendar year 1935. Under the Finance (No. 2) Act, 1939, s. 14 (1), the profits of its trade or business in that calendar year are to be computed according to the income tax principles " as adapted in accordance with the provisions of Sched. 7, Pt. I."

To that there is a proviso. Picking out the relevant words, it is as follows :

> Provided that where a standard period . . . is not an accounting period, the profits or losses of the trade or business for any accounting periods wholly or partly included within the standard period . . . shall be so computed as aforesaid and such division and apportionment of those profits or losses and such aggregation of those profits or losses, or any apportioned part thereof, shall be made as appears necessary to arrive at the profits arising in the standard period or chargeable accounting period ; and any such apportionment shall be made in proportion to the number of months or aggregations of months in the respective periods, unless the commissioners, having regard to any special circumstances, otherwise direct.

Putting it shortly, if the accounting period of the company does not coincide with the calendar year which is selected as " a standard period," where there are two accounting periods, each of them covering a part of that standard period, the proviso is to be put into force.

Under sect. 22 (*f*) of the 1939 Act, it is provided :

> The accounting periods of a trade or business shall be determined in the same manner as the accounting periods of a trade or business are directed by the Finance Act, 1937, s. 20 (2), to be determined for the purposes of the national defence contribution.

The Finance Act, 1937, s. 20 (2), lays down the rules for determining the accounting period of a trade or business. Para. (*a*) is as follows :

> In a case where the accounts of the trade or business are made up for successive periods of 12 months each of those periods shall be an accounting period . . .

Then para. (*c*) says :

> In any other case the accounting periods of a trade or business shall be such periods, not exceeding 12 months as the Commissioners of Inland Revenue may determine.

In the present case the company's financial year ended on June 30. The accounts for the 12 months ended June 30 were submitted to the annual general meeting in the usual way, the balance sheet containing the auditors' report and the accounts signed by the directors as the Companies Act, 1929, requires.

Pausing there, it would seem that there could be no question that the language of s. 20 (2) (*a*) of the Act of 1937 is satisfied, because there are the accounts. They are the accounts for successive periods of 12 months. Therefore, turning back to the Act of 1939, it would be a case where the standard period is covered by two succeeding periods, that is to say, the accounting period ending June 30, 1935, and the accounting period ending June 30, 1936. In view of that fact, the directions contained in the provision would be brought into force and there would have to be an apportionment proportionate to the number of months in the respective periods.

Putting it quite shortly, you would take half the profits shown in the accounts ending June 30, 1935, and half the profits shown in the accounts ending June, 1936, and you would treat those as being the profits of the standard year.

But this company claims that s. 20 (2) (*a*) of the Act of 1937 does not apply, because it is argued that, in the case of this company, it is not true to say that the accounts of its trade or business are made up for successive periods of 12 months. The reason is this. This company had a practice of having accounts prepared and certified by the auditors for six-monthly periods. The accounts so prepared were trading accounts, profit and loss account and balance sheet ; but not an appropriation account. The auditors put upon this balance sheet what purports to be a report to the members of the company. It was in fact nothing of the kind; because these accounts were not prepared for or submitted to the general meeting, but were prepared for the directors, and never got any further. It is, therefore, inappropriate for the auditors to purport to put on a document of that kind a report to the members of the company. Such a report is only appropriate where, under the Companies Act, 1929, s. 134, the auditors make a report to the members on the accounts examined by them and on the balance sheet laid before the company in general meeting.

It is perfectly true that, when these six-monthly accounts were examined, and when they were compared with the twelve-monthly accounts which were submitted to the shareholders at the general meeting, the six-monthly accounts contain all the material subsequently incorporated in the twelve-monthly accounts, subject to what I have said about the appropriation account. Therefore, it is said that you cannot describe the twelve-monthly account as an account "which is made up." It is said the making-up of an account within the meaning of para. (*a*) means in effect going through the books and extracting from them the necessary material to produce the particular form of accounts which you are proposing to produce. Having regard to the fact that the twelve-monthly account in this case is nothing but a compilation from the six-monthly accounts, it is contended that you cannot say that the twelve-monthly account is made up at all.

In my opinion, that is an argument which will not bear examination. It seems to me that the twelve-monthly account is truly made up, notwithstanding that, there being available certain interim accounts, the auditors, in order to produce the twelve-monthly account, did not have to re-examine the books: the material was there all ready to hand and they used it.

Some reliance was placed upon the fact that the twelve-monthly account contains the results of the two six-monthly accounts expressly set out. I cannot see that that makes any difference. It was, no doubt, convenient that the shareholders should know that. One explanation of the convenience of the practice may lie in the circumstance that in this particular company all the shareholders were also directors. Therefore, the twelve-monthly account was incorporating information which had already been laid before the shareholders as directors. But, in my opinion, that is quite irrelevant. It seems to me these accounts were truly made up for successive periods of twelve months.

The argument put forward, if it had been right, would have led to the result that para. (*a*) would not apply and para. (*c*) would apply; in which case the Commissioners of Inland Revenue would have to determine what the accounting period should be.

There is one other way of approaching this question, as it seems to me, which is this. Here you have a company which in fact did prepare two different sets of accounts: one a six-monthly account prepared for the convenience of the directors; the other a twelve-monthly account prepared for the information of the shareholders. That twelve-monthly account is one which has certain characteristics. First of all, it is to be submitted to the shareholders, who are entitled to approve or disapprove it. Therefore, in that sense, it is a final account in a way in which the accounts produced to the directors for the six months were not final accounts at all. Secondly, the accounts so submitted to the shareholders were submitted in pursuance of the statutory obligation to submit accounts. It seems to me, bearing those two considerations in mind, that the yearly accounts are primarily the more important of the two sets of accounts which this company in fact got out.

Applying the language of this section to that state of affairs, which of these two sets of accounts is properly to be described as "the accounts of the trade or business"? Surely, there can be only one answer to that question. The accounts are the important final accounts. It seems to me that these words have to be construed in the light of the well-known practice of companies to have a financial period. A company's financial period is commonly thirteen months; and accounts are got out in reference to that financial period. When the paragraph speaks of the accounts being "made up," it surely must mean the accounts which are the accounts for the purposes of the company's financial unit of time.

For both these reasons, it seems to me that the view taken by Macnaghten, J., which was in favour of the company, cannot be supported.

When the matter came before the Commissioners, a different point was taken by the respondents, which failed before the Commissioners. Reliance there was placed on certain documents got out for the purpose of this controversy in 1941, on the basis of the calendar year ending on Dec. 31, 1935. The Commissioners, quite rightly, held that those documents did not come within the language of para. (*a*).

Before MACNAGHTEN, J., and before us, the case was entirely based on the argument that, having regard to the existence of the six-monthly accounts and the way in which the twelve-monthly accounts were obviously compiled, the twelve-monthly accounts were not accounts "made up" within the meaning of the paragraph. I merely mention that for the sake of record; because the argument before us was different from the argument before the Commissioners.

The Commissioners confirmed the assessment and MACNAGHTEN, J., reversed their decision. At the moment all that we propose to do is to rule upon the precise question of law that has been argued before us in the way I have indicated.

So far as the position as to the assessment is concerned, we propose to adjourn the rest of the hearing, for this reason. It emerged plainly on the face of this litigation that, assuming the respondents to be wrong in their contention, the case was one where the Commissioners, if in their discretion they thought fit, might, under the concluding words of the proviso to the Finance (No. 2) Act, 1939, s. 14 (1), direct that a different form of apportionment should be made. In other words, that the profits of the standard period should not be arrived at by taking half the profits of the year 1934-35 and half the profits of the year 1935-36.

We pointed out in the course of the discussion that the whole object of this provision is to arrive at the true profits, or as near as they can be ascertained, of the standard period. That, obviously, is the only fair basis on which the legislature could proceed. We pointed out that the rule of thumb laid down by the proviso to deal with cases where the accounting period does not coincide with the calendar year is merely a rough and ready rule which, in ordinary circumstances, was thought, and no doubt rightly thought, to be a sufficiently accurate method of ascertaining the profits of the standard period for the purposes of this particular taxation.

But, where special circumstances exist, the Commissioners may direct that some other method of apportionment should be adopted. It occurred to us that here was a case where it could be demonstrated without possibility of doubt what the profits of the year 1935, the standard period, were. There could be no doubt about that. It seemed to us that, in considering, as they were bound to consider, whether the case is one in which they should make a direction, the Commissioners ought to bear in mind the paramount object of this machinery, which is to ascertain, as far as reasonably can be ascertained, what the real profits of the standard period were. Here they have to their hand a method of ascertaining the profits of the standard period in respect of this company which would be absolutely accurate. That being so, we thought it right to point out that it seemed to us that that was a special circumstance applicable to the particular circumstances of this company to which the Commissioners ought to pay serious attention in deciding whether they would exercise their discretion under this proviso. We also ventured to point out that, in our view, their duty in deciding whether they should so exercise their discretion ought to be performed in relation to the facts of each particular case, and not by reference to some supposed rule or precedent which they have thought convenient to adopt in order to guide them.

However that may be, we said that with full appreciation of the fact that it was outside the matter that came before us. We only wished to ascertain what the practical position was. The Attorney-General, on behalf of the Commissioners of Inland Revenue, if I may say so, with great propriety and with the usual fairmindedness which one expects from that quarter, undertook that the Commissioners would reconsider the matter; and was good enough on their behalf to say that the Commissioners were always glad to have any intimation from the Bench on a matter affecting their duties, even if it was not one which expressly fell for decision.

Nothing that we can say can bind the Commissioners to exercise their discretion one way or the other: but we did think it right in the circumstances to state what we thought was the way they might approach a question of this kind; because this is a very striking case where the object of the Act, namely, to find the real *datum* line on which the whole system of taxation is based, *i.e.*, the profits of the standard year, can be ascertained with exactitude.

In these circumstances, the rest of the case must stand over until we are informed what the result of the reconsideration by the Commissioners has been.

MACKINNON, L.J.: I agree.

LUXMOORE, L.J.: I also agree.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue* (for the appellants); *Nordon & Co.* (for the respondent company).

[*Reported by* R. L. ZIAR, ESQ., *Barrister-at-Law.*]

Re AN APPEAL FROM DISALLOWANCES AND SURCHARGES BY LIONEL PRESCOTT WALKER, DISTRICT AUDITOR OF THE MINISTRY OF HEALTH FOR NO. 4 DISTRICT, AND *Re* AN APPLICATION BY WALTER SAMUEL LEWIS AND OTHERS FOR A DECLARATION AND RELIEF IN RESPECT OF THE SAID SURCHARGES.

[COURT OF APPEAL (Scott, Goddard and du Parcq, L.JJ.), **May 12, 1944.**]

Local Government—Remuneration of employees—Children's allowances—Fair and reasonable—Discretion of local authority—Local Government Act, 1933 (*c.* 51), *ss.* 106, 228, 229, 230.

After a meeting with their staff representatives and after inquiring into the practice of other employers, the Birmingham Corporation decided to contribute towards the increased cost of living expenses of their non-manual employees by paying a fixed weekly rate of war bonus according to age or sex with the addition of 2*s.* 6*d.* per week for each child in the case of married men, widowers or widows. These latter payments were called children's allowances. The district auditor disallowed the children's allowances as (i) unlawful since they were not "remuneration or salaries," or (ii) unreasonable since they had no relation to the value of the services rendered:—

HELD: the payment of such children's allowances was within the statutory powers of the local authority provided that the total amount of remuneration was fair and reasonable.

Decision of Divisional Court (*p.* 144 *ante*) *affirmed.*

[**EDITORIAL NOTE.** The remuneration which may be paid by a local authority to its officers and other employees is governed by statute and may generally be said to be in the discretion of the authority. Such remuneration must, however, be fair and reasonable. The real objection taken here was that two men doing the same work might receive different rates of pay because one had children dependent on him and the other had not. The criterion, it was said, is the work done for the authority and not the man's responsibilities. It has been held, however, that a local authority like other employers, may adjust a man's wages or salary in accordance with the man's responsibilities, so long as the remuneration is still fair and reasonable.

AS TO REMUNERATION OF OFFICERS OF LOCAL AUTHORITIES, see HALSBURY, Hailsham Edn., Vol. 21, p. 62, para. 102; and FOR CASES, see DIGEST, Vol. 33, p. 15, Nos. 48-52.]

Case referred to:

*(1) *Roberts* v. *Hopwood*, [1925] A.C. 578; 33 Digest 20, *83*; 94 L.J.K.B. 542; 133 L.T. 289; *revsg.*, S.C. *sub nom. R.* v. *Roberts, Ex p. Scurr*, [1924] 2 K.B. 695.

APPEAL by the district auditor from a decision of VISCOUNT CALDECOTE, L.C.J., and ATKINSON, J., given on Dec. 9, 1943, and reported at p. 144 *ante*, where the facts are fully set out.

Sydney G. Turner, K.C., and *Erskine Simes* for the appellant.

Maurice Fitzgerald, K.C., and *E. J. C. Neep* for the respondents.

SCOTT, L.J.: I have read and considered with care the judgments of GODDARD and DU PARCQ, L.JJ. I agree with them entirely, and only add that it would have been matter for grave regret if, as judges, we had felt bound to interpret the relevant statutory provisions as excluding that broad and human view of the meaning of remuneration from employer to employed which I am satisfied was intended by Parliament. The appeal will be dismissed for the reasons given by GODDARD and DU PARCQ, L.JJ.

GODDARD, L.J.: At the conclusion of the argument in this case I readily admit that I was inclined to the view that this appeal ought to be allowed. I was impressed with the argument of counsel for the appellant that, as children's allowances could have no relation to the value of the employees' services, payment of them to officers and servants could not be regarded, to use LORD WRENBURY'S words in *Roberts* v. *Hopwood* (1), as a " pecuniary return for services rendered " But on reflection I am satisfied that this is not the proper approach to the question that we have to determine in this appeal. I think the solution of the problem is to be found in a passage of LORD SUMNER'S speech in the case just mentioned, and in a passage of the judgment of ATKINSON, J., in the Divisional Court in the present case, to both of which I will refer in a moment. First of all, however they are made up, the sums paid by the corporation to their servants are wages. If one of the servants were not paid in a particular month or week, his cause of action would be for wages and nothing else. The corporation have agreed to pay Smallman, to take one instance, £481 19*s.* 8*d.* a year, or roughly £40 per month, and, if he had to sue, it would properly be described as an action for wages; he would not sue for wages plus children's allowance. The amounts paid would be properly entered in the books of the corporation as wages. When the audit is held, it is the duty of the auditor to disallow any item of account contrary to law. If the sum paid for wages is reasonable in amount, can the auditor enquire into the motive of the corporation that induced them to agree to that particular amount ? In this connection the passage in LORD SUMNER'S speech in *Roberts* v. *Hopwood* (1), at p. 604, seems to me to be decisive. He said:

> If, having examined the expenditure and found clear proof of bad faith, which admittedly would open the account, the auditor further found that the councillors' evil minds had missed their mark, and the expenditure itself was right, then the expenditure itself would not be " contrary to law " and could not be disallowed. Bad faith admittedly vitiates the council's purported exercise of its discretion, but the auditor is not confined to asking, if the discretion, such as it may be, has been honestly exercised. He has to restrain expenditure within proper limits. His mission is to enquire if there is any excess over what is reasonable.

These concluding words seem to me to be of paramount importance. Here there is, of course, no question of bad faith, but a payment not authorised by law is, for this purpose, on the same footing and equally would serve to reopen the account. Now, if an amount paid in wages is reasonable, the expenditure is right and is not contrary to law and cannot be disallowed. This seems to me to show that it is the amount of the wages to which regard must be had, and not the motive which led to that amount being paid. For instance, suppose a local authority had been paying some of their workmen rather less than the trade union rate, with which the men were content because their employment was secure; if the council subsequently decided that they would for the future pay the prevailing trade union rate to married men, no one could say that such a rate was unreasonable, and accordingly it would not be for the auditor to enquire why they were paying it. Now a war bonus is recognised as a reasonable addition to a man's pre-war wage. The bonus granted by this corporation is by no means equivalent to the whole difference between the purchasing power of a man's wage before the war and the present day. The auditor does not suggest that the amount, as an amount, is unreasonable. So, in my opinion, the concluding words of the judgment of ATKINSON, J., neatly and accurately state the position. He says, at p. 150:

> If the council had brought every salary right up to pre-war value, they would have been within their rights. That is clear from the *Poplar* case (1). If so, it must be within their power to bring some only of the salaries (the salaries of the hardest hit) up to pre-war value and, of course, still more must it be within their power to bring those salaries part way up to pre-war value.

How or why they arrive at that particular figure is, in my opinion, irrelevant; if the result is a reasonable sum, that is enough to justify the payment. Were a sum to be added to that which was the limit of reasonableness in order to further some policy of social reform, which was in effect what the Poplar council attempted in *Roberts* v. *Hopwood* (1), different considerations would arise, and that case shows that such action is unlawful. That is not the case here and, in my opinion, the appeal should be dismissed.

du Parcq, L.J.: In this case I find myself so completely in agreement with both Viscount Caldecote, L.C.J., and Atkinson, J., that I would be content respectfully to adopt their reasons as my own, but it is right that I should add some words of my own in deference to the very able argument which we heard from counsel for the appellant.

That argument and the decision of the auditor were based mainly on passages from the speeches of the learned Lords in *Roberts* v. *Hopwood* (1). That case made it clear that a local authority cannot be said to be acting in the lawful exercise of its discretion to fix wages when it grants to its employees, nominally as wages, amounts arrived at arbitrarily, without consideration of any of those matters which an employer, acting reasonably, would normally take into account. The members of a local authority who thus disregard their duty render themselves liable to a surcharge. As I understand the decision, however, it does not follow that expenditure may properly be disallowed, or a surcharge levied, whenever the local authority's reasons for the expenditure are ill-advised, stupid or even (it may be) dishonest. This, at any rate, seems to have been the view of Lord Sumner, who said, at p. 604, that, where there was clear proof of bad faith, the expenditure might yet be right in itself, in which case it "would not be contrary to law" and "would not be disallowed."

The following further observations with regard to *Roberts* v. *Hopwood* (1) may, I think, properly be made. First, that decision re-affirmed the well-established proposition that the statutory discretion as to the reasonable nature of the wages is to be exercised by the local authority and no one else, that it is a "very wide" discretion, and that "the court ought to show great reluctance before they attempt to determine how, in their opinion, the discretion ought to be exercised" (see *per* Lord Buckmaster, L.C., at p. 588, and *per* Lord Carson, at p. 616). Secondly, what is a reasonable wage must depend on the circumstances presently existing in the labour market. In assessing it, the local authority is entitled to be generous (see *per* Lord Atkinson, at p. 600). In the words of Lord Buckmaster, L.C., at p. 590, the value of the employee's work may be "generously measured," though generosity must not (as Lord Wrenbury put it, at p. 612) be "stripped of commercial considerations." One of the matters which it is clearly right to take into consideration is the cost of living. As Lord Atkinson said, at p. 592:

> It is but right and natural that the rate of wages should rise if the cost of living rises . . .

Thirdly, it may, I think, be deduced from the speeches of the learned Lords that a local authority not only may, but ought to, have regard to the practice of private employers. The practice of such employers is one of the relevant circumstances which exist in the labour market, and it may generally be assumed that private employers are guided by commercial rather than philanthropic motives, since, to quote Lord Sumner (at p. 609) they "must make both ends meet and have not the ratepayers' purse to draw on."

I would add, as a corollary to these propositions, that the local authority must be judged according to prevailing practices and conditions. The practice of collective bargaining between associations of employers and workers has greatly developed in the present century. It is nowadays often impossible to regard the employment of each individual worker as the result of a separate bargain struck between master and servant. It is commonly convenient and satisfactory to settle wages by means of negotiations and discussion between the representatives of employers and employed. In the case of local authorities it appears that it is customary to establish joint committees for this very purpose. The evidence shows that the salaries now in question were paid as a result of the recommendation of such a joint committee, who thought it expedient, instead of granting the general increase in salaries which the cost of living would have justified, to grant a smaller increase to men without children, and to add what are called "children's allowances" to the salaries of married men with children. In so doing the Birmingham corporation, far from setting themselves up as model employers, are following the example of many of the joint stock banks and insurance companies. If local authorities were to be debarred from following a course which has commended itself to such profit-making employers, it is possible that they might be seriously hampered in their efforts to obtain the best services available, and that the efficiency of local government would suffer accordingly.

If the corporation, in the course of bargaining with separate individuals whose services it was anxious to obtain or to retain, had felt that it could properly offer a smaller sum to a man who was a bachelor than a married man with children would be likely to accept, it might have incurred reproach for undue parsimony, but it could hardly have been said to have been acting unreasonably. If, as between two applicants, one a bachelor, the other a married man with children, it found that it could obtain the services of the former for rather less than it had proposed to pay, and that of the latter for a little more, it could not have been said to be acting uncommercially or with any excess of philanthropy if it had struck a bargain with each of them on the terms which he proposed. Here the corporation has approved a collective bargain by which, in lieu of a flat rate of increase, the workers accept a graduated increase with discrimination in favour of men with families. We are not concerned to inquire whether this was a wise arrangement, or might have been improved upon. The question is whether the salaries of which complaint is made so manifestly exceed any sums which could have been arrived at on economic principles that the district auditor, or the court, can override the decision of the local authority.

If the corporation, having fixed salaries at a flat rate for everybody, on a basis which would fairly meet the demands of the men with families, had resolved to give an additional annual bonus to its married servants on the birth of each child with a view to increasing the birth-rate in Birmingham, I would have agreed that such payments were not properly to be described as "remuneration," and certainly could not be called "reasonable remuneration." It is clear, however, that the corporation were not influenced by any such political or sociological motive. Indeed, one of the district auditor's criticisms is that the corporation may be tempted to give a preference to the unmarried and the childless. In my opinion the view of the facts taken by VISCOUNT CALDECOTE, L.C.J., and by ATKINSON, J., is correct. VISCOUNT CALDECOTE, L.C.J., said at p. 147:

> The so-called children's allowances are additions, in each particular case in which they are given, to the basic salary and cost of living bonus, though this part of the salary is calculated by reference to the needs and circumstances of each employee.

It was argued in support of the district auditor's objection that when the corporation took into account the number of an employee's children, it was taking into account what were called "extraneous matters." The answer to this argument was given by ATKINSON, J., who pointed out that increased cost of living was clearly a matter which must be taken into consideration in fixing salaries, and added, at pp. 149, 150:

> If increased cost of living is a matter properly calling for the consideration of the employer, it must be relevant to ascertain to what extent any particular applicant or class of applicants is affected by the increase.

I respectfully agree, and I think that it is quite fallacious to argue, as counsel for the appellant did, that, because the way in which an employee spends his money does not concern the employer, therefore the circumstances and responsibilities of an employee are irrelevant to the fixing of his salary. No employer can altogether avoid answering the question: What is the minimum salary which a suitable candidate for employment is likely to accept without reluctance and without dissatisfaction? That question cannot be answered without forming an estimate of the amount which the employed person will need in order to maintain a reasonable standard of life for himself and his dependants.

It was further urged that the salaries complained of must necessarily be regarded as unreasonable because there was shown to be inequality of payment for the same or similar services. This may mean that the men without children are being paid too little rather than that the men with children are being paid too much, and I find a difficulty in seeing how the mere fact of such inequality can be said to show that the council has exceeded its powers. If it were true to say that because A. and B. do the same work for the same employer, and B. is more highly paid than A., therefore part of B.'s so-called remuneration must be a mere gratuity, many employers would be surprised to find themselves branded as philanthropists.

It seems to have been assumed in *Roberts* v. *Hopwood* (1) that unequal pay for equal service was the rule rather than the exception in commercial practice. Lord Buckmaster, L.C., indeed thought, at p. 590, that a council might without impropriety pay " the same wage for the same work without regard to the sex or condition of the person who performed it," but he certainly did not suggest that " the condition " of the worker might not properly be treated as a ground for discrimination, and Lord Atkinson's view, at p. 594, appears to have been that discrimination, at any rate between the sexes, was necessary in order to comply with the law. Conditions and commercial practice may well have changed since 1925, but if it was then not only permissible but right to differentiate between workers on the ground of sex, it can hardly now be unreasonable and necessarily unlawful to discriminate in favour of men with children.

Finally I wish to express my agreement with the concluding passage of the judgment of Atkinson, J., which in my opinion contains a complete answer to the appellant's case. I agree with the judge that, if the council had brought every salary up to its pre-war value, they would have been within their rights. He then added, at p. 150 :

> If so, it must be within their power to bring some only of the salaries (the salaries of the hardest hit) up to pre-war value and, of course, still more must it be within their power to bring those salaries part way up to pre-war value.

Whether, as a matter of public policy or economic orthodoxy, it would have been wiser to raise all salaries equally is a question which does not concern the courts or the district auditor. I certainly do not feel myself entitled, and am happy to think that I am not bound to express any opinion upon it.

I would dismiss the appeal.

Appeal dismissed.

Solicitors : *Bircham & Co.* (for the appellant) ; *Sharpe, Pritchard & Co.*, agents for *Sir Frank Wiltshire*, Town Clerk, Birmingham (for the respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

LOVE *v.* NORMAN WRIGHT (BUILDERS), LTD.

[Court of Appeal (Lord Greene, M.R., Goddard, L.J, and Hallett, J.), **April 3, 24, 1944.**]

Emergency Legislation—Purchase tax—Contract price of goods agreed without reference to tax—Tax to be borne by the seller—Finance (*No.* 2) *Act*, 1940 (*c.* 48), *ss.* 18, 22, 23, 25, 27, 28.

The plaintiff was a manufacturer registered under the Finance (No. 2) Act, 1940, s. 23, and was accountable to the Crown in respect of purchase tax. The parties entered into an agreement whereby the plaintiff was to make and supply a number of curtains together with the necessary hooks and rails for an agreed price. No mention was made between the parties as to who was to bear the purchase tax, although the price agreed did not include the tax. The plaintiff contended that he was entitled to be indemnified by the defendants in respect of the purchase tax and that they must pay the tax in addition to the agreed price:—

Held : (i) the contract was for a sale of goods.

(ii) where a seller offers goods for sale it is for him to quote a price which includes purchase tax if he desires to pass it on to the purchaser, and, if he does not do so, the seller must bear the tax.

[**EDITORIAL NOTE.** The point here is the short one as to the incidence of purchase tax where the contract price is agreed without reference to the tax. It is held that the liability falls on the seller. Generally speaking the price will be inclusive of the tax.

For the Finance (No. 2) Act, 1940, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 33, p. 207.]

Case referred to :

*(1) *Paprika* v. *The Board of Trade*, [1944] 1 K.B. 327 ; [1944] 1 All E.R. 372.

Appeal by the defendants from a judgment of Croom-Johnson, J., dated Dec. 9, 1943. The facts are fully set out in the judgment of the court delivered by Goddard, L.J.

Richard O'Sullivan, K.C., and *Robert Fortune* for the appellants.

Serjeant Sullivan, K.C., and *T. F. Davis* for the respondent.

GODDARD, L.J. [delivering the judgment of the court]: This is an appeal by the defendants from a judgment of CROOM-JOHNSON, J., which raises a question of some general interest with regard to the incidence of purchase tax. The defendants, in November, 1942, put in a tender to the War Office which included, among other things, the provision and fixing of black-out curtains at some London police stations. The tender was made with reference to certain prices set out in what is called Sched. J., and the defendants' successful tender was to do the work and supply the materials at 16½ per cent. below those prices. The defendants then sub-contracted with the plaintiff for the making and supplying of the curtains, together with the necessary hooks and rails, and the price quoted by the plaintiff and accepted by the defendants was 27½ per cent. below War Office prices. The contract between the parties appears to have been made partly at an interview in November, 1942, and partly by a letter from the plaintiff dated Nov. 25, an order dated Dec. 18, and an acknowledgment thereof dated Dec. 21. It is unnecessary for the purpose of this appeal to examine the terms of the contract in detail, for it is common ground that the plaintiff quoted a price for the curtains to which the defendants agreed, and that nothing whatever was said either at the interview or in the letters as to purchase tax. The plaintiff is a manufacturer who is registered under the Finance (No. 2) Act, 1940, s. 23, for the purposes of this tax and is accountable for it to the Crown. In this action he sought to add the amount of the tax to the contract price, and CROOM-JOHNSON, J., held that he was entitled so to do. It is also common ground that in the price quoted nothing was included for purchase tax.

The first point taken by counsel for the appellants was that this was not a sale of goods, but a contract for work and labour and the supply of material in connection therewith. On this point we agree with CROOM-JOHNSON, J., who has held that as the contract involved transferring to the defendants for a price chattels, namely, curtains, in which they had no previous property, it was a sale of goods. If one orders another to make and fix curtains at his house the contract is one of sale, though work and labour is involved in the making and fixing; nor does it matter that ultimately the property was to pass to the War Office under the head contract. As between the plaintiff and the defendants the former passed the property in the goods to the defendants, who passed it on to the War Office. It is unnecessary to elaborate this matter further.

The question then arises whether the seller of goods under a contract made after the purchase tax has been imposed by law can call upon the purchaser to pay the tax exigible in respect of the sale in addition to the price at which he has agreed to supply the goods. Of course, if a seller quotes a price of £*x* plus purchase tax the buyer must pay the amount of the tax, whatever it may be, as part of the purchase price, although the amount may not be mentioned at the time the contract is made. Conversely, it would seem clear that, if a seller agrees to supply goods for a certain sum he cannot call on the buyer to pay anything for tax in addition, unless the statute which imposes the tax authorises the seller to recover it from the buyer. No doubt the tax is called a "purchase" and not a "sales" tax and is charged on the wholesale value of chargeable goods bought under chargeable purchases, but that cannot of itself determine the question whether, in the absence of agreement on the matter, the incidence of the tax is to fall on buyer or seller.

We have, therefore, to examine the various sections of the Act dealing with the tax. Sect. 18 imposes the tax, and under that section chargeable purchases are purchases made from a wholesale merchant or manufacturer selling by wholesale, with the exception of goods bought by a registered wholesale merchant as stock, or by a registered manufacturer as materials for his business. By sect. 22 the person accountable for the tax, where the purchase is made from a wholesale merchant or manufacturer, is the seller. This again is not conclusive of the matter; it makes the seller accountable for the tax, so that he must pay it whether he can recover it from anyone else or not, but this section does not of itself empower the seller to collect it from the buyer. Sect. 23 provides for the registration of wholesale merchants and manufacturers; when they are registered, purchases by them of stock or material for manufacture do not attract the tax. Then under sect. 25, as soon as a wholesaler or manufacturer appropriates or applies goods for any of the purposes there specified, the appropriation or application, which may not be a sale at all, is treated as a chargeable purchase and he is accountable for the tax which becomes due at the time of the appropriation or application.

Sect. 27 is that on which counsel for the plaintiff mainly relied as entitling the seller, without any agreement to that effect, to throw the burden of the tax on to the buyer. That section requires the seller under a chargeable purchase made after the tax comes into operation to add to any invoice or similar document delivered by him to the buyer a statement indicating the amount due from the buyer to the seller by reference to tax for which the seller may be accountable in respect of the purchase. The argument was that, as the section refers to the amount due from the buyer to the seller, it necessarily implies that the seller may charge the buyer with the tax. In our opinion, this argument is unsound. The section does not require or empower the seller to add anything except a statement to the invoice. If one transposes a few words at the end of the section so that it reads "a statement indicating by reference to tax for which the seller may be accountable in respect of the purchase the amount due from the buyer to the seller," which, in our opinion, is its true reading, it then becomes clear that the effect is only to require that the invoice shall show the amount of the tax for which the seller has to account. The seller may agree, or be willing without any express agreement, to bear the tax or part of it, but the invoice must show the sum for which he is accountable.

The matter really becomes clear when sect. 28 is considered. That section has the same object as the Finance Act, 1901, s. 10, which, dealing with the imposition of new duties, whether of customs or excise, gives the seller of goods under a contract made before the new duties were imposed the right to add the amount to the contract price, or, if the duties are abolished or decreased, allows the buyer to reduce the price by the amount of the reduced duty. So with regard to purchase tax; no doubt in the great majority of cases the seller would pass on the burden of the tax to the buyer, consequently this section provides by subsect. (1) that he may do so in respect of a contract made before the tax was imposed, but which would be subject to tax when the time for performance arrived; and subsect. (2) gives a corresponding right to the buyer to make a deduction if the tax is reduced after the contract is made. In either case the right is given only in the absence of agreement to the contrary, and in the case of a buyer only if the seller has had the benefit of the tax not becoming chargeable at the reduced rate. Observe that subsect. (1) allows an addition to and subsect. (2) a reduction from the consideration, that is, the price. Similarly, sect. 21 (1), which provides for the ascertainment of a wholesale value of goods in respect of which tax is chargeable, says that it is to be:

> . . . the price which . . . the goods would fetch . . . if no tax were chargeable in respect of the sale . . .

thus indicating an assumption that normally the tax will be added to the purchase price by the seller. Where an article is taxed, whether by purchase tax, customs duty or excise duty, the tax becomes part of the price which ordinarily the buyer will have to pay. The price of an ounce of tobacco is what it is because of the rate of tax, but on a sale there is only one consideration, though made up of cost plus profit plus tax. So, if a seller offers goods for sale, it is for him to quote a price which includes the tax if he desires to pass it on to the buyer; if the buyer agrees to the price it is not for him to consider how it is made up, or whether the seller has included tax or not.

Whether the purchase tax was to be regarded as part of the price had to be considered recently by the Divisional Court in *Paprika* v. *Board of Trade* (1). There the appellants had been convicted of certain rationing offences, for which the prescribed penalty was three times the price which the articles, the subject of the charge, might be expected to fetch if lawfully sold. They were fined a sum which was more than three times the price of the goods if purchase tax was left out of account. The court held that whenever a sale attracts purchase tax, that tax presumably affects the price which the seller, who is liable to pay the tax, demands, but it does not cease to be the price which the buyer has to pay, even if the price is expressed to be X plus purchase tax, and the sentence was upheld. We agree with the decision. If sect. 27 has the effect for which the plaintiff contends and gives him the right to demand the tax in addition to the price he has quoted, there would have been no necessity for sect. 28. If, in the absence of agreement, he can demand the tax in respect of a contract made after the tax was in operation as an addition to the price, there would seem to be no reason why he should not do so in respect of one made before its imposition; indeed, the latter would seem to be a case *a fortiori*. The truth is that sect. 27 gives no right in any case to add the tax to the consideration for the sale. Whether the omission to take the tax into account when quoting was due to inadvertence or because the plaintiff thought that it would not be payable is immaterial.

Counsel for the plaintiff adduced one further argument which, as we understood it, was that, as tax was not paid by government departments, the contract must be read as though there was an undertaking by the defendants to indemnify the plaintiff against tax, as they could recover any tax that was paid from the War Office. Apart from the consideration that no such case was either pleaded or suggested in the court below, we can see no ground for implying any such term. The plain fact is that the parties omitted to take purchase tax into consideration at all, and the incidence of the tax must lie where it falls. The plaintiff is accountable for it, but has shown no ground for recovering it from the defendants.

The appeal must, therefore, be allowed with costs and the judgment will be reduced to £143 15*s.* 11*d.*

Appeal allowed with costs.

Solicitors: *Langford, Borrowdale & Thain* (for the appellants); *White & Co.* (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

J. H. BEAN (H.M. INSPECTOR OF TAXES) *v.* DONCASTER AMALGAMATED COLLIERIES, LTD.

[KING'S BENCH DIVISION (Macnaghten, J.), **March 28, 1944.**]

Income Tax—Deduction against profits—Coal mine—Statutory obligation to remedy damage to district drainage system resulting from subsidence—Contribution to scheme relieving mine owner of statutory obligation—Contribution payable by instalments—Whether capital or revenue expense.

The respondent company was a mine owner which proposed to mine the coal in a seam beneath a drain known as Mill Dyke, the property of the Dun Drainage Commissioners. In order to carry out its obligations, imposed by the Dun Area Drainage Act, 1929, s. 9 (1), to obviate or remedy any decrease in the efficient working of the drainage system in the district which resulted from working of minerals, the defendant company entered into an agreement to contribute £65,295, to be paid by 60 equal half-yearly instalments, towards the cost of a drainage scheme proposed by the Dun Drainage Commissioners. The execution of the scheme in question relieved the respondent company from all liability under the Act in respect of the Mill Dyke. The Crown contended that, as the respondent company had by its contribution to the scheme secured an asset for the enduring benefit of its trade, the contribution should be regarded as a capital expense for the purposes of income tax:—

HELD: the instalments of the contribution payable by the company were a revenue expense and were deductible in computing the company's profits.

[**EDITORIAL NOTE.** When an annual payment of a revenue nature is replaced by a lump sum, it has been held that the lump sum retains the nature of the annual payment and is a revenue payment deductible against profits. Here the matter is carried a step further. If the lump sum is payable by instalments, then those instalments retain the nature of the previous sums and are still revenue payments and deductible against profits, and, further, this is applied to sums which may or may not be regularly payable in each year, since the original payments herein would be payable as and when subsidence occurred.

As to Mines, see HALSBURY, Hailsham Edn., Vol. 17, p. 141, paras. 290, 291; and for Cases, see DIGEST, Vol. 28, pp. 42-56, Nos. 215-283.

Cases referred to :

*(1) *Atherton* v. *British Insulated & Helsby Cables, Ltd.*, [1926] A.C. 205 ; Digest Supp. ; 10 Tax Cas. 155.

*(2) *Anglo-Persian Oil Co., Ltd.* v. *Dale* (1931), 16 Tax Cas. 253 ; *on appeal*, [1932] 1 K.B. 124 ; Digest Supp. ; 100 L.J.K.B. 504 ; 145 L.T. 529 ; 16 Tax Cas. 253.

(3) *Mallett* v. *Staveley Coal & Iron Co., Ltd.*, [1928] 2 K.B. 405 ; Digest Supp. ; 97 L.J.K.B. 475 ; 139 L.T. 241 ; 13 Tax Cas. 772.

Appeal by the Crown from a decision of the Commissioners for the General Purposes of the Income Tax Acts. The facts are fully set out in the judgment.

The Solicitor-General (*Sir David Maxwell Fyfe, K.C.*), and *Reginald P. Hills* for the appellant.

F. Heyworth Talbot for the respondent company.

Macnaghten, J. : This is an appeal by the Crown from a decision of the Commissioners for the General Purposes of the Income Tax Acts for the division of Doncaster Borough in the county of York.

By an agreement dated Sept. 28, 1939, the respondent, the Doncaster Amalgamated Collieries, Ltd., undertook to contribute the sum of £65,295 (to be paid by sixty equal half-yearly instalments of £1,088 5*s.* each) towards the cost of carrying out a drainage scheme called the Dun Drainage Improvement Scheme which had been prepared by the Dun Drainage Commissioners—an internal Drainage Board within the area of the River Ouse Catchment Board under the Land Drainage Act, 1930—for the general improvement of the drainage of the southern portion of their area. The question at issue on this appeal is whether in computing the profits of the respondent for the purposes of income tax under Sched. D, those instalments should be deducted as a revenue expense. The General Commissioners held the instalments to be deductible ; and the Crown appeals against that decision on the ground that the instalments should be regarded as a capital expense and excluded from the computation.

By the Doncaster Area Drainage Act, 1929, s. 9 (1), it is provided that :

> . . . it shall be the duty of every mine owner working or proposing to work minerals under any lands situate within the Doncaster district . . . to construct and maintain in proper condition such works and do such things as may by reason of any subsidence which results or may result from the working of minerals be necessary in order to obviate or remedy so far as having regard to all the circumstances of the case is reasonably necessary any loss of efficiency which has arisen or may arise in the drainage system and the drainage works of the Doncaster district.

The respondent is a mine owner working a seam of coal under lands situate within the Doncaster district called the Parkgate seam. This seam of coal lies below a drain, the property of the Dun Drainage Commissioners, known as the Mill Dyke. The respondent proposed to mine the coal beneath the Mill Dyke, and, accordingly, in order to carry out the obligation imposed by the Doncaster Area Drainage Act, 1929, it prepared a scheme, which it was roughly estimated would cost some £68,000, whereby that obligation would be discharged. The Dun Drainage Improvement Scheme prepared by the Dun Drainage Commissioners involved the complete elimination of the Mill Dyke, and thereby relieved the respondent from all obligation under the Act in respect of that drain. The respondent, accordingly, by the agreement dated Sept. 28, 1939, agreed with the Dun Drainage Commissioners to contribute the sum of £65,295 towards the cost of the scheme which they had prepared, such sum to be paid by the instalments I have mentioned.

The case for the Crown is that, since by the execution of the Dun Drainage Improvement Scheme the respondent is for ever relieved from the obligation imposed by the Doncaster Area Drainage Act of 1929, the respondent has by its contribution towards the cost of that scheme secured " an asset or an advantage for the enduring benefit " of its trade within the meaning of those words as used by Lord Cave in *Atherton* v. *British Insulated and Helsby Cables, Ltd.* (1), and that the contribution must be regarded as a " capital expense." The Crown also suggests that the scheme prepared by the respondent must necessarily have involved it in very large capital expenditure. The case stated by the

General Commissioners does not describe the nature of that scheme; but it does state that work of the character required by the Act of 1929 is often carried out by the simple expedient of raising the banks of a drain such as the Mill Dyke as and when any danger of subsidence may arise. I do not think that the fact that the respondent contemplated the execution of a scheme which would cost about as much as its contribution to the Commissioners' scheme has any bearing on the question at issue in the present case. It is not disputed that, if the respondent year by year, as and when the drain subsided, obviated or remedied the inefficiency of the drain in consequence of the subsidence, the expense of doing so would be a "revenue" expense and would be brought into a computation of the profits of the respondent for the purposes of income tax. The Commissioners have found that the payment of these half-yearly sums was made by the respondent in order to fulfil its obligations under the 1929 Act and are a permissible deduction. I think they are right. Since the expenditure in repairing or obviating any damage caused to the drain by reason of the underground workings of the colliery, if made as and when the occasion occurs, would be a revenue expense to be included in the computation of the respondent's profits, it seems to me that a lump sum payable for relief from an obligation to incur such expenditure must also be regarded as a "revenue" expense. It is a matter of no importance to the respondent that it is relieved from its obligation with regard to the Mill Dyke for all time since the obligation was only during its subsidence. When the drain had finally subsided in consequence of the respondent's operations underground, then there would have been no further liability on the part of the respondent to keep it in repair. What in fact the respondent has secured is that during its operations under the Mill Dyke, it will not have to incur the expenditure which it would otherwise have had to incur in either obviating or remedying damage done to the drain by subsidence. It seems to me that the respondent's contribution to the Dun Drainage Improvement Scheme comes within the words used by Rowlatt, J., in *Anglo-Persian Oil Co., Ltd.* v. *Dale* (2), where he was expounding the same principle as was laid down by Lord Cave in the *Atherton* case (1). At p. 260 of the report he says:

> Now it is abundantly clear by this time that the circumstance that the payment is a lump sum payment [for in that case the question was a question of a lump sum payment] in one year in lieu of annual payments in a number of years does not in any way prevent it from being a deductible expense; all the cases that we have been talking about all day show that; but the question always is: What is the annual expense that this lump sum payment frees you from? I would refer to what I said in *Mallett's* case (3), not because they were my words, but because they were approved by the Master of the Rolls who quoted them. In that case there had been a contention that royalty payments that were gotten rid of by the arrangement there made were like payments to servants which were gotten rid of on a lump sum payment. I said, and the Master of the Rolls approved it, that that only applies where an annual business expense which is obviated by the single payment is an annual business expense chargeable against revenue. That is the question: Is what is got rid of an annual expense which is chargeable against revenue?

In this case I think that the respondent got rid of an annual expense by their contribution to the Dun Drainage Improvement Scheme, and that the instalments payable by the respondent under the agreement of Sept. 28, 1939, are deductible just as if they were payments made year by year for remedying the loss of efficiency actually arising or anticipated to arise by reason of the underground workings.

I, therefore, think that the appeal fails, and must be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the appellant); *Bird & Bird*, agents for *C. M. H. Glover*, Doncaster (for the respondent company).

[*Reported by* R. Boswell, Esq., *Barrister-at-Law.*]

THE ATTORNEY-GENERAL *v.* GRETTON AND SHRIMPTON.

[Court of Appeal (Scott, Goddard and du Parcq, L.JJ.), **April 20, May 3, 1944.**]

Estate Duties—Cesser of annuity—Annuity bequeathed by will—Substitution of smaller annuity secured by deed of compromise—Whether "granted for full consideration in money's worth"—Finance Act, 1894 (*c.* 30), *s.* 3 (1).

By a will dated Aug. 26, 1882, a testator, who died on Nov. 15, 1882, gave an annuity of £6,000 free of legacy duty, income tax and all other duties. The will contained a clause empowering the trustees of the will to purchase an annuity in the name of the annuitant, but not the usual appropriation clause. Apart from another small annuity the residue was given to two sisters of the testator. The next-of-kin of the testator were a brother and three sisters. In 1883, the brother and the two sisters entitled to the residue agreed with the annuitant to withdraw their threatened opposition to the grant of probate of the will in consideration of the annuitant accepting an annuity of £5,000 free of duty and tax payable out of the testator's estate and agreed for the appropriation of securities to satisfy the annuity. Upon such appropriation the remainder of the estate was to be released and upon the death of the annuitant the appropriated securities were to fall into residue. The annuitant on her part waived for a period of 5 years her right to have an annuity purchased in her name. Neither the parties to the deed nor the residuary legatees or any of them at any time entered into any personal covenant to pay the annuity. The Crown claimed that the annuity of £5,000 was payable under the will and was not given for full consideration and that estate duty was payable in respect of the annuity fund on the death of the annuitant:—

Held [Goddard, L.J., *dissenting*]: (i) the annuity was not that payable under the will, but was a new annuity.

(ii) in the circumstances of the case, full consideration was given for the annuity and, therefore, it came within the provisions of the Finance Act, 1894, s. 3 (1).

Decision of Macnaghten, J. ([1943] 2 All E.R. 759) *reversed.*

[**EDITORIAL NOTE.** The facts of the case are complicated by the fact that a party who was not one of the residuary legatees was made one of the parties granting (if that word is permissible) the new annuity. The agreement of compromise, however, stated that the funds were to be appropriated from the testator's estate and, on the cesser of the annuity, those funds were to fall into residue. The majority of the Court of Appeal have, however, held that this was an annuity for which full consideration was given and, therefore, no estate duty was payable on its cesser.

As to Exemption from Estate Duty where Money Consideration is Given, see HALSBURY, Hailsham Edn., Vol. 13, p. 251, para. 244; and for Cases, see DIGEST, Vol. 21, pp. 17-19, Nos. 97-107.]

Cases referred to:

(1) *Re Gretton's Indenture, Re Ratcliff & Brinckman's Trusts, Hood* v. *Byron* (*Lady*), [1923] 1 Ch. 77; 28 Digest 76, *411*; 92 L.J.Ch. 49; 127 L.T. 817.

(2) *A.-G.* v. *Sandwich* (*Earl*), [1922] 2 K.B. 500; 21 Digest 18, *106*; 91 L.J.K.B. 757; 127 L.T. 517.

Appeal by the trustees from a decision of Macnaghten, J., given on Nov. 1, 1943, and reported [1943] 2 All E.R. 759, where the facts are fully set out.

Cyril King, K.C., and *A. P. Vanneck* for the appellants.

The Attorney-General (*Rt. Hon. Sir Donald B. Somervell, K.C.*), and *J. H. Stamp* for the Crown.

Scott, L.J.: This is a claim for estate duty under the Finance Act, 1894, s. 2 (1), on property which the information of the Attorney-General asserts must be deemed to have passed upon the death of the late Lady Houston in 1936. The defendants are the trustees under a declaration of trust dated June 8, 1888, of funds out of which Lady Houston received an annuity of £5,000 a year. The question is whether there is a good defence to the claim for estate duty by reason of sect. 3 (1) of that Act, which provides as follows:

> Estate duty shall not be payable in respect of property passing on the death of the deceased by reason only of *bona fide* purchase from the person under whose disposition the property passes, nor in respect of the falling into possession of the reversion on any

lease for lives, nor in respect of the determination of any annuity for lives, where such purchase was made, or such lease or annuity granted, for full consideration in money or money's worth paid to the vendor or grantor for his own use or benefit, or in the case of a lease for the use or benefit of any person for whom the grantor was a trustee.

The relevant facts can be stated very shortly. Lady Houston when still a spinster, Fanny Lucy Radmall, was left by the will of one Frederick Gretton, the great-uncle of the first defendant, an annuity of £6,000 a year free of all taxes. Subject to that legacy (into which a bond for £1,000 a year already executed by him in favour of Miss Radmall was to merge on his death) and to another small legacy, the testator left his whole estate, real and personal, to his two sisters, Frances and Clara, in equal shares. His brother John, the father of the first defendant, was his heir-at-law and next-of-kin. Upon the testator's death John, Frances and Clara threatened to contest the validity of the will: on what grounds we are not told. Thereupon, by a deed of Feb. 14, 1883, a compromise was effected between the three objecting relations of the deceased of the first, second and third parts, and Miss Radmall of the fourth part, under which the three undertook to abstain from opposing the grant of probate, in consideration of Miss Radmall agreeing "in lieu and satisfaction of" her annuity of £6,000 under the will to accept an annuity of £5,000, payable out of "the testator's estate or out of the shares of the said estate" of the two sisters as thereinafter mentioned. That deed contained an express covenant that "the said annuity shall accrue as from the date of the death and be payable quarterly." This covenant is important on the main issue of interpretation of this deed, because it is only if the deed was intended entirely to supersede and take the place of the legacy in the will that this provision was necessary. If Miss Radmall's right under the will was to persist, it would be unintelligible. By the deed Miss Radmall also agreed that for a period of five years she would "waive and release the right" which the will, when proved, would give her, of calling upon the executors and trustees of it to purchase the annuity provided by the will. The second covenant ran as follows:

> Provided always and it is hereby agreed and declared that it shall be lawful for the said Frances Gretton Clara Gretton and John Gretton or any or either of them or their or any or either of their executors or administrators at any time within the period of five years from the day of the date hereof to purchase or transfer into the names of two trustees the one to be chosen by the person or persons making such purchase or transfer and the other by the said Fanny Lucy Radmall such a sum of stock of the Government of Great Britain the interest or dividends whereof will amount to the total of the said annuity of £5,000 and the tax and duties thereon as aforesaid say £5,300. And the said trustees shall hold the said stock in trust in the first place to pay the said annuity tax and duties and subject thereto as part of the residuary estate of the said Frederick Gretton.

It was contended by counsel for the Crown that there was never any grant of a new contractual annuity of £5,000, but only an agreed reduction of the testamentary annuity of £6,000: and much reliance was placed on the stipulation that the two Gretton sisters were entering into no personal covenant to pay. But this is a two-edged weapon for the Crown to use. It is only if it was a new contractual annuity that was being created by the deed that that stipulation could have any sensible meaning. It is obvious as it seems to me, that the two Gretton sisters were making themselves really responsible for the due discharge of the annuity of £5,000 because they reserved an option to purchase or transfer funds out of which it could be paid, and covenanted in that event to charge the fund and its trustees with such payment. When, by the deed poll of 1888, the trustees appointed to administer that trust assumed their duties, the arrangement contemplated by the contract of 1883 was duly carried into effect.

For the above reasons I am of opinion that, when Lady Houston died, sect. 3 (1) of the Act came into operation and prevented any claim for duty attaching, unless the argument of the Attorney-General that full consideration was not given is well-founded. On that issue also I feel bound to differ from Macnaghten, J. The consideration given seems to me necessarily to have been "full." There is, and can be, no material either below or for this court to make an independent appraisement of the chances which John, Frances and Clara had of upsetting the will. But the slenderer they were, the more adequate must the concession made by Miss Radmall have appeared to the three Grettons. They were getting the present value of an annuity of £1,000 a year upon the life of a quite young woman. In addition, they gained the chance of her dying within the five years' respite that she gave them before asking for funds to be earmarked for the payment of her £5,000 a year. If the settlement had been made in court on the terms of the deed of 1883, is there any counsel acting for them who would not have advised them to make it unless they had a cast-iron case of undue influence ? And of that there is no hint. I regard it as not unfair to the three Grettons who were parties to the 1883 deed to suppose that, acting under legal advice, they judged their chances of upsetting the will as fairly balanced by Miss Radmall's concessions. What other assumption is it open to us to make ? In the result I have no hesitation in holding that the consideration was full. A question about the "tax free" addition to the £5,000 annuity was dealt with by ROMER, J., in *Re Gretton's Indenture* (1). His decision is consistent with our decision, though it did not determine any of the points we have had to decide.

I have read the judgment of DU PARCQ, L.J., and agree with it.

The appeal must be allowed.

GODDARD, L.J. : By his will made on Aug. 6, 1882, Frederick Gretton bequeathed an annuity of £6,000 free of tax to a lady who died in 1936, and estate duty is claimed in respect of the cesser of that annuity. The testator had previously settled on the lady an annuity of £1,000, and this annuity was to be included in that for £6,000 bequeathed by the will. With the exception of another small annuity left to his servant, the only other beneficiaries were two sisters of the testator, to whom he left the residue of what was, no doubt, for those days, a very large estate. There was a gift over in the event of their dying before him. He left nothing to his brother, who was his heir-at-law. He died a few months after making his will. The brother and the two sisters were minded to dispute the validity of the will, or threatened to do so. First of all, they made an arrangement between themselves whereby each sister assigned to their brother one half of the share they took under the will, subject to the payment of a proportionate part of the annuity to the lady, or of any annuity that might be substituted for it. Then on Feb. 14, 1883, a deed of compromise was entered into between the brother, the two sisters and the annuitant which recited that the brother and sisters had threatened to contest the will, and that the deed was made to compromise and settle all questions between the parties in reference to the rights of the lady under the will. Before examining the deed in detail, it may be said that the principal matter which it effected was that she was to get an annuity of £5,000 instead of £6,000. It may not be material, but it does not look as though the brother and sisters could have had much confidence in the strength of their case ; the annuity was only to be reduced by one-sixth, which was no great amount for the annuitant to give up had there been any real prospect of upsetting the will, in which case she would have got nothing except the £1,000 previously settled upon her, and they would have got everything. On the other hand, it was just the sort of price anyone in her position would be likely to agree to pay to avoid the unpleasantness which a public trial, in these circumstances, would have been likely to involve, and she was left with what, in the year 1883, was a very handsome provision. Now the operative part of this deed provided that in lieu and satisfaction of the annuity of £6,000 given by the will, the lady would accept one of £5,000, clear of all duties and tax, which annuity should be received by her out of the estate as mentioned in the will, or out of the shares as thereinafter mentioned, that is, the sisters' shares, but nothing in the deed was to impose any personal liability on either of the sisters to pay the annuity or any part of it, and the lady agreed that for the period of five years she would waive and release the right given to her by the will of calling upon the trustees of the will to purchase an annuity for her. It was then provided that the brother and sisters might at any time during this period of five years put into the names of trustees enough Government stock to yield the annuity of £5,000, and the tax and the duties thereon, say £5,300, and the trustees were to hold the stock in trust to pay the annuity, tax and duties, and subject thereto as part of the testator's residuary estate. It was then provided that, if this stock was so appropriated within five years, the lady's right to call on the trustees of the will to purchase an annuity for her should cease, and that she would, if called upon so to do, execute a release of that right, and that after the stock had been appropriated the annuity of £5,000 and the tax should be payable exclusively out of the income of the trust, or, if the income was insufficient, out of the *corpus*, and the testator's estate should be released from the said annuity. The brother and sisters thereby also agreed to withdraw all opposition to the will, and they charged their interests in the real and personal estate of the testator with the payment of the annuity and tax until the stock had been purchased and transferred to the trustees. Thereafter the executors, who were no parties to the deed, proved the will.

What, then, was the position in 1883 ? Yielding to pressure, the lady agreed to accept a reduced annuity, and she also gave up for five years her right to require the trustees of the will to buy her an annuity, and thereby also gave up the alternative right to require them, during that period, to pay the present value of such an annuity. If, within that time a sum sufficient to secure that annuity was put in trust, she was to accept that in full discharge, so that she could not thereafter claim as a legacy the then present value of the annuity. One thing at least is plain ; neither the brother nor the sisters covenanted to pay the annuity ; any personal liability of the sisters was expressly negatived, and there was no covenant by the brother. All they did was to charge their shares in the estate as security. Had some catastrophic fall in the value of the estate taken place so that there was only enough left to pay an annuity of, say, £500 a year, the annuitant could have got no more. As soon as the will was admitted to probate her right, in my opinion, was against the executors and trustees of the will, who were bound to retain enough of the estate to meet it, though, if they failed to pay she could have enforced her charge on the shares of the brother and sisters. This, in my opinion, was the position when the will was proved, and so continued till 1888. The annuity to which the lady was entitled was, I think, the annuity granted by the will, payable out of the testator's estate, but limited by the terms of the deed. No new annuity was granted or purchased by her ; the annuity was created by the bounty of the testator, though the annuitant agreed to accept a reduced amount and gave up the option which she might otherwise have exercised, to demand its capital value. Whether, had the deed not been executed, she would have exercised that option is, of course, entirely problematical ; in fact, she made an uncommonly good bargain by not doing so, as she lived for some 53 years, and so must have received gross payments amounting to something over £265,000. The declaration of trust executed in June, 1888, implemented the deed of 1883, which had authorised the relatives to set aside a sum to satisfy the annuity, but none the less, in my opinion, the annuity remained one granted by the will, which was the root of her title. In my opinion, she did not purchase a new annuity, but only agreed to accept the annuity left to her subject to modifications. I agree with the argument of counsel for the Crown that this view is in no way inconsistent with the judgment of Romer, J., who considered the effect of these documents in *Re Gretton's Indenture* (1). As I understand it, Romer, J., decided that the title to the annuity depended, not on the will alone, but on the will and cll. 2 and 4 of the deed of 1883, that is to say, on the will as modified by the agreement contained in the deed. The Finance Act, 1894, s. 3 (1), exempts from estate duty property passing on the determination of an annuity granted for full consideration in money or money's worth paid to the grantor for his own use or benefit. *A.-G.* v. *Lord Sandwich* (2), shows that " money's worth " means no more than a fair equivalent given for what is received. Here, in my opinion, there was no grant of an annuity by anyone ; the annuity was bequeathed by the testator, whose estate provided the fund from which it was always paid. In my opinion, therefore, the section in question does not exempt the fund from estate duty. I agree with the conclusion of Macnaghten, J., and would dismiss the appeal.

du Parcq, L.J.: The defendants are, or were at the date of the information, the trustees under the declaration of trust of June 8, 1888, whereby their predecessors, the original trustees, declared that they would stand possessed of the sum of £176,700 2¾ per cent. bank annuities in trust, in the first place, to pay an annuity of £5,000 to the lady to whom I will refer as the annuitant. The trust fund was provided by Frances Gretton and John Gretton. When the annuitant died, it is common ground that a benefit " accrued or arose " to the defendants as trustees, or, in other words, to those who had provided the trust fund, by the cesser of the annuitant's interest in the fund. The question is whether the defendants can escape the liability which, *prima facie*, they incur under the Finance Act, 1894, s. 2 (1) (*b*), by reason of the exception created by sect. 3 (1). Is it right to say that the annuity was " granted for full consideration in money or money's worth paid to the " grantors for their " own use or benefit " ?

To answer this question it is first necessary to decide whether the annuity was " granted " by Frances and John Gretton, or, as the Crown contends and A MACNAGHTEN, J., has held, granted by the will of Frederick Gretton, and merely limited in amount, and charged on a different security, by the operation of the deeds of 1883 and 1888. When the somewhat similar point arose in the Scottish case to which we were referred, the question was asked : Is this a new annuity or an old one with a varied security ? The same question may be posed in this case, and it is not, I think, a very easy one to answer. Cl. 1 of the deed of 1883, when read by itself, favours the contention of the Crown. It may fairly B be interpreted as meaning that the annuitant is to accept a smaller annual sum which may be charged on a varied security. But the deed went on to empower Frances, Clara or John Gretton " or any or either of them or any or either of their executors or administrators," within five years, to do what Frances and John Gretton in fact did, that is to say, to " purchase or transfer into the names of two trustees " stock to be held by them in order that there might be paid to the annuitant the annuity " and the tax and duties thereon." It is to be C observed that the fund to be provided was not necessarily to come out of the estate of Frederick Gretton, and, indeed, John Gretton, though heir-at-law, took nothing under the last will of Frederick Gretton. The deed further provided as follows :

> After such purchase or transfer the remainder of the estate of the said Frederick Gretton shall be absolutely released and exonerated from the same annuity and from D all claims and demands in relation thereto.

It may be argued that the words " the remainder of the estate " reinforce the contention of the Crown, since it is perhaps possible to read them as indicating a mere variation of the security by the transfer of a specific part of the estate with which the beneficiaries were entitled to deal ; but, inasmuch as John Gretton was not a beneficiary under the will and both he and Frances were at liberty " to purchase " the stock which was to be put in the names of the trustees, E I think that the right conclusion is that a new annuity was to be granted in place of the old. The words " the same annuity " which follow cannot, I think, fairly be read as meaning that the annuity which will thereafter be paid is identical with the annuity which was payable under the will. Indeed, it seems impossible, when the reality of the transaction is looked at, to say that it was in truth the same annuity. Not only was it smaller in amount, and charged on a different security, but the obligation to pay it rested on different persons. F After the execution of the deed of 1888, nothing remained payable to the annuitant under or by virtue of the will. Thenceforth her only right was under the deeds, as she found to her cost when ROMER, J., held, as I respectfully think that he was bound to hold, that, since the annuity had become payable by virtue of cll. 2 and 4 of the deed of 1883, and of the deed poll of 1888 which gave effect to them, the agreement which was thereby constituted to pay free of tax G was illegal and void : see *Re Gretton's Indenture* (1), especially at pp. 87 and 88.

It is no doubt true, as MACNAGHTEN, J., points out, that Frances, Clara and John Gretton had no desire to make the annuitant the object of their bounty, and it is no less true that, but for the provision in the will, the deeds of 1883 and 1888 would never have been executed. But it does not follow that what the annuitant received after 1888 was the same annuity which was payable under the will. H

In order to make this point clear, let it be supposed that the will had directed the payment of the annuity, without any provision that the annuitant might call for the purchase of an annuity by the trustees of the will. Then suppose that, by agreement between the trustees and the annuitant, the trustees had purchased an annuity for the annuitant from an insurance company, the annuitant on her part releasing the trustees from all future liability. It cannot, I think, be doubted that the annuity so purchased would have been a new annuity, of which the insurance company would have been the grantor.

There is, of course, one obvious difference between this hypothetical case and that which we are considering, namely, that in the hypothetical case there could be no question but that full consideration in money had been given. This is an aspect of the matter with which I must deal later. Assuming for the moment that Frances and John Gretton received full consideration in money's worth for their agreement to pay the annuity to the annuitant, the present case seems to me not to differ in any essential feature from that which I have supposed.

For these reasons, I am of opinion that a new annuity became payable under the deeds of 1883 and 1888. In his argument for the Crown counsel conceded, as I think he was bound to concede, that, if it was a new annuity which then became payable, the transfer of funds to the trustees under the deed of 1888 constituted a grant by the transferors to the annuitant. I thus arrive at the conclusion that Frances and John Gretton were the grantors of the annuity which fell in on the death of the annuitant.

The question remains whether the annuity was granted for "full consideration in . . . . money's worth paid to the grantors for their own use and benefit." Counsel for the Crown did not concern himself with this point, preferring to rely on the contention that there was no grant of an annuity under the deeds. It is, however, necessary to deal with it.

It is not in doubt that the deeds in question were executed in order to carry out a bargain by way of compromise of threatened proceedings to set aside the will. The fair view to take, since there is no suggestion of *mala fides* on either side, is that the parties to the compromise believed in their own causes. It ought to be assumed, I think, that the parties threatening to contest the will believed that they had at least a reasonable prospect of success, and that the annuitant, when (to quote the deed of 1883) she insisted that the will was a good and valid testamentary disposition, was expressing the honest opinion which she had formed, no doubt after receiving counsel from her advisers. It may be assumed, further, that there was on either side a consciousness of the possibility that their hopes and beliefs might prove to be unfounded, and a desire to avoid both the uncertainty and the unpleasantness of litigation. In consideration of the grantors' forbearance to dispute the will and of their grant of the annuity, the annuitant forewent her chance of getting the full annuity which the will provided, gave up all her rights against the trustees of the will, and consented to accept a much reduced amount (for, indeed, a sum of £1,000 a year over what was likely to be a long period represents a large capital sum) and to look only to the fund provided by the grantors. This was good consideration. It was agreed upon as the result of a bargain between parties who were at arms' length, and this fact is *prima facie* evidence that it was also "full consideration." There is no evidence to the contrary, and I, therefore, think that we ought to hold that it was in fact "full consideration." The authorities which counsel for the appellants cited appear to me to establish his proposition that the consideration consisted of money's worth paid to the grantors within the meaning of the subsection.

Was it paid to the grantors "for their own use and benefit"? MACNAGHTEN, J., appears to have thought not, though he gives no reasons for this particular finding. In my opinion, the question should be answered affirmatively. It appears that Clara Gretton had died intestate in 1887, and that John Gretton, Frances Gretton and another sister were her sole next-of-kin: see the statement of facts in *Re Gretton's Indenture* (1), at p. 81. It is clear, therefore, that John Gretton, as well as Frances Gretton, derived substantial benefit from the annuitant's renunciation. Thus the words of the subsection are, in my opinion, satisfied.

In the result, I must respectfully differ from the conclusion arrived at by MACNAGHTEN, J. In my opinion, the appeal should be allowed, and the information dismissed.

Appeal allowed with costs. Information dismissed. Leave to appeal to the House of Lords.

Solicitors: *Radcliffes & Co.* (for the appellants); *Solicitor of Inland Revenue* (for the Crown).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Re VON KANTZOW'S PATENT.

[Chancery Division (Lord Simonds), **April 26, 1944.**]

Patent—Extension of term—Applicant prohibited by foreign law from giving necessary information –Patented article manufactured abroad—Corresponding foreign patent already expired—Patents and Designs Acts, 1907-1942, *s.* 18 (6).

A Swedish subject was the inventor and legal owner of a British patent which he held on behalf of a Swedish company. The patented material was manufactured in Sweden under a Swedish patent and sold in the United Kingdom through an English company who were the sole selling agents. The Swedish patent had expired. V.K., and the Swedish company applied under the Patents and Designs Act, 1907-1942, s. 18 (6) for an extension of the term of the British patent on the ground that loss had been suffered by reason of the war, and this was found to be the fact. The applicants admitted that during the war an increased profit had been made in respect of the Swedish patent, but by reason of the Swedish law they were prohibited from producing any evidence relevant to that effect :—

Held : (i) the fact that the applicant is the subject of a foreign state and is by that state's municipal law prevented from giving certain information to the court does not in England excuse him from providing any necessary evidence in respect of the patent.

(ii) upon an application under sect. 18 (6) of the Acts, the fact that the exploitation of the patent in this country has taken the form of the importation of the manufactured material through exclusive selling agents is not necessarily fatal to the application ; but the fact that a corresponding foreign patent has already expired is a matter to be taken into consideration.

(iii) taking all the facts into consideration, the application must be refused.

[**EDITORIAL NOTE.** The jurisdiction of the court to extend a patent is discretionary and for this reason all relevant facts must be disclosed. If foreign law prevents such disclosure, that is the misfortune of the applicant and is more or less fatal to his application.

As to Extension of Term of Patent, see HALSBURY, Hailsham Edn., Vol. 24, pp. 737-746, paras. 1373-1378 ; and for Cases, see DIGEST, Vol. 36, pp. 700, 701, Nos. 1786-1799, pp. 719-725, Nos. 2056-2125.]

Cases referred to :

*(1) *Re Societe Chimique des Usines du Rhone's Patent*, [1922] 1 Ch. 258 ; 36 Digest 719, *2056* ; 91 L.J.Ch. 348 ; 126 L.T. 657 ; 39 R.P.C. 27.

*(2) *Re Kettering and Chryst's Patents* (1924), 42 R.P.C. 507 ; 36 Digest 709, *1902*.

(3) *Re Semet and Solvay's Patent*, [1895] A.C. 78 ; 36 Digest 701, *1794* ; 64 L.J.P.C. 41 ; 71 L.T. 674 ; 12 R.P.C. 10.

(4) *Re Pieper's Patent* (1895), 72 L.T. 782 ; 36 Digest 700, *1795* ; 12 R.P.C. 292.

Originating Summons taken out under the Patents and Designs Acts, 1907-1942, s. 18 (6) for the extension of the term of a patent. The facts are fully set out in the judgment.

James Mould for the applicants.

G. H. Lloyd-Jacob and *Irene G. R. Moses* for the Comptroller-General of Patents.

Lord Simonds : This application for an extension of patent presents some peculiar features. It is made under sect. 18 (6) of the Acts and is based on the allegation that the patentee as such has by reason of hostilities between His Majesty and a foreign state suffered loss or damage. The applicants are von Kantzow, the inventor, a Swedish subject who is the legal owner of the patent, and Aktiebolaget Kanthal, a Swedish company formed in 1931, on whose behalf von Kantzow admits that he holds the patent.

The invention relates to fire-resistant alloys with high electric resistance, and has for its object the production of an alloy which can be advantageously used for the fabrication of electrical heating elements for use in domestic appliances and other apparatus. The alloy, the product of the invention, is thus the raw material for the manufacture of articles which may be of importance in British industry.

The exploitation of the invention was begun in 1931 by the Swedish company, and for reasons which are set out at length in the affidavit of von Kantzow, it was decided that the alloy could not be economically manufactured in the

United Kingdom but that the invention could best be exploited by concentrating its manufacture for the world market in Sweden and developing its sale in other countries by means of exclusive selling agreements.

Accordingly, on May 1, 1932, the Swedish company made an agreement with Hall & Pickles, Ltd., of Manchester, under which the latter agreed to promote the sale within Great Britain, Northern Ireland and the Irish Free State of the alloy manufactured by the former (which in the agreement is called "Kanthal") and further agreed not to sell this material in any territory outside the before-mentioned area with the qualification that it should not be considered a breach of the agreement if a product containing Kanthal not exceeding 10 per cent. of the total weight should be sold in any such territory.

Other terms of the agreement provided for the supply by the Swedish company of the English company's requirements and for reference by the former to the latter of inquiries from purchasers within the prescribed area. In effect the English company were constituted sole selling agents in the United Kingdom and Eire for the Swedish company and so remained until the expiry of the patent though the original agreement was in some respects modified by a letter of Sept. 12, 1936.

The evidence has satisfied me that the sale of the patented article was substantially interfered with by the outbreak and continuance of the war, and the case for some extension of the patent could be clearly made out but for two factors which I must now consider.

In the first place, the court requires to be satisfied that the patentee who "as such," that is in respect of his British patent, has suffered loss by reason of the war, has not by reason of the same fact made a countervailing profit in respect of a foreign patent or otherwise. This is one of the circumstances which the court must take into consideration. For it might well come to pass that the same war which brought loss to a patentee in respect of his British patent, might bring to him greater profits in respect of a foreign patent, and I need say no more than that in such an event it is unlikely that the subsection could be successfully invoked in his favour.

In the present case the Swedish company admits having made increased profits since the war but alleges that such increases have not been due to the war. It is unable to put before this court any relevant particulars, stating that it is by Swedish law prohibited from doing so, and it relies upon the fact that it has, after some conflict of opinion among the Swedish authorities, been held not to be liable to the special assessments for so called "conjuncture taxes" which are imposed upon profits that are consequential on the war. This is very unsatisfactory. I do not know what considerations influenced the minds of the Swedish authorities who came to this conclusion, and I hope I shall not be thought to show any lack of comity towards them if I say that there is no presumption that, having all the relevant facts before me, I should conclude that the company's increased profits were not directly or indirectly due to the war. It appears to me that this court, having had placed upon it the delicate task of determining whether its discretionary jurisdiction should be exercised in favour of an applicant in a matter in which the public interest also is concerned, must be told all the relevant facts. If an applicant is the subject of a foreign state and is precluded by his municipal law from giving the necessary information to the court, that is his misfortune.

In the second place, I must refer again to the fact that the exploitation of the patent in this country has taken the form of the importation of the manufactured material through exclusive selling agents. With this fact must be taken the further fact that in Sweden where the material has been manufactured the corresponding letters patent have expired. The first fact is by itself not necessarily fatal where the application is under subsect. (6), see per Sargant, J., in *Re Societe Chimique Des Usines Du Rhone's Patent* (1), where he said, at p. 32, that under the ordinary jurisdiction his inclination would be strong against granting any such extension, whatever the circumstances of the case, where the patented article had been manufactured exclusively abroad. He said, however, that an application under subsect. (6) was not for an ordinary extension but for an extraordinary extension by way of quasi-substitution and that the general reasons which applied against an ordinary extension did not apply to anything like the same extent in the case of an extension under the subsection which really amounted only to a substitution. He, therefore, extended the patent for a period of four years to represent the loss for an equivalent period during the war.

In *Re Kettering and Chryst's Patent* (2), which came before Tomlin, J., three years later, the evidence showed that the patentee as such had by reason of the war suffered a loss which amounted to about three years of the patent. The patented articles had been manufactured wholly in the United States of America and the United States of America patents expired about one year after the British patents. Tomlin, J., whose attention was called to the earlier case, having these facts before him, granted an extension not for the full period of three years of loss but for a period of about one year, so that the British patents might expire co-terminously with the United States of America patents. His judgment was very short but it is, I think, clear that, though he was prepared to follow Sargant, J., so far as to grant some extension notwithstanding that the patented articles had been wholly manufactured abroad, he was not prepared to do so in such a way as might place British industry at a disadvantage in comparison with the country where the invention had originated and the manufacture had been exclusively carried on.

Upon a petition for extension the expiry of foreign patents is always a matter to be taken into consideration: see *Re Semet and Solvay's Patent* (3). It may be a "great obstacle" to extension: see *Re Carl Pieper's Patent* (4).

In my judgment this is the case also where the application is for an extension under subsect. (6), though it may be a matter of very serious consideration for in the creation of any monopoly the balance must be preserved between the public interest on the one hand and provision of proper reward for the inventor on the other. Where the application is under subsect. (6) the extended term may be referred to as a substitutional term but it may have quite a different effect upon the public interest, if the original term would, but the new term would not, be co-terminous with the foreign patents. This may particularly be the case where the patent has been developed and manufactured abroad and has in this country been exploited only by a selling agency. It would certainly seem that in regard to the expiry of foreign patents a more indulgent attitude to extension has been adopted by my predecessors where the application is by originating summons under subsect. (6), just as exclusive manufacture abroad is less seriously regarded for the same purpose. I do not in any way depart from this attitude, but both facts are elements which cannot be altogether disregarded. Giving some weight to them but giving much greater weight to the fact to which I first referred, namely, that through no fault of their own the applicants are unable to give the court information which I regard as essential, I think it right to exercise my discretion in this case by refusing the application for an extension.

The costs of the comptroller will be paid by the applicants.

Application dismissed with costs.

Solicitors: *Coote & Co.* (for the applicants); *Solicitor to the Board of Trade* (for the Comptroller-General of Patents).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

NORMAN *v.* GOLDER (H. M. INSPECTOR OF TAXES)

[King's Bench Division (Macnaghten, J.), **March 28, 1944.**]

Income Tax—Practice—Appeal against assessment—Appeal heard by two Special Commissioners—Case stated signed by one commissioner only owing to death of the other—Whether appeal competent.

The appellant had appealed to the Special Commissioners against an assessment of income tax. The appeal was heard by two commissioners and a decision was given by them; but one of them died before a case could be stated for the opinion of the High Court. The case, therefore, was stated by the surviving commissioner. It was submitted by the appellant that the appeal was incompetent since the case was signed by only one commissioner:—

Held: the appeal was competent.

[**EDITORIAL NOTE.** This is purely a practice point, though of importance since the decision when applicable will mean a considerable saving of time and expense.

As to Cases Stated by Income Tax Commissioners, see HALSBURY, Hailsham

Edn., Vol. 17, pp. 361, 362, paras. 738-742; and FOR CASES, see DIGEST, Vol. 28, p. 102, Nos. 631, 632.]

APPEAL by the taxpayer by way of case stated by the Special Commissioners. A decision was given by two commissioners (as required by the Income Tax Act, 1918, s. 230 (2)), but the case was signed by only one, owing to the death of the other before it was ready for signature. At the end of the hearing the appellant submitted that the appeal was incompetent because the case was signed by only one commissioner.

A The appellant appeared in person.

The Solicitor-General (*Sir David Maxwell Fyfe, K.C.*), and *Reginald P. Hills* for the respondent.

MACNAGHTEN, J.: I think that where as in this case one of the Commissioners has died after they had announced their decision, and an application for a special case had been made, the surviving Commissioner can state the facts proved to B the satisfaction of them both and the contentions on the questions of law raised by the parties, and that the appellant, who has transmitted the case signed by the surviving Commissioner cannot be heard to say that the appeal is incompetent.

Appeal dismissed with costs.

Solicitor: *Solicitor of Inland Revenue* (for the respondent).

[*Reported by* R. BOSWELL, ESQ., *Barrister-at-Law.*]

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DRAKE *v.* BEDFORDSHIRE COUNTY COUNCIL.

[KING'S BENCH DIVISION (Cassels, J.), **March 22, 1944.**]

Highways -Repair—Continuing nuisance—Trunk road—County council agents for Minister of Transport—Whether defences open to highway authority available to county council.

D The plaintiff's husband in Oct., 1942, was lawfully and without negligence proceeding along a footpath, part of a highway, when he fell through a gap in the railings which adjoined the footpath and suffered injuries from which he died. The defendants were the highway authority for the area in question until Jan., 1937, when it became vested as a trunk road in the Minister of Transport. By agreement in April, 1937, the defendants E became the agents of the Minister and undertook the repair of the highway. Between July and October, 1937, a motor vehicle damaged the railings in question and a low brick wall which supported them. Some of the fragments were removed after the collision but the gap in the railings was never repaired. It was found as a fact that the gap was a danger. An action was commenced on Mar. 15, 1943, by the plaintiff under the Law Reform (Miscellaneous Provisions) Act, 1934, and the Fatal Accidents Acts against F the defendants as the highway authority, or as the agents of the highway authority, or as the county council, for the area in question on the ground that the deceased's death was caused by the negligence of or the nuisance committed by the defendants. On behalf of the defendants it was contended (i) that they were not the highway authority for the area in question at the time of the accident and had not been so since April, 1937; (ii) alternatively, that the failure to keep the fence in repair was a non-feasance; G and (iii) that they were protected by the Public Authorities Protection Act, 1893, s. 1:—

HELD: (i) the gap in the railings constituted a continuing nuisance for which the defendants were liable.

(ii) the removal of the debris after the accident in 1937 and the failure to replace the railings was a misfeasance, but, if it were non-feasance, the H defendants were merely the contractors of the highway authority, and could not rely upon a defence open only to the highway authority.

(iii) since the defendants were merely contractors, they were not entitled to the protection of the Public Authorities Protection Act, 1893.

[**EDITORIAL NOTE.** The trunk roads have been vested in the Minister of Transport as highway authority. In practice the county council often takes over the duties of the highway authority as his agent. In such circumstances, it appears that the county council, if sued for non-repair, cannot avail itself of the peculiar defence of non-feasance open to the highway authority, nor is it protected by the Public Authorities Protection Act, now the Limitation Act, 1939, s. 21.

As to Misfeasance and Non-Feasance, see HALSBURY, Hailsham Edn., Vol. 16, pp. 332-337, para. 455; and for Cases, see DIGEST, Vol. 26, pp. 398-408, Nos. 1239-1291.]

Cases referred to:

*(1) *Bradford Corpn.* v. *Myers*, [1916] 1 App. Cas. 242; 38 Digest 110, *784*; 85 L.J.K.B. 146; 114 L.T. 83; *affg. S.C. sub nom. Myers* v. *Bradford Corpn.*, [1915] 1 K.B. 417.

(2) *McClelland* v. *Manchester Corpn.*, [1912] 1 K.B. 118; 26 Digest 404, *1270*; 81 L.J.K.B. 98; 105 L.T. 707.

*(3) *Huyton and Roby Gas Co.* v. *Liverpool Corpn.*, [1926] 1 K.B. 146; 38 Digest 129, *949*; 95 L.J.K.B. 269; 134 L.T. 203.

(4) *Carey* v. *Bermondsey Metropolitan Borough* (1903), 67 J.P. 447; 38 Digest 130, *953*.

(5) *Freeborn* v. *Leeming*, [1926] 1 K.B. 160; 38 Digest 130, *955*; 95 L.J.K.B. 114; 134 L.T. 117.

(6) *White* v. *Hindley Local Board of Health* (1875), L.R. 10 Q.B. 219; 26 Digest 412, *1322*; 44 L.J.Q.B. 114; 32 L.T. 460.

*(7) *Skilton* v. *Epsom & Ewell Urban District Council*, [1937] 1 K.B. 112; [1936] 2 All E.R. 50; Digest Supp.; 106 L.J.K.B. 41; 154 L.T. 700.

(8) *Simon* v. *Islington Borough Council*, [1943] 1 K.B. 188; [1943] 1 All E.R. 41; 112 L.J.K.B. 337; 168 L.T. 65.

Action under the Law Reform (Miscellaneous Provisions) Act, 1934, and the Fatal Accidents Acts, for negligence and nuisance committed by the respondents as the county council, or as the highway authority, or as agents of the highway authority for the area in question. The facts are fully set out in the judgment.

Tristram Beresford, K.C., and *Granville Sharp* for the plaintiff.

W. H. Cartwright Sharp, K.C., and *Gerald Howard* for the defendants.

Cassels, J.: Ernest Drake was a bookmaker by occupation in civil life. At the time of his death on Oct. 4, 1942, at the age of 31, he was a trooper in the Royal Tank Corps. Whilst on leave on Oct. 3, 1942, he had been with friends to Luton dog races, won money, spent part of the evening with the same friends at their home and in the Spread Eagle Hotel, Dunstable, and after 10 o'clock was waiting on the approach to the Dunstable Station on the L.M.S. Railway for the Luton bus, which was to start from that place at 10.40. About 10.30 he expressed a desire to visit the fried fish shop, a short distance away. He started across the station approach towards the main road, which is called High Street North, Dunstable, a part of the well-known main road, Watling Street. It was a very dark night and black-out conditions prevailed. Drake had gone only a few yards when he fell through a gap in some railings over a dwarf retaining wall between the footpath at the side of the sloping approach to the station from the main road. He fell on to the main road at a spot which could not be precisely ascertained, but the drop would be from 2ft. to 4ft. according to the position of the spot where he fell. He suffered injuries which necessitated his removal to the Dunstable Hospital. There it was decided to operate, and he died whilst under the anaesthetic on Oct. 4. It was admitted by the defendants that the death of Ernest Drake was due to the accident.

The plaintiff is the widow of Ernest Drake, and her claim, based on negligence and nuisance, is against the defendants as the highway authority, or agents for the highway authority, or as the county council for the county of Bedford, in which area this particular place is situated. It is alleged that the lack of fencing of the embankment and dwarf wall was dangerous to the public, that no warning was given to the deceased of the danger existing, and that after an accident in 1937 (the date of which was given in evidence as between July and October) which damaged two bays of the original fencing or railings, the defendants negligently failed to replace the railings and thus permitted the danger to remain on the highway.

The defendants admit that they were the highway authority from before 1934 until Mar. 31, 1937, after which date this particular piece of highway became vested in the Minister of Transport, of whom the defendants are the agents by agreement, but say they owe no duty to the plaintiff. They admit that they did not replace the portion of the railings damaged by the accident in 1937 and deny that they were under any duty to do so. The defendants traverse the allegations of negligence and nuisance and they further plead the Public Authorities Protection Act, 1893, s. 1. The defendants deny that they are the highway authority or agents for the highway authority for the approach to the station. In the course of the trial the defendants admitted that this particular place was dangerous to pedestrians lawfully using the road, that is the station approach road, and did not ask the court to negative a finding that this road on Oct. 3, 1942, was dangerous to the public. Counsel on behalf of the defendants added that it became dangerous to the public when black-out conditions arrived in September, 1939.

The deceased man could not have fallen at a more troublesome place. It is necessary to go in some detail into its description and its history and the relationship at various times of the defendants to the main road, the dwarf wall, the embankment, the railings and the footpath at the side of the station approach and between that and the main road. At this spot on the main Watling Street on the left side going north-west a road branches at a sharp angle towards the station. The station stands at a higher level than the main road, which goes underneath the railway; the bridge is only a short distance from where the accident happened. The approach road, therefore, rises from the main road and gradually bends away from it, but about half way along the slope where the footpath divides into two, one branch bends round to the station and the other goes straight along under the bridge almost but not quite parallel to and at a higher level than the main road. Between the edge of the footpath at the side of the approach road and of the main road is an embankment, mostly grass and sloping. This embankment varies in height from 14 to 16ft. near the bridge to nothing at the end where it joins the main road; it also varies in width, being wider near the bridge and tapering to a point towards the other end. The station approach was constructed with the railway about 1845. The embankment was then merely earth and grass with the railings at the top. 75 years of surface water and of wandering cattle driven along Watling Street combined to damage such an embankment so much that in 1920 the Dunstable Town Council, with the sanction of the defendants, built a concrete retaining wall to protect the embankment. Between 1929 and 1935 the defendants carried out an extensive Watling Street construction scheme at a cost of £270,000. This included the lowering of the main road under the bridge so as to increase the head room from 14ft. 3ins. to 16ft. This particular work exposed the foundations of the concrete retaining wall and that involved pulling down this wall and erecting a new brick wall on concrete foundations. This work was carried out and completed in November, 1934. A brick wall as it can be seen to-day was constructed and the railings, some of which the defendants removed for the operations, were replaced ending at the main road end in a brick pilaster or pier. This railing consisted of two horizontal rails supported by upright iron posts about 8ft. apart. In February and March, 1934, the railway companies concerned, which until then had maintained the station approach including the footpath, dedicated for the use of the public as part of the adjoining highway this particular portion of the footpath, and the deeds provided that the Dunstable Corporation should maintain the footpath as part of the adjoining highway. On May 2, 1934, the Dunstable Corporation wrote asking if the defendants would agree to maintain this footpath as part of the main road, and on July 27, 1934, the defendants passed the following resolution:

> That this council do bear the expense of the maintenance of that portion of the footpath commencing at the embankment near the Railway Hotel and terminating at the "Bird in the Hand" public house in High Street North, Dunstable, as part of the adjoining highway.

By the Trunk Roads Act, 1936, the Minister of Transport became the road authority for certain main roads of which Watling Street is one. On Jan. 27, 1937, the Minister made an order to the effect that for the next two years councils or local authorities should go on acting as his agents, and by an agreement dated Apr. 19, 1937, the Minister appointed the defendants as his agents to construct or carry out any work of improvement of or other dealings with a trunk road. Counsel for the defendants contended that this merely made the defendants contractors as far as the main road was concerned.

It was while this state of affairs prevailed that on some date between July and October, 1937, a motor vehicle knocked down the brick pier and bent and misplaced the first and second bays of the fencing, according to the description of Mr. Wilkins, who was then borough engineer and surveyor to the Dunstable Corporation. On behalf of the defendants it was admitted that soon after the accident there was a tidying up of the fragments by the employees of the Dunstable Corporation acting for the defendants, and counsel on behalf of the defendants added that the defendants on their part would be acting for the Minister; and I take it that that would be under the agreement of Apr. 19, 1937. Nothing further was done. This left a gap of some 16ft. with no railings plus 8ft. with only the bottom rail between the two posts. It was an unguarded and unfenced drop from the footpath by the side of the station approach to the main road, varying in height from a few inches to about 3ft. where there were A no railings, and more where there was only one rail. At the foot of the dwarf wall was an 8in. kerb but no footpath. The place was not lighted during darkness. A bollard with red lights directed towards traffic approaching from the south showed where the station approach branched off from the main road. Contributory negligence on the part of the deceased was not alleged.

On Mar. 16, 1939, the Minister made another agreement with the defendants, delegating to them his functions with regard to trunk roads. By cl. 3 it was B provided as follows:

> The council [the defendants] shall in exercising the said functions take all reasonable precautions for the protection of public and private interests as if the council were the highway authority, and subject thereto the Minister shall indemnify the council against all claims for damages and compensation in relation to the exercise of the said functions which may be brought against the council and in respect of such costs as may thereby be incurred.

C The roads were named in the schedule and included this main road. It was further provided that the defendants should not maintain or repair any part of a trunk road for the maintenance and repair of which the Minister was not liable. The functions of the Minister referred to in that agreement included "provision and maintenance of fences . . . necessary for the support or protection of the highway."

It was on Oct. 3, 1942, that the deceased fell from the station approach foot- D path on to the main road. The writ was issued on Mar. 15, 1943, five months after the accident and death, five and a half years after the accident in 1937, nearly but not quite six years after the Minister of Transport became and the defendants ceased to be the highway authority for the main road.

In this state of facts the plaintiff brings her action. She must establish that the death of her husband was brought about by negligence or nuisance committed by the defendants, and consideration has to be given to the Public E Authorities Protection Act, 1893, to see whether it applies. I find as facts that the deceased met his death by reason of the danger which existed at this spot, that that danger was created by the absence of a fence guarding the drop from the footpath over the dwarf brick wall to the main road, that there was no warning during darkness of the presence of that danger, that the absence of the fence constituted a nuisance which continued and remained from 1937, F the time when it was damaged and tidied up, until the accident by which the deceased met his death.

The defendants rest their defence upon several grounds: (i) that this fence and the dwarf wall were a part of the highway, that is, the trunk road, and the defendants were not the highway authority for the trunk road at the time of this accident and had not been the highway authority for that road since Apr. 1, 1937, when the Minister of Transport took it over, which was before the accident G which knocked the fence down. (ii) The defendants as a highway authority are not liable for non-feasance and are not liable to fence a highway or to keep a fence in repair. (iii) The Public Authorities Protection Act, 1893, s. 1, now replaced by the Limitation Act, 1939, s. 21, protects the defendants as a public authority from any action in respect of anything done or omitted to be done before 12 months before Oct. 3, 1942.

I have set out the history of this footpath and the railings which were there H for safety and to protect the public from the danger of falling from the footpath on to the road below. Before 1934 that footpath was undoubtedly upon private property. After 1934 it became vested in the Dunstable Corporation and by arrangement between that corporation and the defendants its maintenance was undertaken by the defendants. If the footpath became a part of the main road then it was taken over by the Minister of Transport on Apr. 1, 1937, and the defendants ceased to be the highway authority with regard to it. I think it would be reasonable to hold that this footpath did become a part of the main road, and I am prepared to find it as a fact. It is a footpath which could be, and doubtless is, used by pedestrians going along the main road and not going to the station ; it has been so regarded by the defendants. As far as the deceased was concerned, he was lawfully using a highway and without negligence on his part fell off it on to another part of it by reason of the danger which is admitted by the defendants to have been there.

Are the defendants in law and in this action responsible for this danger ? The position which the defendants have taken up is that after the accident in 1937 there would be a tidying up of the fragments by the foreman and other employees of the Dunstable Corporation acting for the defendants who in turn would be acting for the Minister. That tidying up in my view, made the place no better but in fact probably worse from the point of view of the protection of the public against the danger. We do not know where precisely the deceased man fell except that he fell somewhere through the gap which was left and was found injured on the roadway of the main road below. Dangerous as this gap was in its entire length, I can imagine nothing more dangerous than the space between the two posts where the lower rail is left only a few inches from the ground. A pedestrian in the dark crossing at that spot might easily trip over the rail and be thrown headlong into the roadway below, possibly in the way of wheeled traffic. A person who leaves a danger on a highway leaves a public nuisance which remains until it is abated. It was the defendants' agents who created the danger by taking away what was left after the accident of 1937 and not replacing the railings. In what capacity did the defendants stand in regard to that ? They themselves have said that they were the agents of the Minister by agreement with him : they were carrying out a contract with the Minister, who was the real and only highway authority. If that is so, then they were merely contractors carrying out a contract and not a public authority doing an act in the direct execution of a statute or in the discharge of a public duty or the exercise of a public authority, and not entitled to the protection of the Public Authorities Protection Act, 1893 : see *Bradford Corpn.* v. *Myers* (1), assuming in the circumstances that it applied in view of the continuing nuisance. But whichever way they turn, my view is that the defendants cannot escape liability. I hold that this was a continuing nuisance, a continuing danger to the public. It is contended on behalf of the defendants that at most they were only guilty of a non-feasance. I decide against the defendants on that point. I am satisfied that this was a misfeasance. But the point only arises if the defendants were the highway authority, and they were not, and have said so. They do not become a highway authority because they act under a contract with a highway authority. Assuming that they were a highway authority, they might still be liable if this was misfeasance, as I hold it was : see *McClelland* v. *Manchester Corpn.* (2). In that case LUSH, J., at p. 127, said :

> If a highway authority, therefore, leaves a road alone and it gets out of repair, there is, of course, no doubt that no action can be brought, although damage ensues. But this doctrine has no application to a case where the road authority have done something, made up or altered or diverted a highway, and have omitted some precaution, which, if taken, would have made the work done safe instead of dangerous. You cannot sever what was omitted or left undone from what was committed or actually done, and say that because the accident was caused by the omission therefore it was non-feasance. Once establish that the local authority did something to the road, and the case is removed from the category of non-feasance. If the work was imperfect and incomplete it becomes a case of misfeasance and not non-feasance, although damage was caused by an omission to do something that ought to have been done. The omission to take precautions to do something that ought to have been done to finish the work is precisely the same thing in its legal consequence as the commission of something that ought not to have been done, and there is no similarity in point of law between such a case and a case where the local authority have chosen to do nothing at all.

If the defendants were not the highway authority, then the point of the distinction between liability for non-feasance and misfeasance does not arise. Assuming the defendants in what they did and omitted to do through their agents, the Dunstable Corporation, were acting as a public authority in the discharge of a public duty (which I hold they were not) they would have been guilty of a continuing breach of duty right through until the happening of the accident which caused the death of the deceased man. In *Huyton and Roby*

Gas Co. v. *Liverpool Corpn.* (3), which was a case of damage to gas pipes through neglect to ram the earth sufficiently and where the defendants relied on the Public Authorities Protection Act, 1893, because the action had not been commenced within six months of the negligence, BANKES, L.J., at p. 152, said :

> An act of omission may constitute a breach of duty just as an act of commission can.

Then a little further on he said :

> From some points of view and in some cases it is easier to establish a continuing neglect or default in the case of an act of omission than in the case of an act of commission, because once it is established that the act of omission constitutes a breach of duty the breach continues under most circumstances until the omission is remedied. This is, of course, not true where it can be established that the duty to remedy the omission ceased before the injury complained of occurred, or on the present construction of the statute if it ceased more than six months before the commencement of an action complaining of the omission.

At p. 154 SCRUTTON, L.J., said :

> What is the effect where the cause of action is damage following from an act or neglect, and the act is before the six months' period but the damage within it ? Where there is one act which causes damage which gradually develops, as in a claim for personal injury, we are bound by the decision of the Court of Appeal in *Carey* v. *Bermondsey* (4) to hold that time runs from the act, and not from the latest damage. It is not necessary to decide in the present case what is the result where no damage occurs till six months has elapsed from the act, and damage is a necessary part of the cause of action. If time runs from the act this leads to the startling result that you may lose a cause of an action before you have got it. Possibly this remarkable result might be avoided by holding that the words "neglect complained of," "default complained of," involve something which can be legally complained of, and, therefore, the time runs from the accruing of the cause of action, though not from the latest development of the damage ; but it is not necessary so to decide in the present case. But the case seems to me quite different where after the original act there is a legal duty to avert its consequences, neglect of which is a continuing breach from day to day. Where a man removes a support, which he ought to render continuously, and does not replace it, there is a continuing breach of duty, and on the day of the damage complained of there is a neglect and damage resulting therefrom, and it seems to me immaterial that the original removal was some time before. This helps one to appreciate the meaning of the concluding words of the section, "or in case of a continuance of injury or damage, within six months of the ceasing thereof."

The time runs from the negligent act and not from the resulting damage (*Freeborn* v. *Leeming* (5)), but in the case of "a continuance of injury or damage," to quote the words of the Act, the time runs from the ceasing thereof. This danger continued from the time of its creation until the death of the deceased ; but, if the defendants were not acting in the execution of any public duty or authority within the meaning of the statute, then the only limitation which applies is that of six years, and whether that time runs from 1937 or from Oct. 3, 1942, the plaintiff has started her proceedings within the time.

A further point discussed in the course of the case was whether these railings were a part of the highway or not. They were certainly on the highway but they may not be a part of the highway. For instance, seats, lamp posts, police and telephone booths, pillar-boxes, direction posts, sand bins and suchlike things are to be found upon a highway, but they may not be a part of it. In *White* v. *Hindley Local Board of Health* (6), a grid of a sewer was held to be a part of the sewer and the Local Board of Health was held liable for leaving it in a dangerous condition. The same result occurred in the traffic stud case (*Skilton* v. *Epsom Urban District Council* (7)), and in the abandoned tramway case *Simon* v. *Islington Borough Council* (8)). I do not think that the point calls for decision in this case. These railings in the condition in which the defendants by negligence and nuisance caused them to be were a danger on the highway whether they were a part of it or not, and continued to be so. The railway company put them there originally. The defendants pulled some of them down and put them back when they reconstructed the dwarf wall and may be said to have exercised dominion over them.

I hold that the defendants are liable not as a highway authority, but as persons who by their act have caused a continuing danger on the highway and by reason of that danger the deceased man was killed.

Judgment for the plaintiff with costs.

Solicitors : *Harold Kenwright & Cox* (for the plaintiff) ; *Berrymans* (for the defendants).

[*Reported by* P. J. JOHNSON, ESQ., *Barrister-at-Law.*]

HOLMAN *v.* GEORGE ELLIOT & CO., LTD.

[COURT OF APPEAL (McKinnon, L.J., and Morton, J.), **May 2, 1944.**]

Practice—Writ—Extension of time for service—Action under Fatal Accidents Act, 1846—*Writ issued within the* 12 *months limited by the Act—Not served within* 12 *months of date of issue—Discretion of court to extend time for service—R.S.C., Ord.* 64, *r.* 7.

A writ was duly issued in an action brought by a widow in respect of the fatal accident to her husband within the 12 months limited by the Fatal Accidents Act, 1846. By an oversight the solicitor's clerk omitted to serve until a short time after the expiry of the 12 months allowed for service by the rules of the Supreme Court. Upon the application of the defendant that service was set aside and three months later the plaintiffs applied for a renewal of the writ and an extension of the time of service under R.S.C. Ord. 64. r. 7. It was contended that this was a case where the extension of time ought to be refused since it deprived the defendant of a defence under a statute of limitations :—

HELD : the court could in the exercise of its discretion extend the time for service. Since the writ was issued within the statutory limitation of time, it could not be said that the defendant was being deprived of a defence under a statute of limitations.

[**EDITORIAL NOTE.** A writ must be served within 12 months of the date on which it is issued. After the expiration of that time it can only be served if leave is obtained and the writ renewed ; but, if renewed, the writ is effective from the date on which it is issued. The argument here really amounts to a contention that, if the service is set aside the writ can no longer be renewed and operate from its original date. This argument is rejected and, so long as leave is obtained, the action is commenced on the date of the original writ.

AS TO SERVICE OF WRIT, see HALSBURY, Hailsham Edn., Vol. 26, pp. 26, 27, para. 35 ; and FOR CASES, see DIGEST, Practice, pp. 845,846, Nos. 3924-3926.]

Cases referred to :

*(1) *Doyle* v. *Kaufman* (1877), 3 Q.B.D. 7, 340 ; Digest Practice 845, *3924* ; 47 L.J.Q.B. 26.
*(2) *Hewett* v. *Barr*, [1891] 1 Q.B.D. 98 ; Digest Practice 311, *362* ; 60 L.J.Q.B. 268.
(3) *Mabro* v. *Eagle, Star and British Dominions Insurance Co., Ltd.*, [1932] 1 K.B.D. 485 ; Digest Practice 405, *1067* ; 101 L.J.K.B. 205 ; 146 L.T. 433.
(4) *Weldon* v. *Neal* (1887), 19 Q.B.D. 394 ; Digest Practice 106, *913* ; 56 L.J.Q.B. 621.
(5) *Smalpage* v. *Tonge* (1886), 17 Q.B.D. 644 ; Digest Practice 845, *2925* ; 55 L.J.Q.B. 518 ; 55 L.T. 44.
(6) *National Provincial Bank* v. *Gaunt*, [1942] 2 All E.R. 112.
(7) *Culverwell* v. *Nugee* (1846), 15 M. & W. 559 ; 32 Digest 534, *1872* ; 15 L.J.Ex. 308.
(8) *Cornish* v. *Hockin* (1853), 1 E. & B. 602 ; 32 Digest 534, *1868* ; 22 L.J.Q.B. 142 ; 20 L.T.O.S. 234.

APPEAL by the defendant from an order of STABLE, J., in chambers. The facts are fully set out in the judgment of MACKINNON, L.J.

A. W. Karmal for the appellant.

N. Fox Andrews for the respondent.

Karmal : The judge was wrong to extend the time for the service of the writ. The plaintiff's claim was finally barred and the effect of the judge's order was to revive the action. On the authorities he had no power to do this. Alternatively, even if he had a discretion, he exercised it wrongly.

Fox Andrews : The writ was issued in time and the defendants were advised of the fact that the action was being brought. It is not correct to say that the judge's order revived a statute-barred claim, nor did the order deprive the defendant of any defence under the statute. The service of the writ was merely a question of procedure. The judge had full discretion which in the circumstances he correctly exercised in the plaintiff's favour. The service of the writ was only a few hours out of time. It remained a valid writ though it could not be served without leave. [Counsel referred to *Culverwell* v. *Nugee* (7) and *Cornish* v. *Hockin* (8).]

MACKINNON, L.J. : On Oct. 9, 1941, a fatal accident happened to the plaintiff's husband. Under Lord Campbell's Act any claim arising out of a fatal accident has to be brought within 12 months. The solicitors for the widow issued a writ on Oct. 7, 1942, that is to say, two days short of the expiration of 12 months from the date of the accident, and, therefore, in time. Then, most unfortunately, owing to what has been admitted to be grave negligence on the part of the managing clerk to the solicitors, no steps were taken to serve that writ on the defendants till Oct. 7, 1943, when he suddenly woke up to the fact that he had got this unserved writ and he sent it by registered post. It arrived on Oct. 7, 1943. Having been issued on Oct. 7, 1942, it arrived one day after the expiration of 12 months from the date stamped on the writ. A

It is provided by R.S.C., Ord. 8, r. 1, that no original writ of summons shall be in force for more than 12 months from the day of the date thereof including the day of such date. It has been held under that rule that, if a writ is issued on Jan. 1 its force expires and it comes to an end on Dec. 31. Therefore, on the date when this writ was served, it had ceased to be in force under that order.

Thereupon conditional appearance was entered for the defendants on Oct. 12, 1943, and an application was made on Nov. 1 by the defendants to Master B Moseley to set aside the writ on the ground that it had expired, pursuant to R.S.C., Ord. 8, r. 1. Master Moseley acceded to that request and ordered :

> . . . that the service of the writ in this action be set aside on the ground that the writ, having been issued on Oct. 7, 1942, was not served on the defendants until Oct. 7, 1943, on which date it was no longer in force.

There was a subsequent application to Master Moseley on Jan. 17, 1944, C asking for an extension of time for the service of the writ, pursuant to R.S.C., Ord. 64, r. 7. The master refused that, and from that refusal there was an appeal to Stable, J., who ordered that the appeal should be allowed and that the writ of summons should be renewed for six months from the date of its expiry. From that order of Stable, J., this appeal is brought.

Counsel for the defendants says that Stable, J., was wrong in making that order extending the time and relies upon several old cases which, he says, laid D down the rule that, where an extension of time would have the effect of depriving a defendant of an accrued defence under a statute of limitations or its equivalent, such an extension ought not to be allowed. In particular, he relies upon the decision of the Queen's Bench Division, confirmed by the Court of Appeal, in *Doyle* v. *Kaufman* (1). The headnote in that case says :

> The court has no power under Ord. 57, r. 6 [the equivalent of what is now Ord. 64, E r. 7] to extend the time for renewing a writ of summons where the claim would, in the absence of such renewal, be barred by the statute of limitations.

Counsel for the plaintiff points out, and I think with reason, that this is not a case where the order of the judge in extending the period for the delivery of the writ deprives the defendants of an accrued right of defence pursuant to the statute of limitations or its equivalent under Lord Campbell's Act. The right of defence by the limitations section of Lord Campbell's Act would arise F if the writ had not been issued before Oct. 9, 1942. It was, in fact, issued on Oct. 7, 1942, two days before the expiry of the 12 months.

The sole question is, first of all, whether there is a discretion in the court under R.S.C., Ord. 64, r. 7, to enlarge the time fixed for the service of a writ under R.S.C., Ord. 8, r. 1 ; and, secondly, if there is such a discretion, whether the judge exercised it rightly in this case. I think it is not accurate to say that G *Doyle* v. *Kaufman* (1) laid down as a settled rule that the court had no power to extend the time within the rule. I think the true view is, as was indicated by Kay, L.J., in a subsequent judgment in *Hewett* v. *Barr* (2) that there is a discretion in appropriate circumstances, though no doubt *Doyle* v. *Kaufman* (1) points out circumstances in which it would be wrong for the court to exercise that discretion in favour of an applicant plaintiff. That there is such a discretion I think has been recognised in subsequent cases, such as *Mabro* v. *Eagle* H *Star and British Dominions Insurance Co., Ltd.* (3), where again this rule about depriving a defendant of an accrued defence under the statute of limitations was relied upon as a reason why no order should be made. Greer, L.J., sums up the matter at the end of his judgment by saying :

> Whether the matter is one of discretion or not, it appears to me inconceivable that we should make an order which would have the effect I have mentioned. It has been the accepted practice for a long time that amendments which would deprive a party of a vested right ought not to be allowed.

I think that there is no rule that the court or a judge is deprived of any discretion of allowing such an extension of time as is involved in this case but that there has been an accepted practice for a long time not to exercise that discretion in such circumstances as were dealt with in *Doyle* v. *Kaufman* (1). In this case, as I have said, the obligation under Lord Campbell's Act to issue the writ within 12 months of the date of the accident had been complied with; and by that issue of the writ if it had been served in proper time the defendants would have failed to be in a position to rely upon the limitations in that Act. All that has happened in this case is that, owing to this lamentable neglect on the part of the solicitors' managing clerk, two days over the 12 months were allowed to elapse before he served the writ. In those circumstances I think there was a discretion on the part of the judge to make the order which he did extending the time, and in all the circumstances of the case, that is an exercise of discretion with which I certainly should not interfere. Not only is it one with which I should not interfere but it is an exercise of discretion which I think was perfectly right and proper.

In the result I think this appeal fails and should be dismissed with costs.

Morton, J.: I agree. So far as I personally am concerned, I think the vital question in this case is: Had Stable, J., a discretion to make the order which he in fact made? The wording of R.S.C., Ord. 64, r. 7, is extremely wide. So far as material it says:

> The court or a judge shall have power to enlarge or abridge the time appointed by these rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.

For the reasons already given by my Lord, I am satisfied that *Doyle* v. *Kaufman* (1) and *Hewett* v. *Barr* (2), which were cited by counsel for the appellant, did not deprive the judge of a discretion under that rule. I would only add this. I observe that in *Hewett* v. *Barr* (2) in addition to the observation of Kay, J., to which reference has been made by my Lord, Lord Esher commences his judgment by saying:

> It has been laid down in *Weldon* v. *Neal* (4) as a general rule of conduct, with regard to the granting of amendments, that they ought not to be granted where they would have the effect of altering the existing rights of the parties. This being the rule with regard to amendments of pleadings, the same principle applies still more strongly to the case where we are asked to allow the renewal of a writ, though by so doing we should deprive the defendant of his existing right to the benefit of the statute of limitations.

As I read the judgment, Lord Esher is not suggesting that the discretion has gone. Similarly Lopes, L.J., after referring to *Doyle* v. *Kaufman* (1), ends by saying:

> In my experience, the practice as laid down in that case has been followed ever since.

There again I do not think that any of the members of the Court of Appeal in *Hewett* v. *Barr* (2) intended to lay down that there was such an absolute prohibition against exercising what appears to be a discretion under R.S.C., Ord. 64, r. 7, as has been suggested by counsel for the appellant. There being in my view a discretion, I respectfully agree that there is no reason for interfering with the exercise of discretion by Stable, J., in this case, and, indeed, I should certainly have exercised it in the same way myself. I agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: *Watson, Sons & Room*, agents for *Allen Pratt & Geldard*, Cardiff, for the appellants; *Gibson & Weldon*, agents for *John Whittle, Robinson & Bailey*, Manchester, for the respondent.

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

Applied. GOLD COAST SELECTION TRUST, LTD. *v.* HUMPHREY. [1948] 2 All E.R. 379.

ABSALOM *v.* TALBOT.

[HOUSE OF LORDS (Viscount Simon, L.C., Lord Atkin, Lord Thankerton, Lord Russell of Killowen and Lord Porter), **February 14, 15, 16, 17, 21, 23, 24, 28, May 22, 1944.**]

Income Tax—Profit—Speculative builder—Part of purchase price not advanced by building society advanced by builder on security—Trade debt—Income Tax Act, 1918 (*c.* 40), *Sched. D, cases* 1 *and* 11, *r.* 3 (*i*).

A speculative builder had built a number of houses for sale to the working classes and in respect of each house an advance was obtained from a building society of the greater part of the purchase money. The builder received a small deposit and the remaining money required to make up the purchase price was made payable by annual instalments with interest and secured in favour of the builder either by a second mortgage or by a promissory note. It was contended for the builder that the sums due under the second mortgages or the promissory notes were either to be treated as trade receipts in the year in which they were actually paid or that they should be brought into account at figures not exceeding their present value:—

HELD [VISCOUNT SIMON, L.C., and LORD PORTER *dissenting*]: since the credit given was not ordinary commercial credit, but a debt payable with interest by instalments over a period of years, the actual balance of the purchase price remaining on loan was not a debt to be included in the profits of the year in which the sale took place. The debt must either be valued according to risk of its not being paid in full, or, if valuation should prove impracticable, the instalments must be taken as profits for the year in which they are payable.

Decision of the Court of Appeal (LUXMOORE and DU PARCQ, L.J.J., SCOTT, L.J. dissenting) ([1943] 1 All E.R. 589) *reversed.*

[**EDITORIAL NOTE.** The House has here made a distinction between the case where ordinary commercial credit is given and that where a debt is allowed to be paid by instalments extending over a number of years the debt, as far as it is unpaid, carrying interest in the meantime. In the first case the debt is treated as paid and the taxpayer is left to claim an allowance for a bad debt if subsequent events show that the amount is not paid or not paid in full. In the second case the House, quite apart from the dissenting judgments, has left the matter to be finally settled by the commissioners. In the first place they must attempt to attach a present value to the debt having regard to the risk of its not being paid in full. This is a matter of evidence. If this method proves impracticable, the only alternative seems to be to include each instalment as it becomes payable in the profits for the year in which it is payable. The difficulty in the second method is that, if the taxpayer should cease to carry on the business in which the debt is incurred, subsequent instalments will escape tax altogether. Incidentally the House has made a number of observations. It has been said that the practice of the Revenue to make allowances for bad debts is a benevolent practice, but the better view seems to be that it is a statutory duty binding on them. The decision of the Privy Council in *Gleaner Co., Ltd.* v. *Assessment Committee* (2) is criticised but it is not finally agreed that the decision was a wrong one. This decision has not in fact been applied in practice in England and, having regard to the opinions given herein, it seems unlikely that it will be followed in the future.

AS TO INCOME TAX ON SALE OF PROPERTIES BY BUILDERS, see HALSBURY, Hailsham Edn., Vol. 17, pp. 100, 101, para. 194; and FOR CASES, see DIGEST, Supp., Income Tax, Nos. 122c-122f.]

Cases referred to:

*(1) *Harrison* v. *Cronk* (*John*) *& Sons, Ltd.*, [1937] A.C. 185; [1936] 3 All E.R. 747; Digest Supp.; 106 L.J.K.B. 70; 156 L.T. 20; *sub nom. Cronk & Sons, Ltd.* v. *Harrison*, 20 Tax Cas. 612.

*(2) *Gleaner Co., Ltd.* v. *Assessment Committee*, [1922] 2 A.C. 169; 28 Digest 49, *n.*

(3) *Anderton & Halstead, Ltd.* v. *Birrell*, [1932] 1 K.B. 271; Digest Supp.; 101 L.J.K.B. 219; 146 L.T. 139; 16 Tax Cas. 200.

(4) *Reid's Brewery Co.* v. *Male*, [1891] 2 Q.B. 1; 28 Digest 56, *285*; 60 L.J.Q.B. 340; 64 L.T. 294; 3 Tax Cas. 279.

(5) *Dailuaine-Talisker Distilleries* v. *Inland Revenue Comrs.*, [1930] S.C. 878; Digest Supp.; 15 Tax Cas. 613.

(6) *Usher's Wiltshire Brewery, Ltd.* v. *Bruce*, [1915] A.C. 433; 28 Digest 56, *287*; 84 L.J.K.B. 417; 112 L.T. 651; 6 Tax Cas. 399; *revsg.* [1914] 2 K.B. 891.

*(7) *Emery* (*John*) *& Sons* v. *Inland Revenue Comrs.*, [1937] A.C. 91; Digest Supp.; 156 L.T. 87; 20 Tax Cas. 213.

APPEAL by the taxpayer from a decision of the Court of Appeal (LUXMOORE and du Parcq, L.JJ., Scott, L.J., dissenting), given on Apr. 20, 1943, and reported [1943] 1 All E.R. 589. The facts are fully stated in the opinion of Viscount Simon, L.C.

Cyril King, K.C., and *J. H. Bowe* for the appellant.

The Solicitor-General (*Sir David Maxwell Fyfe, K.C.*), and *Reginald P. Hills* for the respondent.

Viscount Simon, L.C.: My Lords, the question in this case is as to the proper method by which to compute under the Income Tax Act, 1918, Sched. D, para. 1 (*a*), the annual profits or gains arising or accruing to a speculative builder. The nature of the business to be considered is adequately illustrated by two instances annexed to the case stated. It is sufficient to take as example the sale by Absalom in Mar., 1933, of the fee simple of a house to James Mayhew on a building estate in Kent which the appellant was developing. The price of £425 was provided by a cash deposit of £40 made by the purchaser; by £320 paid by a building society which took a first mortgage from the purchaser, while the balance of £65 was provided by a loan from the appellant to the purchaser and was secured by a second mortgage under which the borrower bound himself to pay to the appellant the sum of £65 with interest at the rate of £5 10*s.* per cent. per annum by equal monthly payments of 8*s.* 2*d.*, with the further provision that the mortgagee would accept payment of the principal sum and interest thereon by the said instalments as long as the instalments were punctually paid.

It is not disputed that the appellant is carrying on a trade of which the transaction just described is an example. The question at issue is whether the profits and gains arising or accruing from such trade have been correctly calculated so far as the £65 covered by the second mortgage is concerned. The Crown contends that the amounts owing to the appellant, secured by second mortgages or promissory notes, are debts of his trade, the amount of which must be brought into account, except in so far as a deduction is permissible in respect of bad or doubtful debts under the provisions of Sched. D, cases I and II, r. 3 (*i*). The appellant keeps his accounts on the basis of the calendar year, and consequently his assessment of income tax for the fiscal year ending Apr. 5, 1935, is based upon the figures of his trade for the calendar year 1933. The argument for the Crown is that since he sold this house in Mar., 1933, he must bring into his account for income tax purposes for the year 1934-5 the whole purchase price of £425, notwithstanding that £65 of it was not due and payable in 1933, and would only be paid off gradually, so that, if the terms of the second mortgage were duly observed, some 22 years would elapse before it was finally discharged.

The appellant, on the other hand, contends that the sums receivable under the second mortgage fall to be valued at the time of the sale of the houses at their actual value at that time and not at their face value. A second contention urged on behalf of the appellant went further, and urged that such part of the price as was not paid or payable within the year 1933 ought not to be included on the profit side of the account for that year at all, but would fall to be included in the later year or years in which they were paid or became payable. It was, of course, a corollary of this last proposition that there should be included in the calculation of profits and gains for the year 1933 instalments paid or due to be paid in the course of that year in connection with the sales of houses previous to that year.

The case stated includes the information that the appellant retired from his business of a speculative builder on Dec. 31, 1937. It is easy, therefore, to see the importance to him of securing a decision that what remained to be paid to him after that date does not properly come within the calculation of income tax on his business profits. But there remains to be decided the question as to what is the right mode of estimating the annual profits of his trade.

I have come to the conclusion that neither of the contentions put forward on behalf of the appellant ought to succeed. When a trader in the course of his trade makes a sale to a purchaser, whether the subject-matter of the sale be a house or any other asset in which he deals, his accounts for the year in which the transaction takes place should for income-tax purposes normally include on the one side the cost of providing the asset with which he has parted to the purchaser and, on the other side, the price for the asset which the purchaser has paid or bound himself to pay. The figure to be entered on the credit side is ordinarily the full price and its face value. If at the end of the year the taxpayer can satisfy the commissioners that such portion of the debt as has not actually been paid is a bad or doubtful debt, an adjustment under cases I and II, r. 3 (*i*), may be obtained, though presumably this sort of adjustment is more likely to arise at a later stage. But from the point of view of the trader the relevant time is the time when he parts with his asset to the purchaser, and, if the accounts are to set out correctly his profits and gains, the whole consideration must be brought in at that stage, notwithstanding that a portion of it will not be payable until later, while carrying interest in the meantime. If the transaction took the unusual form of a sale in return for a payment, in whole or in part, of a lump sum in the future, with no interest in the meantime, I should be quite prepared to agree that the debt representing the true price required to be arrived at by taking the present value of the lump sum which is payable *in futuro*. But when the unpaid lump sum (as is usually the case) carries a commercial rate of interest until payment, it is the lump sum itself which enters into the calculation of the price. The decision of this House in *Cronk's* case (1) is distinguishable: in that case there was no question of debt due from the purchaser of the house, and the issue lay between the builder and the building society.

This is, I believe, the recognised practice of accountants in dealing with returns for income tax, and is the method for which the Crown contends. It corresponds to the business sense of the transaction. The appellant here in the course of selling the house becomes entitled to £65 which will be due to be paid him in the future. In the meantime, he is charging his debtor interest and holds security. The position is, therefore, indistinguishable in a business sense from what it would be if the purchaser had paid him the £65 down and he had then lent the £65 back again to the vendor on second mortgage at a suitable rate of interest. So analysed the transaction is obviously one in which the £65 should be treated as coming into the profit side of his account at the time of the sale of the house, while the interest paid on it will, of course, be liable to tax on each occasion that it is received.

As this appeal has been very fully and ably argued on both sides, I do not wish to leave it without making an observation on r. 3 (*i*), which provides that, in computing the amount of the profits and gains to be charged, no sum shall be deducted in respect of:

> . . . any debts except bad debts proved to be such to the satisfaction of the commissioners and doubtful debts to the extent that they are respectively estimated to be bad.

It is clear from the words used in the beginning of the rule that it is concerned with prohibiting various claims for deduction from profits and has nothing to do directly with declaring what are profits. Yet I cannot help suspecting that it must be sometimes rather hastily read as though it amounted to an assertion that trade debts are profits. The true view is that, in cases like the present, profits (or losses) so far as due to the particular transaction, arise from the sale and at the time of the sale; the debt representing the price is created by the sale and at the time of the sale. Indeed, the second reason of the respondent's case is that debts due to the appellant from the purchases of houses "were debts within the meaning of r. 3 (*i*)." If that were so, the only result would be that such debts necessarily enter into the calculation of profits. To my way of thinking, the reason why debts such as the £65 in this case are to be brought in on the credit side of the account is because they are an element in arriving at the appellant's profits and gains, and not because of anything stated in r. 3 (*i*) at all.

There is a further reflection on r. 3 (*i*) which it seems appropriate to put on record at the end of the present appeal. At one time in the course of the argument it was suggested that the right to make a deduction for bad or doubtful debts in years subsequent to the year of the transaction creating the debt was conceded only by the benevolent practice of the Revenue. But it seems to me that the Revenue's practice in this respect is not due to benevolence but to statutory law. If in the year when a house has been sold the whole price of the house has been included in the calculation of the vendor's trade profits and, if in a later year it is ascertained that part of the price which still remains to be paid is of doubtful value or is a bad debt, the allowance made by the Revenue is authorised and required by statute, notwithstanding that the year of sale has passed by. It will be adjusted by an allowance in the later year in which its unsoundness is proved. The judgment of the Judicial Committee delivered by LORD BUCKMASTER in *Gleaner Co., Ltd.* v. *Assessment Committee* (2) may appear to be inconsistent with this view, but the Privy Council was there pronouncing on the income tax of Jamaica, which is not in quite the same terms as our own, and in so far as this is not an adequate distinction, I must say that I find myself, with all respect to LORD BUCKMASTER who prepared the judgment, unable to accept the proposition there laid down and think that the case should not be followed.

I would dismiss the appeal.

LORD ATKIN [read by LORD THANKERTON] : My Lords, the problem raised by this case can be stated simply, but its solution evidently affords ground for difference. The appellant in the years of assessment was engaged in the business of building industrial dwellings which he sold to members of the working class. The business procedure was that the purchaser agreed to buy a house at a price, arrangements having already been made that a building society would advance to him a proportion of the price on a mortgage repayable by instalments over a period of years. The purchaser would provide a small sum in cash, and this cash payment together with the amount provided by the building society would be handed to the builder on completion. The balance the purchaser agreed to pay to the builder by instalments including principal and interest over a period which might extend to over 20 years. Thus in one sample case exhibited to the case stated J. Mayhew, described as a labourer R.A.S.C., bought a house for £425. He paid £40 down and the building society advanced to him £320 on mortgage which was paid over to the appellant. For the balance, £65, the builder took a second mortgage payable with interest at 5½ per cent. by monthly instalments of 8*s.* 2*d.*, which would discharge the sum agreed to be paid in rather more than 22 years. The agreement appears to provide that the bargain to receive payment in instalments only lasts as long as the instalments are duly paid. Part of the balance was sometimes paid by the purchaser signing a promissory note for such amount payable by monthly instalments over a period of four or five years, but this variation does not seem to affect the main issue.

The issue is whether these marginal sums agreed to be paid to the builder over a period of years ought to be assessed on him for income tax in the year of the contract as profits of his trade for that year at the full face value of the sum agreed to be paid, or whether some other, and, if so, what assessment should be made. The commissioners, MACNAGHTEN, J., and the majority of the Court of Appeal have decided that the builder is subject to assessment on the full sum agreed to be paid. With all respect to them this appears to me to be giving an extremely unnatural and, indeed, unjust meaning to profits of the year, and I think that the decision cannot stand. I have the less reluctance in differing from the decisions appealed against because they are all based upon a view of an income tax rule, Sched. D, cases I and II, r. 3 (*i*), which I believe all your Lordships are agreed will not bear the construction put upon it.

The rule is :

> 3. In computing the amount of the profits or gains to be charged no sum shall be deducted in respect of (i) any debts except bad debts, proved to be such to the satisfaction of the commissioners and doubtful debts to the extent that they are respectively estimated to be bad. In the case of the bankruptcy or insolvency of a debtor, the amount which may reasonably be expected to be received on any such debt shall be deemed to be the value thereof.

It was contended by the Crown that the effect of this rule was that all debts, at any rate all "trade debts," must be brought into account at their face value subject to such deductions as were permissible under the rule for bad and doubtful debts, and this construction has been adopted by all the tribunals before whom this appeal came. It appears to have been overlooked that the rule does not purport to state what debts are to be brought into account, but deals only with deductions which may be made from debts that were brought into account. What debts are to be brought into account and at what value the rule does not say.

No one doubts that in ordinary commercial practice, where goods are sold on terms of ordinary commercial credit of three or six months or even more, traders are in the habit of treating the debt so created as part of the profits of the year in which the debt is incurred. Thus, where the business accounts are made up at the end of the calendar year, a sale in December on credit terms which expire in March or April will be regarded as a profit made in December; and this commercial practice is treated by taxpayers and tax collectors alike as involving a just and accurate computation of profits. The obligations so incurred in ordinary trading are treated as firm obligations and as good as cash in hand, and no one is any the worse. If expectations are disappointed an allowance for a bad debt can be claimed and will be granted. But when one leaves the realm of ordinary commercial credits and has to deal with credits extending over many years the whole situation is changed.

According to the Crown's contention it makes no difference whether the price of goods is to be paid forthwith or at the end of 20 years, or by instalments over 20 years, and whether with interest or not, nor apparently is the possibility or probability of the debtor being unable to continue the payments over the whole period a matter to be taken into account. To my mind, to treat money to be paid 20 years hence as producing a profit this year equal to money in fact paid this year is to produce a completely unreal conception of yearly profit, and I venture to think quite foreign to any commercial ideas on the subject. It will be observed that the suggested rule does not even contemplate the allowance of discount. To style the obligation a trade debt which it is does not meet the difficulty. Nor, with great respect, is it conclusive to say that the creation of the debt is the consideration for the delivery of the goods. It is, but the question is still whether the consideration produces a profit in the year in which the purchase is made, and there are some conditions in which that proposition cannot be true, as, for instance, a promise in return for goods to render services over a period of years, or to give in exchange other commodities in a future year or years.

It seems to me, therefore, in the present case unreasonable to treat the whole sum payable over 20 years as amounting to a profit of the whole face value made in the year of sale. I am, of course, dealing only with the balance of the price: the parts of the instalments that are allocated to interest do not come into the calculation. I agree that a sum payable by instalments at interest and fully secured either on mortgage of property or by the obligation of a debtor whose credit is beyond question as a bank or large insurance company might well be taken at its face value, for that would be the value of the obligation created. On the other hand a sum payable without interest either in a lump sum several years ahead or by instalments could never be equivalent to its face value in the year of origin. Similarly, an obligation created as in the present case by members of the working classes whose ability to pay depends upon continuity of employment and continuance of health and life, and is further burdened by an obligation to pay much larger sums in reduction of the mortgage to the building society would very improbably be equivalent to the face value. This is plainly indicated by the figures in the accounts exhibited to the case which appear to indicate in general terms an annual deficiency of bad debts in respect of these marginal payments of over 20 per cent.

But it is said these are not real difficulties. The taxpayer has for years prepared his accounts on the footing of entering the whole of the marginal payments at their face value, and the uncertainty of the payments is satisfactorily met by the allowances made in subsequent years for bad debts. There seems to have been some doubt on both sides as to whether these allowances in subsequent years are in accordance with law, doubts which are reflected in the judgments in the Court of Appeal. The doubts are due to a decision in the Privy Council in *Gleaner Co., Ltd.* v. *Assessment Committee* (2). I will discuss this case later, but I wish now to state that I entertain no doubt that allowances for bad debts made in subsequent years are legal, and that what has been described as the normal practice of the Inland Revenue in such cases is correct.

But the practice of the taxpayer, acquiescing in the claim of the Inland Revenue, is of little value when the practice is sought to be put upon a legal footing. As long as a business is continued, and income tax rates are fairly constant, it matters little to the taxpayer how this profit is computed, the allowances in future years will remedy the excessive assessment in the first year.

But when rates begin to rise, or particularly as in the present case where the taxpayer is retiring from business, the position becomes at once unsatisfactory. It appears to be conceded that once the creditor has gone out of business no further allowances can be made, and thus the excessive assessment of the first year can no longer be compensated. I can see no reason why such an arbitrary method of computing profit leading to real hardship should be adopted, when there is no statutory enactment prescribing it. I am satisfied, therefore, that the assessment which has been confirmed by the courts cannot stand.

There are more methods than one of calculating the profit in such cases as the present, and it may be that more than one may have to be adopted. For my part, I think that the most satisfactory course would be to put the debts at their face value on the one side and to open a suspense account on the other side which no doubt would be calculated upon the ordinary risk of bad debts and adjust it year by year in accordance with the actual payments made. It is said that this is forbidden by r. 3 (*i*). On the other hand, if that rule only applies, as I think it does, to debts that are correctly entered at their face value, its provisions would have no bearing on debts which could only be entered at their face value if some such corrective as a suspense account is necessary. Another method which is correct enough in theory is to value the debt. It would thus be treated as an asset received in part discharge of the price, and its value would be calculated according to the experience of the business. I see no reason why the valuation should not be made of each debt as would appear to be the effect of r. 3 (*i*) " to the extent that they are *respectively* estimated to be bad." Valuation is certainly a rough method of adjusting profit, for there seems no means of subsequent correction by actual results, but at any rate it removes the anomalies that arise otherwise on a discontinuance of business.

Another and more accurate method as long as the business continues is that which I understand is preferred by my noble and learned friend LORD RUSSELL OF KILLOWEN, which is to enter only in each year the instalments actually paid or at any rate payable. The difficulty as it appears to me is that, when the creditor retires from business, according to present accepted practice income tax would no longer be chargeable on instalments received after that date. I venture myself to doubt whether this practice is correct: the proceeds would be annual gains, and they would be due to carrying on a trade though not in the year of assessment; it is difficult to see how they would differ from instalments received in the second or third year while business is still being carried on. I can express no final opinion about this for it has not been argued, but I should like to consider it an open point.

However, there is, I think, no doubt about the practice, and I think, therefore, that, as the case must go back to the commissioners, it will be sufficient to leave it to them to settle the right method of adjusting the assessment, feeling that the method of valuation affords least scope for legal doubt, and that, in default of satisfactory valuation being possible, they may have to fall back upon the method of taxing instalments in each year as they fall due.

As I have said, I have arrived at this result while accepting the view put before us by the Crown as I understand in the present case for the first time in this House, that it is in accordance with the Income Tax Acts to make allowances for bad debts in years subsequent to that in which the original debt was incurred. The authority to the contrary is the judgment in *Gleaner Co., Ltd.* v. *Assessment Committee* (2). That case is a decision on the Income Tax Act of Jamaica, but the wording so closely resembles the English Act from which no doubt it was borrowed, that it is, to my mind, impossible to distinguish it. The decision clearly lays down that allowances granted under the words of r. 3 (*i*) can only be made in the original assessment. Notwithstanding the unfeigned respect I have for the learned Lord who delivered the opinion of the Privy Council, I cannot but remember that occasionally "*dormitat Homerus.*" I see no reason for such a restriction which appears to defeat almost any beneficial effect of the power to render such an allowance. It is often, I should have thought usually, the case that the need for allowance becomes obvious not in the year the debt was incurred, for, if doubt arose then presumably the debt would not be created, but at a later period. I am satisfied that the practice of the Inland Revenue coincides with commercial needs, and I am driven to say that, in my opinion, the *Gleaner* case (2) was wrongly decided and should not be treated as an authority in English income tax law.

For these reasons, I am of opinion that this appeal should be allowed, and the case should be remitted to the Special Commissioners for the assessments to be varied in accordance with the opinion expressed in this House. The appellant should have his costs of his appeal before the Special Commissioners in the courts below and in this House.

Lord Thankerton: My Lords, I agree with the opinion of my noble and learned friend Lord Atkin, except that, like my noble and learned friend Lord Russell of Killowen, I find it unnecessary to come to any final conclusion as to the statutory validity of the Crown practice to make allowances for bad debts in years subsequent to that in which the original debt was incurred. There is no question of any such allowance in the present case, and—without further consideration—I am not prepared to hold that the opinion expressed in the Privy Council in *Gleaner Co., Ltd.* v. *Assessment Committee* (2) is not applicable to the English Acts, or is wrong. With reference to the two cases referred to by my noble and learned friend Lord Porter, I would only note that in *Anderton and Halstead, Ltd.* v. *Birrell* (3), the allowances were made by agreement and no such question was raised, much less decided, while in *Reid's Brewery Co.* v. *Male* (4), it was only by holding that the brewers carried on banking and moneylending as a branch of their business that the court found the deductions permissible.

I agree with the motion proposed by my noble and learned friend Lord Atkin.

Lord Russell of Killowen [read by Lord Thankerton]: My Lords, this is a very special case. It is the case of the business or trade carried on by a person, who is commonly called a speculative builder, *i.e.*, one who buys land, and enters into agreements to build houses on parcels thereof for persons who are not prepared, in return for a conveyance to them of the house and land, to find more than a small proportion of the purchase money. I need not state the methods adopted by the appellant or the part played in the transactions by the building society. That has already been done, and the details appear in the two cases selected before us as typical, *viz.*, Mayhew and Hearndew It is sufficient for my purpose to state that in no case did his bargain with the purchaser entitle the appellant to receive the full purchase money in the year in which he sold and conveyed to the purchaser the house and land; indeed, the bargain bound him to wait for many years before the final instalment became due. The instalments payable by the purchaser consisted partly of principal and partly of interest, but, if the purchaser made default in payment of any instalment, the whole amount of the purchase money still unpaid became immediately due.

The Crown contends that, in computing the full amount of the profits or gains of the appellant's trade of the year preceding the year of assessment, the balance due from purchasers of houses and land conveyed to them in that year in respect of unpaid purchase money should be included as debts at their face value, notwithstanding the long credit given which entitled the purchasers to pay by instalments extending over many years. In the respondent's case before this House, this inclusion is stated (curiously enough) to be in accordance with Sched. D, cases I and II, r. 3 (*i*), a rule which relates only to deductions in respect of debts, not to their inclusion. That rule *per se* does not justify the Crown's contention, nor does any inference which could legitimately be drawn from the rule. The matter is, however, in my opinion, decided adversely to the Crown by the decision of this House in *Harrison* v. *John Cronk & Sons, Ltd.* (1). It is true that the facts in that case differed from the facts in this case. In *Cronk's* case (1) the portion of the purchase money withheld from the vendor was withheld by the building society, and might not (in whole or in part) ultimately reach the vendor if the purchaser came in default to the building society. In the present case part of the purchase money is withheld from the vendor by the purchaser, and may not (in whole or in part) ultimately reach the vendor, if the purchaser comes in default to him. But in each case the question is the same, *viz.*, whether the amount withheld should be brought into the account on the receipt side at its face value. The Court of Appeal held that the amounts were to be brought in as trading receipts at the time of each sale, not at their face value, but on a proper valuation. We affirmed that decision, but added (in view, I think, of a difficulty which had been anticipated by the commissioners in making a valuation) that, in the event of the commissioners finding a valuation impracticable, they should not be treated as receipts of trade except in so far as such sums or any part thereof were released to the company (*i.e.*, received by the vendors) during the trading periods in question. That authority seems to me inconsistent with the contention that the amount of outstanding purchase money should be brought in at its face value.

For myself, I think that " the annual profits or gains arising or accruing " to the appellant from his trade in any one year would be most truly computed by including on the credit side of the account his actual cash receipts during that year, and so much of the outstanding purchase moneys as fell due to be paid in that year, *i.e.*, treating the latter on the footing of receipts in that year. If and so far as they could properly be deemed bad or doubtful, deductions would be made under the before-mentioned r. 3 (*i*). If by reason of default the whole of the outstanding purchase moneys had become due, the whole amount would be entered as falling due in that year with the appropriate deduction under the rule. This method is in effect the alternative suggested by this House in *Cronk's* case (1) in the event of valuation being found to be impracticable.

The majority of your Lordships, however, are of opinion that the proper course to adopt is to value the debts which represent the outstanding portions of purchase money which will be received in subsequent years when and if the successive instalments (which are composed in part of unpaid purchase money and in part of interest) are duly paid. I am not disposed to disagree. It must, however, be borne in mind that this valuation is in no sense a discounting for the purpose of arriving at a present value of a future payment, for the debt is carrying interest until payment. Nor is it a deduction in respect of a bad or doubtful debt under r. 3 (*i*), for (there being no existing default) there would be no ground for alleging that the debt was either bad or doubtful. Had any default already occurred the whole of the outstanding purchase moneys would have become due, and would be entered as a debt immediately payable, with the appropriate deduction under the rule. No need for valuation in that case would arise. The valuation which I contemplate is one which takes into account all the risks which a creditor runs who (like the appellant in this case) gives very long credit on doubtful security, and which may at some future time convert a presently good debt into a bad one. In assisting the commissioners to arrive at such valuation, I can see no objection to evidence being given to show that in the experience of the appellant in his trade, and of others who carry on the same kind of trade, a certain percentage of these future instalments proves to be irrecoverable.

I would accordingly allow the appeal and send the case back to the commissioners for them to make a valuation and to alter the assessments accordingly.

I have not found it necessary to express any views upon the true construction of r. 3 (*i*), or upon the legality of the practice which was described by SCOTT, L.J., in his judgment as extra-legal. As at present advised, I do not think that the rule permits a deduction, in computing the profits of a subsequent year, of a debt treated as good in computing the profits of a previous year, and that the practice referred to is a concession to the taxpayer, not a right on his part. But I prefer to keep these points open until the necessity for their decision arises.

LORD PORTER : My Lords, the facts in this case have been fully stated and I need not repeat them. No doubt the habit of building and selling houses to purchasers who obtain part of the purchase price from building societies whilst for the remainder they continue to be debtors direct to the building owner with or without security is of recent origin. Nevertheless, it is now widespread and its effect in a form not identical with but similar to that adopted in the present case has already been the subject of a revenue appeal in your Lordships' House. That in the normal course of affairs it will become even more common is, I think, likely. Your Lordships' decision is, therefore, of importance not only in law, but also in fact to a considerable number of taxpayers who will be affected by it. I make these observations because it has been suggested that this is an exceptional case and will have little, if any, effect upon the liability to tax of building owners or other business men.

Debts so incurred and credits so obtained are no doubt an extension of the type of debit and credit customary when income tax was originally imposed, but the same language continued to be employed when and after that tax was reimposed though the content of the word " debt " was being extended to meet changing conditions. In spite, therefore, of the forcible judgment of Scott, L.J., based upon a historical survey of the conditions originally obtaining, I cannot but believe that the sums owing to the owner by the purchaser are debts as generally understood amongst business men and by accountants at the present time, and come within the express words of Sched. D, cases I and II, r. 3 (*i*) as set out in the Income Tax Acts.

In the Court of Appeal it appears to have been assumed that, in calculating the profits of a business, debts whether presently payable or not must be brought into account on the credit side at their face value because they are debts, unless indeed they can be shown to be bad or doubtful. Rule 3 (*i*) seems to have been considered to imply that they must be so treated because a provision as to what deductions are allowable in the case of a debt necessarily implies that it is to be taken into account at its face value save in so far as those deductions are allowable. My Lords, I do not think that this contention can be accepted in that form.

Debts, no doubt, if payable within the year of charge and possibly those not so payable provided they are payable within a reasonable time thereafter, must be taken into account, and, when they are taken into account, r. 3 (*i*) prescribes what deductions are allowable. But it does not follow that all debts must be taken into account either in the year in which they are contracted or at their face value. What has to be ascertained are the profits and gains of the business, or, as the wording originally stood, the balance of profits and gains—a difference in language which does not affect the meaning of the provision. In order to ascertain that balance one has to determine what sums are to be credited and what debited in the annual accounts. No directions are given in the Income Tax Acts as to how those profits are to be ascertained and in default of direction they must, I think, be arrived at on ordinary commercial principles, subject to such provisions of the Income Tax Acts as require a departure from such ordinary principles, see *per* Lord Clyde (Lord President) in *Dailuaine-Talisker Distilleries* v. *Inland Revenue Comrs.* (5), and *Usher's Wiltshire Brewery Co., Ltd.* v. *Bruce* (6). As Mr. Konstam says in the 9th edition (1943) of his book on the Law of Income Tax at p. 100 :

> Speaking generally, the profits of a trade are usually computed for the purposes of Sched. D on an earnings basis . . . Amounts receivable under contracts entered into in the year are credited and bad debts debited, and allowance is made for bad debts.

So considered it must, I think, be conceded that at the present time debts, whether payable at once or in the future, would normally be treated as an asset of the business in the year in which they were contracted. Rule 3 (*i*) appears so to assume, but they are treated as credits not primarily by reason of the rule, but because business practice follows that course. Indeed, this seems to be the natural course to follow in circumstances such as those under consideration, since upon the sale and transfer of each house the owner has parted with an asset and received in exchange a payment from the building society together with a debt due from the purchaser, secured by a second mortgage with or without a promissory note in addition.

I find it difficult to think that these items are not to be brought into account as soon as the transaction is completed or to accept the view that they must wait until each instalment is paid before they are credited. They are present assets though payable at intervals in the future. Indeed, counsel for the appellant did not, save in the last resort, argue to the contrary. His first and main submission on behalf of the appellant was that they should be taken into account in the year in which the several houses were sold but at a valuation, and in support of this argument he relied upon your Lordships' decision in *Harrison* v. *John Cronk & Sons, Ltd.* (1).

If, then, the debts are to be brought into account in the year in which the various houses are parted with, it has to be determined what value is to be put upon them, and whether they are to be assumed to have their face value or are to be valued otherwise and, if so, upon what basis.

That in some cases they may not have their face value must, I think, be conceded. Indeed, I understand that the representatives of the Crown eventually did not dissent from this view. A simple illustration may be taken: A and B agree that a debt of (say) £15,000, which the one owes to the other, shall be settled twenty years hence by means of one payment of £25,000. In such a case the present value of the £25,000 may reasonably be taken to be £15,000, and I see no reason for treating the asset as being worth £25,000 at the moment when the bargain is made. Clearly it has no such real value. The position, however, of a debt payable in the future which bears interest meanwhile is another matter. The parties are free to arrange what interest will recompense the lender for the delay in payment and *prima facie* what they arrange does represent the proper payment for that delay. It might, no doubt, be shown that it is only nominally arranged for that purpose and that in reality it is too large or too small, but such cases must be rare and as a rule it is a true evaluation of the amount to be paid in return for the postponement.

There may be a number of reasons for valuing a debt at less than its face value, and, were it not for r. 3 (*i*), I should regard the proper course in cases like the present to be to write down the value of the individual debt in accordance with the many risks of its not being paid which so long a postponement and so unsubstantial a debtor would involve. But though other eventualities may be taken into account in ascertaining the value of a debt, r. 3 (*i*), in forbidding an allowance to be made for anything other than bad or doubtful debts to the extent to which they are estimated to be bad, does, I think, imply that badness or doubtfulness, which is not actually existent at the time the estimate has to be made but is then only a future possibility, should not be taken into consideration. Any delay in payment is made up for by the agreed interest, and for the moment it cannot be said that any of the debts in issue are or can presently be estimated to be bad or doubtful. Indeed, it has not been suggested that any allowance should be made in the present case on those grounds and except for the delay I know of no contingency other than that the debts may at some time become bad or doubtful which would call for a reduction.

Cronk's case (1) dealt with a different set of circumstances. In it no debt remained due from the purchaser to the owner, the full price was paid to the latter by the building society. But lest the society should not be repaid by the purchaser in full, the owner deposited a sum of money with it and guaranteed payment of an additional sum beyond the deposit. In these circumstances there were contingent liabilities on each side—in the case of the society to return the deposit or some part of it, if the money which was recovered from the purchaser enabled this to be done: on the side of the owner to implement his guarantee if the purchaser failed to pay even so much as with the deposit made up the full price. The amount of the liability on either side was not an ascertainable figure and could at best be estimated and perhaps only guessed. In these circumstances your Lordships decided that, if it could be estimated, the liability of the building society should be brought into account in the year in which it was incurred. But if it could not be estimated, any sum found to be due from the society to the owner must be treated as an asset in the year in which it was ultimately paid. In such a case there was no debt either present or future due to the appellant. It might eventually happen that something would be found to be due to him, but, on the other hand, so far from receiving, he might have to pay. I do not see how such a contingent liability could be treated as having its largest possible value, when it might have none; and that, not because the liability was a debt and was bad or doubtful, but because there might be no liability at all.

Emery v. *Commissioners of Inland Revenue* (7), on which the appellants also relied, did not bring in issue any question of the value of a debt. There was no personal obligation in that case, only a ground annual, *i.e.*, a perpetual annuity of a fixed sum secured upon property. Such an annuity was not money but money's worth, had an ascertainable value in cash, and was in your Lordships' view to be taken into account at that value. Neither case seems to me to throw much light upon the question which your Lordships have to consider.

If the face value of a debt once taken were final, it might be said that an injustice had been done to the owner who would be accountable for the full value, and yet, if his experience (*e.g.*, in the present case) was to be trusted, might lose as much as a third part of the debts which had been treated in his accounts as having their full face value.

Your Lordships' attention, however, has been drawn to the practice in the past of the Inland Revenue authorities of making an allowance in respect of losses for bad or doubtful debts as and when they occur, though the debt itself was originally treated as being of its face value in a previous year's accounts. Such a practice necessitates, I think, the corresponding obligation on the part of the taxpayer to submit in a later year to an increase in the sum at which a debt previously treated as bad or doubtful should be brought into account if in fact a payment greater than the assumed value had been obtained or seems likely to be obtained on a later occasion.

In *Anderton and Halstead, Ltd.* v. *Birrell* (3), a debt taken into account in a previous year was later permitted to be written down in two stages in two successive years. The decision in that case turned upon a different point, *viz.*, whether the debt could be treated as having been mistakenly valued at too low a figure in the years in which the value had been written down, so that the profits of those years could be recalculated, the value written up, and the sum, upon which tax was payable, increased. The argument that it could be so treated was held to be unsound, but nothing was said to throw doubt upon the right of the subject to have the value of a debt reduced, at any time as and when it was discovered to be bad or doubtful, or of the Crown to have it increased in some future year, if it proved to be of greater value than had been assumed in an earlier year when it was brought into account or valued. A course similar to that followed in *Anderton's* case (3) seems to have been adopted in *Reid's Brewery Co., Ltd.* v. *Male* (4), and I know of no decision to the contrary which binds the courts of this country.

In the submission of the Crown this practice is justified under the terms of r. 3 (*i*). It has been argued, however, that the wording of this rule permits a deduction from the face value of a debt only in the year in which it is brought into account. Thereafter, it is said, its value can no longer be altered. An opinion to this effect is to be found in *Gleaner Co., Ltd.* v. *Assessment Committee* (2). That case depends upon the wording of the Jamaica Income Tax Acts, and though the language used is similar to the wording of the English Acts, yet the case itself being a decision of the Privy Council is not binding upon your Lordships, and in any case the view expressed in it has always been regarded with some doubt so far as concerns this country: see HALSBURY, Hailsham Edn., Vol. XVII, p. 162, note (*t*).

Apart from that case, I know of no reason for limiting the effect of the section to one year. In my view, the practice of the Income Tax authorities has statutory warrant, and the correct course to pursue in cases like the present is to treat the debt as good until it is shown to be bad or doubtful, and, when it is so shown, to make an allowance in the year in which its diminution in value is thus justified. In other words, the debt, subject to the amount of capital periodically paid off, should be brought in as an asset from year to year and treated on each occasion, so far as it consists of capital repayment, as having its full face value unless there is some reason to regard it as being bad or doubtful in any year of charge. On any such occasion it should be appropriately reduced. Admittedly, so much of the sum as consists of interest must be separately accounted for as and when each portion becomes due.

No doubt, if this course be followed and, if a building owner goes out of business, he may suffer some hardship inasmuch as there is in that case no future year after his business activities have ceased in which he can be given an allowance. On the other hand, if a debt has been written down before he retires and is afterwards paid in full, he will receive a windfall in the shape of a payment which is subject to no tax.

However that may be, I find myself in agreement with VISCOUNT SIMON, L.C., and would dismiss the appeal in the present case for the reasons set out above, which are not dissimilar to, though not quite identical with, those which influenced the Court of Appeal.

Appeal allowed with costs.

Solicitors: *Claude Barker & Partners* (for the appellant); *Solicitor of Inland Revenue* (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

F.P.H. FINANCE TRUST, LTD. (IN LIQUIDATION) *v.* COMMISSIONERS OF INLAND REVENUE.

[HOUSE OF LORDS (Viscount Simon, L.C., Viscount Maugham, Lord Atkin, Lord Russell of Killowen and Lord Porter), **February 7, 8, 9, 10, 14, May 22, 1944.**]

Income Tax—Investment company—Company incurring trading loss but still receiving investment income—Finance Act, 1936 (*c.* 34), *s.* 20 (1), (6).

The appellant company, formed in 1913, carried on a general financial business. From 1933 to 1936 its profits from financial trading exceeded its income from investments. In 1937 and the first 3 months of 1938 there was a trading loss in respect of which the company claimed, and was granted, income tax relief, but in that period it still received an income from its investments. On Apr. 1, 1938, the appellant company passed a resolution for winding up. For the year 1938-1939, the year following the commencement of the winding up, a direction was made upon the company under the Finance Act, 1922, s. 21, as amended by the Finance Act, 1936, s. 20, that its income should be deemed to be the income of the members. It was contended for the appellants (i) that the company, having been an ordinary financial trading company during the greater part of its existence, could not be considered an investment company if a representative period, and not merely the 15 months ending Apr. 1, 1938, were taken into account; (ii) that since, in the year 1938-1939, the trading loss of the company exceeded its income from investments, there was no income to which the section could refer :—

HELD [LORD RUSSELL OF KILLOWEN *dissenting*] : (i) the question whether a company is an investment company within the meaning of the Finance Act, 1936, s. 20 (1), is not to be determined by comparing the income of the company from its investments with the income from its trading activities during a short period. Its character must be judged by considering the kind of income it normally enjoyed during a period sufficiently long to enable a fair judgment to be made. In the circumstances of the present case the company was not an investment company.

(ii) upon the true construction of the Finance Act, 1936, s. 20 (1), the word " income " means the aggregate amount of income from all sources.

Decision of the Court of Appeal ([1943] 1 All E.R. 438) *reversed.*

[**EDITORIAL NOTE.** The assessment here in question is for a year during the winding up of the company. The investment income would still be available to the members during the winding up, but would not be liable to sur-tax apart from the special machinery of the section here considered. If, therefore, for any reason the winding up was protracted, a member of the company might, but for these provisions, receive considerable sums not subject to sur-tax, though the income would, of course, be subject to ordinary income tax by deduction at the source. There is no question here of the members seeking to avoid the incidence of taxation, the whole question being whether the company was an investment company within the meaning of the Finance Act, 1936, s. 20 (1). That subsection speaks of the income of the company being mainly investment income and the whole question here turns upon whether the word " income " means the taxable income or whether the subsection is satisfied if the only income of the company is investment income which is in point of fact set off by trading losses.

FOR THE FINANCE ACT, 1936, s. 20, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 29, pp. 234, 236.]

Case referred to :

(1) *London County Council* v. *A.-G.*, [1901] A.C. 26 ; 28 Digest 73, *392* ; 70 L.J.Q.B. 77 ; 83 L.T. 605 ; 4 Tax Cas. 265 ; *revsg. S.C. sub nom. A.-G.* v. *London County Council*, [1900] 1 Q.B. 192.

APPEAL by the taxpayer from a decision of the Court of Appeal reported [1943] 1 All E.R. 438, where the facts are fully set out.

J. Millard Tucker, K.C., and *F. Heyworth Talbot* for the appellants.

The Solicitor-General (*Sir D. Maxwell Fyfe, K.C.*), *J. H. Stamp* and *Reginald P. Hills* for the respondents.

VISCOUNT SIMON, L.C. : My Lords, this is an appeal from an order of the Court of Appeal (GODDARD and DU PARCQ, L.JJ., SCOTT, L.J., dissenting), which dismissed an appeal by the appellant from a decision by MACNAGHTEN, J. That judge had dismissed an appeal by the present appellant upon a case stated by the Commissioners for the Special Purposes of the Income Tax Acts and had affirmed the determination of the said Commissioners in favour of the Crown.

The question to be decided is whether the appellant at the date of its going into liquidation, *viz.*, Apr. 1, 1938, was an "investment company" as defined in the Finance Act, 1936, s. 20 (1). If it was (since it was admittedly a company to which the Finance Act, 1922, s. 21, applied—see subsect. (6) of that section, together with the Finance Act, 1936, ss. 19 (1) and (2), and 20 (2)), then, upon a direction of the Special Commissioners addressed to the liquidator on Jan. 11, 1940, to that effect, the income of the appellant for the year ended Apr. 5, 1939, was, for the purposes of assessment to sur-tax, deemed to be the income of the members. The result of this would be that income assessed to sur-tax of each of three ladies who were members or loan creditors of the company was increased by between £5,000 and £6,000, whereas, if the company did not fall within the definition of an "investment company" in sect. 20 of the Act of 1936, the profits of the company since the liquidation would not attract sur-tax at all—either in the hands of the company or in the hands of the three individuals, because when distributed to them in the liquidation the amount would be in the nature of capital received by them.

An "investment company" is defined in sect. 20 (1) of the Act of 1936 as a company:

> . . . the income whereof consists mainly of investment income, that is to say, income which, if the company were an individual, would not be earned income as defined in the Income Tax Act, 1918, s. 14 (3).

The definition of earned income here referred to is the definition used to decide, in the case of an individual, the deduction which he may be allowed, in assessing his income for the purpose of income-tax, on the ground that his income, or part of it, is "earned income." Income derived from carrying on a trade or profession, or from an employment of profit, is, for example, "earned"; income from investments—at any rate, if they do not arise from carrying on a trade—is "unearned."

The case stated finds that the appellant company, before going into liquidation, carried on a general financial business including underwriting and dealing in options, but that the main business of the appellant company was that of dealing in stocks and shares. An exhibit to the case showed that for four successive periods beginning with Apr. 1, 1932, and ending with Dec. 31, 1936 (the last being a period of 21 months owing to a change in the date up to which the company made up its accounts), large profits had been made from the company's main business and a considerable though smaller profit from dividends from investments. During these years, therefore, the company could not have been regarded as an investment company within the definition. For the 12 months following, however (Jan. 1, 1937, to Dec. 31, 1937), the company's trade of dealing in stocks and shares was carried on at a loss of £412,464, and for the next three months up to the date of liquidation (Apr. 1, 1938), also at a loss of £72,202, while the income from investments during these respective periods was £82,145 and £11,668 respectively.

Two objections are urged against the view, which has prevailed in the courts below, that the company is an "investment company" within the definition. The first is that, for the last 15 months before liquidation, the company's receipts from investments were more than counterbalanced by its trading losses, and, therefore, it is argued, it had no "income" at all. Its income, therefore, could not "consist" of anything. On this view, a company which is suffering a trading loss could not fall within the definition unless its investment income was greater than its trading loss and left it on balance with an "income."

The second objection taken is that, in deciding whether the company at the date of liquidation was an "investment company," the Commissioners should not have limited their review to the 15 months prior to the date of liquidation, but should have considered the history of the company as a whole.

As regards the first objection, DU PARCQ, L.J., in a most careful judgment, has advanced the view that sect. 20 (1) of the Act of 1936 requires us to look at two categories of possible income (*a*) earned income, and (*b*) investment income, and to compare their size. If under category (*a*) we find a figure of loss and under category (*b*) a figure of profit, the company's main income consists of investment income and the definition applies notwithstanding that the figure of investment profit is the smaller of the two.

With all respect to DU PARCQ, L.J., I am unable to accept this application of the subsection. It is true that the subsection requires us to ascertain the amount of the investment income. But the subsection does not in terms require us to ascertain as a separate item of account the amount of the earned income or to compare that amount with the ascertained amount of the investment income. What the subsection does require is that this last-mentioned amount should be compared with the amount of the company's "income." An investment company is defined by the subsection as a company the "income whereof consists mainly of investment income," and I can see no sufficient reason for giving to the words "income whereof" contained in the subsection anything other than the meaning they ordinarily bear in legislation, such as this is, which is concerned with the imposition of sur-tax, *viz.*, income from all sources ascertained in accordance with the Income Tax Acts. This, too, is in substance the meaning given to the word "income" in the world of commerce. If a company in the course of a year's trading carries on its business at a loss exceeding in amount the investment income received during the year, its income for the year would be described among business men as having been nothing. But, if the company's income be nothing, it cannot be said to consist, whether mainly or otherwise, of any particular item of income. As it does not exist it cannot "consist" of anything.

The view I take is, I think, confirmed by the fact that in such a case as this, the taxpayer can claim repayment of income tax suffered on investment income (under the Income Tax Act, 1918, s. 34), "by reference to the loss and to the aggregate amount of income for the year."

In my opinion, a company such as I have described above is not an investment company within the meaning of the subsection.

It has been suggested that the use of the words "income from all sources" found in sect. 20 (6) indicates that the word "income" in subsect. (1) must have been used by the legislature in some narrow sense. I am not impressed by this argument. The object of subsect. (6) is in substance to make applicable to investment companies in liquidation the provisions of (amongst others) the Finance Act, 1922, s. 21 (1). In that subsection the income of a company that is dealt with is referred to as its income from all sources and it was only to be expected that sect. 20 (6) of the Act of 1936 making sect. 21 (1) of the earlier Act applicable to investment companies in winding up should have used the same language as is to be found in such earlier Act.

Having reached the view that the first objection is well-founded, it is not necessary for me to deal exhaustively with the second. But I may observe that, if a company's history of trading has been that of a finance company (as opposed to an investment company), the fact that in two periods, while carrying on this same type of business, it makes losses on its stock and share dealings, and can only bring in on the credit side dividends and interest on its investments, does not seem to me of itself to effect a change in the character of the company.

My Lords, I would allow the appeal.

VISCOUNT MAUGHAM [read by LORD MACMILLAN]: My Lords, this appeal raises a point, with a deceptive appearance of simplicity, as to the true construction of a few ordinary words contained in the Finance Act, 1936, s. 20 (1). What in that subsection is the true meaning of the sentence "companies . . . the income whereof consists mainly of investment income"? There has been a difference of opinion as to the answer in the Court of Appeal and there is a difference of opinion in your Lordships' House; and I will readily admit that the question is one of considerable difficulty. I shall, therefore, express my view with great deference to those who have held or hold a different one.

The facts are contained in the case stated; and the relevant sections of the various taxing Acts have also been cited, and I do not think it is necessary for me to repeat them. The appeal is against a direction made upon the appellant company for the year of assessment, 1938-39, under the provisions of the Finance Act, 1922, s. 21, as extended by the provisions of the Finance Act, 1936, s. 20. On Apr. 1, 1938, the appellant company passed a resolution for winding up.

The question is whether, at that date, it was an "investment company" within the meaning of the Finance Act, 1936, s. 20, and that depends on whether its income "consisted mainly of investment income." If it was an "investment company" within the meaning of that section at the date of the commencement of the winding up, then (under subsect. (6)) the actual income of the company from all sources since that date is deemed to be the income of the members for purposes of sur-tax. It should be noted that the subsection is no longer law: see Finance Act, 1927, s. 31, and Finance Act, 1936, s. 35.

It is not in dispute that the company was one to which the Finance Act, 1922, s. 21, applies. The direction of the Commissioners was clearly made on the footing that the company was an "investment company." The main question being whether that is correct, two points were raised below by the appellant, and were argued before your Lordships.

The first was that upon the facts of the case the Commissioners were not entitled as a matter of law to find that the appellant was an investment company, and that their decision had been arrived at by examining only the period of 15 months immediately preceding the date of liquidation, whereas they should have taken into account also the accounting periods prior to the period of 15 months. The second was that the word "income" in the Finance Act, 1936, s. 20 (1), means total income from all sources; and that as the appellant's trading losses in the period selected by the Commissioners for review exceeded its investment income for the same period, it had no total income from all sources for that period and consequently could not be brought within the terms of the definition of "investment company."

Counsel for the appellant sought to raise another point which, however, was not raised below or before the Commissioners and sought for the first time to dispute the view that all the investment income of the company was "unearned income" within the meaning of the Finance Act, 1918, s. 14. Your Lordships however, took the view that such a contention was not now open to the appellant.

My Lords, in approaching the question of the meaning of the words in sect. 20 (1) of the Act of 1936, it is necessary to begin the inquiry by observing that Pt. II of that Act (which relates to income tax and contains sect. 20), has to be construed as one with the other Income Tax Acts (see sect. 35 (2)). We must, therefore, bear in mind that sur-tax (like the old super-tax) is payable by a person on his total income from all sources estimated in accordance with the provisions of the Income Tax Acts (see Finance Act, 1918, s. 5, and Finance Act, 1927, s. 38 (2)). He is accordingly entitled to the benefit of the Income Tax Act, 1918, s. 34. It was no doubt thought obvious that you could not truly ascertain, still less could you justly tax, the total income of an individual for the purposes of an additional duty of income tax without deducting a loss sustained by him in any trade, profession, employment or vocation or in the occupation of lands as mentioned in sect. 34. I will add that, speaking generally, it is true to say that "income" as the word is used in the Income Tax Acts, refers to a balance of annual profits and losses made or sustained by a person, always remembering that it is not intended to tax capital. The five schedules A, B, C, D and E and their respective rules were designed as convenient machinery for taxing in the hands of an individual every kind of property yielding income (see *London County Council* v. *Attorney-General* (1), *per* Lord Macnaghten, at pp. 35, 36). The word "income" is sometimes expressly applied in relation to income chargeable under a particular schedule; but in other cases it is not infrequently found in the Acts as meaning "income from all sources" without the addition of the latter words.

Super-tax, like sur-tax, was always leviable on individuals, and not on companies or societies. It was not till 1922 that the legislature (by the Finance Act, 1922), thought it expedient to exact super-tax on the undistributed income of certain companies:

> With a view to preventing the avoidance of the payment of super-tax through the withholding from distribution of income of a company which would otherwise be distributed . . .

Those are the opening words of the Finance Act, 1922, s. 21. The section leaves it to the Special Commissioners to decide whether the company has distributed a reasonable part of "its actual income from all sources" for the period in question, having regard not only to the current requirements of the company's business, but also to such other requirements as may be necessary or advisable for the maintenance and development of that business. Subject to that important provision, the Commissioners may in an appropriate case direct that "the said income of the company" shall for purposes of assessment to super-tax *be deemed to be the income of the members* and the amount is to be apportioned among them. The super-tax chargeable is then to be assessed upon the members in the name of the company and—unless the members elect to pay the tax—it must be paid by the company.

The Crown makes no question as to the meaning of the words "actual income from all sources" of a company. It is expressly provided in Sched. I, sect. 6 (to the Act of 1922), that in computing its income from all sources the income from any source shall be estimated in accordance with the provisions of the Income Tax Acts relating to the computation of income from that source, computed, however, by reference to the income of the year or period in question. Whether because of this provision or on some other ground, it is admitted that sect. 34 of the Act of 1918 must apply to the computation of "the actual income from all sources." (See also sects. 5, 8 and 9 of the same Schedule).

Two methods of evading sur-tax were discovered in due course. One was in connection with certain loan creditors of a company, who received out of the income of the company moneys in or towards the redemption, repayment or discharge of their loans. The other was by the device of holding up the distribution of dividend and then at a suitable time putting the company into liquidation and distributing the assets in the liquidation, with the result that the shareholders would escape sur-tax. It was in these circumstances that the legislature passed into law the section which is now under consideration. The Finance Act, 1936, s. 20, begins with what is in effect a definition of "investment companies" as follows:

> (1) The following provisions of this section shall have effect as respects companies (hereafter in this section referred to as "investment companies") the income whereof consists mainly of investment income, that is to say, income which, if the company were an individual, would not be earned income as defined in the Income Tax Act, 1918, s. 14 (3).

There followed four subsections as to certain loan creditors of companies described as "investment companies" to which the Finance Act, 1922, s. 21, was applicable. These provisions applied to such companies as going concerns. Then came subsect. (6), under which the present case arises:

> (6) Where, whether before or after the passing of this Act, an order has been made or a resolution passed for the winding up of an investment company to which the Finance Act, 1922, s. 21, applies, the following provisions shall have effect:
>
> (*a*) the actual income of the company from all sources since the date of the order or resolution shall, for purposes of assessment to sur-tax, be deemed to be the income of the members;
>
> (*b*) the Special Commissioners shall from time to time by notice in writing to the liquidator direct that the amount of that income for the year or period specified in the notice shall be deemed for those purposes to be the income of the members for that year or period, and the amount thereof shall be apportioned and sur-tax assessed and charged accordingly;
>
> (*c*) the provisions of the said sect. 21 and any provisions of this or any other Act relating thereto shall, with any necessary modifications, apply in relation to any such directions, apportionments and assessments as they apply in relation to directions, apportionments and assessments under the said sect. 21 (1).

It is agreed that "the actual income of the company from all sources" since the liquidation must be estimated for the purposes of this subsection after deducting losses on income account; but it is contended on behalf of the Revenue that the words "companies . . . the income whereof consists mainly of investment income" contained in the definition above set forth do not permit of any such deduction. The result in the case under appeal, according to that view, is that we must disregard the fact that the company in the 12 months to Dec. 31, 1937, made a loss on its trade of £412,464, and in the three months thereafter to Apr. 1, 1938 (the date of liquidation) made a trading loss of £72,202. There were gross taxed dividends on the company's investments of £82,145 and £11,668 for the two periods mentioned. The income of the company, according to the Commissioners, therefore, is mainly investment income, the company is an "investment company," and sect. 20 (6) (*c*) must necessarily apply in the winding up.

That, if correct, is a strange result, for it is apparent that the company could not have distributed any dividends whatever in either of the two periods. Assuming the section to be one of a penal nature, a *lex poenalis,* it is a little odd to find it applied in cases where there is neither *delictum* nor *maleficium.* Such, of course, may be the result of the words used; but, for my part, I am not disposed to construe the words in the definition of investment companies in such a way as to create or to add to obvious injustice unless I am compelled by reasonably clear words so to do.

It is important to note at the outset that the words "the income thereof" in the definition plainly must mean "the income thereof from all sources." They cannot mean the income assessed under some of the Scheds. A, B, C, D and E, and not under others. The subsection is silent as to any such discrimination. The income of a company, in the absence of qualifying words, must mean the whole of its income, *i.e.*, its income from all sources. If I correctly understand the argument on behalf of the respondents, this is not in dispute. Of course, the word "income," if not found in Income Tax Acts which have to be read as one, might refer to the income of the company, and, of course, the whole income ascertained according to ordinary commercial principles approved by law; but in the place where the words in question are found they must, I think, refer to income computed according to income tax rules. The question then arises whether there is any real difference between the words "the actual income of a company from all sources" and the words "the income of a company" where the words "from all sources" are plainly to be implied. Is there any magic in the word "actual"? If it means "other than notional," that, also, I think, must be implied in sect. 20 (1).

My Lords, I have come to the conclusion that the words relating to the income of the company in sect. 20 (1) have the same meaning as the words "actual income from all sources" in the Finance Act, 1922, s. 21 (1). The two sections, I repeat, have to be construed together as if they were contained in the same Act. After all, we are ultimately concerned merely with sur-tax payable by shareholders. We are dealing with a tax which is essentially chargeable on the total income of individuals, but not on something which must be more than that income as the word is generally used. It is not reasonable to suppose that by the words as to actual income in sect. 20 (1) of the Act of 1936 it was intended to disregard the circumstance that for dividend purposes income losses must be deducted from other income before dividends are paid, or to tax shareholders of companies for sur-tax in cases where they have already paid sur-tax on all the dividends which the company could properly have paid out of the income of the company. Losses on income account must be deducted, since, generally speaking, a limited company cannot pay dividends out of capital; and the directors and auditors must necessarily have regard to trading losses before declaring dividends. The proposition is a commonplace of company law. To disregard it is to travel on a road to ruin. One should not lightly assume that the legislature is contemplating that the income of a company should be calculated on the footing that an illegal course is being followed.

In an endeavour to make my next observations clear, I shall describe the "income" of the company in the place where the word first appears in subsect. (1) as "the income A," without at first any assumption as to what that word means, and I shall call income of the company which is not "earned income," as defined, as "the income B." The subsection then tells us that, if the company is one of which the income A "*consists mainly*" of the income B, then the company is an investment company. Obviously the income B (if it exists at all) is part of the income A. Now sect. 20 of the Act of 1936 consists of amendments of the Finance Act, 1922, s. 21. It relates both to investment companies within that section which are going concerns and also (subsect. 6) to cases where an order has been made or a resolution passed for the winding up of investment companies "to which the Finance Act, 1922, s. 21, applies." That section, however, as I have pointed out, imposes super-tax on the shareholders on the footing that income from all sources which might have been distributed as dividends has been held up, and shows quite clearly that the income so distributable must be calculated after deduction of losses under sect. 34. I am of opinion that this same method must be used in applying sect. 20 (2), (3), (4) and (5) of the Act of 1936 to persons defined as "loan creditors." These provisions are of a complicated character and I cannot discuss them here. (A brief account of them will be found in KONSTAM, LAW OF INCOME TAX, 9th Edn., pp. 310, 311). The language of subsect. (2) seems to me to point clearly to the conclusion that the opinion I have expressed is correct. The proviso as to distribution of a reasonable part of the actual income is framed on the assumption that losses have been already deducted; and I have not heard any reason for supposing that the legislature, when it passed provisions for treating payment of certain loans as distributions of income (for purposes of sur-tax) was seeking to alter the provisions of the Finance Act, 1922, s. 21, as to deduction of losses under sect. 34. If my view is correct as to sect. 20 (2) of the Act of 1936, then the definition in subsect. (1) must necessarily be construed in the way I have above suggested, and it will necessarily apply to subsect. (6), which relates, as I have said, to the liquidation of investment companies. *Prima facie*, then, I am of opinion that the word income, where it is first found in the section, means actual income of the company from all sources ascertained in accordance with the provisions of the Income Tax Acts.

Is there, then, some sufficient reason for coming to another conclusion? It is true that, in several instances where the taxing Acts wish to refer to income "from all sources" it uses those or equivalent words. Subsect. (6) of the section now under consideration is an example. But it is not very difficult to see why the draftsman added the words in the subsect. (6), since he was dealing with a conception hitherto unknown under the taxing Acts, namely, with what is described as the "actual income" of a company in liquidation which might not be carrying on any business at all and would not be taxable for income tax under the well-known sections and rules. The words "from all sources" are, I think, used *ex abundanti cautela*. In any case, I am not prepared to attach great weight to the argument that, when in the welter of legislation relating to income tax and sur-tax we sometimes find additional words used to give a precise meaning to the word "income," a similar meaning may not be given to the word without those additional words.

So far I have not mentioned the question of the period of time which must be taken for judging whether at the relevant date (which here must be the date of liquidation, Apr. 1, 1938), the income A of the company consists mainly of the income B—which no doubt means that income B is more than half the amount of income A. The word "income" plainly has no meaning at all where the amount of it is concerned unless we add the factor of time.

I attach considerable weight to the circumstance that the subsection uses the present tense "consists," and says nothing as to the length of time during which the income has been received by the company. I cannot think that the definition is framed so that a company may be "an investment company," say, in January, when its trading business is going badly, but is not an investment company, say, in March, when its trading business has recovered. A few pounds one way or the other may make all the difference. I will add that, if losses on income account are to be disregarded, the company might well be an investment company the day after a large loss though it had not been one on the previous day or for many years before. The alternative, and I venture to think the more reasonable view, is that the words indicate companies of a particular type or character, judged no doubt by the kind of income which they have normally received. If the investment income B has constituted a major part of the total incoming flow during a period sufficient to enable a fair judgment to be formed as to the character of the company, then the company is stamped as an "investment company," with the consequences mentioned in the Act. If the company goes into liquidation, the actual income "from all sources since the date of the order or resolution" (for here we get the period mentioned) must for the purposes of assessment to sur-tax be deemed to be the income of the members. If the argument for the Crown is right the result, as pointed out, may depend on a mere accident. The company may have distributed every penny of its available profits during the period in question, and, indeed, in every year since its incorporation. That makes no difference. We are concerned, it is contended, with a mere question of arithmetic; the income A (but without regard to trading losses) during a period unnamed in the Act but selected without guidance from the Act by the Commissioners must be compared with the unearned income B. If the income B exceeds half of the income A, the consequences follow mentioned in the section. The Act is not concerned with justice or equity, or with ascertaining the true nature of the company's activities. Well, if the Act says so, it must be so ; but, if the language used permits of another interpretation with a more rational result, my view is that we should adopt it.

My Lords, with all respect to those who think otherwise, my opinion is that A the subsect. (1) points to the character of the company being ascertained by the nature of its income during a period sufficient for the trading purposes of the company and, as I have pointed out, without regard to the question whether the company is or is not in liquidation. The Commissioners are not tied to any particular period and are certainly not confined to the last year of assessment to tax. The Commissioners took a period of 15 months. In the case before us I think it was wrong in law to take a period of great losses in trade owing B to enormous depreciation in the trade which was being carried on without also considering the results of the preceding periods. It would not be right to lay down any rigid rule, for every case of the kind must depend on the precise circumstances which bear upon the matter to be determined. I am content in this case to say that I think it was wrong in law not to have regard to the trading income of the company for the 21 months to Dec. 31, 1936, which amounted to no less than £633,150, to say nothing of the trading income for C the three preceding years. If these periods or the first period alone is looked at the inevitable conclusion must be that the company was not an "investment company" within the section.

I must add that, in my opinion, sect. 20 (1) now under consideration, does not apply to a case where the company's income from all sources amounts to nil, as was here the fact. I have above given my reasons for the view that, upon the D true construction of subsect. (1), the company's income was in fact nil, and, if that is correct it affords a second reason for the conclusion that the Commissioners were wrong in the decision at which they arrived and that the direction they gave was invalid. It cannot, I think, be a fair use of language to say that a non-existent income (the income A) "consists mainly of investment income."

My Lords, on the above grounds I think the appeal should be allowed, with the usual consequences. E

LORD ATKIN [read by LORD PORTER] : My Lords, I have had the advantage of reading in advance the opinion which has just been delivered by my noble and learned friend LORD MAUGHAM, and I agree with his conclusions and the reasoning by which he reaches them. I find it only necessary to deal generally with the points raised in the case. It seems to me important to bear in mind that we have to deal with a statutory definition of an investment company, contained F in the Finance Act, 1936 s. 20 (1). Why it should be styled by one of the Lords Justices a "label" I cannot think, unless the conception of a definition was considered dangerous to the conclusion about to be reached. It is a definition with a genus "company," and a "differentia" "mainly investment income," and the sole question is whether the company in question, when it went into liquidation, was an investment company as so defined. Now it has to be noted G that the definition cannot be applied merely by considering the position of the company at any arbitrary date. Whether the income of a company is mainly investment or mainly earned cannot be ascertained in the case of a trading company such as this admittedly is until the close of the trading year in which the earned profits, if any, would be ascertained. It is, therefore, obvious that it is only in reference to yearly results that the definition can be applied. The language used is entirely appropriate to a logical definition of a class or species H of company. Does its income consist mainly of investment income ? Is one of its attributes mainly investment income ? In the case of a company whose known business is trading in securities, which has for several years made large profits in trading, followed by one year, while still trading, of serious losses, I cannot imagine anything more unscientific than the process of arriving at a conclusion by examining the phenomenon of a single and apparently exceptional year. I eliminate the quarter of the year 1938 as adding nothing of value. Of course, if it were established that in the course of the last trading year the company had abandoned its trade, different considerations would apply. But in the present case the company not only continued to trade in the last year, but made substantial trading profits on its actual transactions for the year, over £80,000, considerably in excess of its income from "investments." It is only because the stock in trade with which the company had not traded during the year had immensely depreciated by the end of the year that the vast trading loss for the year was arrived at. I think, therefore, that the application of the definition requires the examination of the company's activities over a period of certainly more than one year, and that there was no evidence to support their finding that in April, 1938, this was an investment company. The opposite view that a company, while still continuing its ordinary trading, may be an investment company one year and a non-investment company the next, popping in and out of the Inland Revenue pigeon holes as trade was bad or good, seems to me inconsistent with the language used and from a business point of view to be deprecated.

Counsel for the appellants sought to raise before this House for the first time the point that the whole of the investment income was in fact earned income, as it was the direct result of the trading operations of the company, who in the course of their trading bought and paid for the very dividends which are sought to be contrasted with the earned profits. It was obvious that such a point required an examination of the facts of the trading, which the Commissioners were never invited to make, and that the point was made too late. I express no opinion about it except to say that in deciding the first point I have found it difficult to eliminate from consideration, though I think I have succeeded, the very obvious fact that much of this so-called investment income must in fact be the product of trading, bought and paid for in the course of trade. On such an issue it would seem difficult to distinguish between the purchase of a share-cum-dividend and the purchase of a cow in calf. However, the effect of such considerations on this section must remain open.

On the question of income I agree with my noble friend that to predicate of a company which makes a loss of £400,000 and receives dividends of £80,000, that it has an income of £80,000, appears to me a misuse of ordinary language. I cannot agree with the suggestion of MACNAGHTEN, J., that, if a man receives a salary but makes a loss in passing equivalent to the salary, his income could be said to be the amount of his salary. Assume as we may to test the question that he has no other resources but his salary, the end of his trading year would leave him penniless. Would he still say, though I have an income of £2,000 a year, in fact I am penniless. In my opinion, for the reason given by my noble friend, income in the definition means a positive balance of profits and gains for the year, and in the present case the company had no income in the relevant period. I agree that the appeal should be allowed.

LORD RUSSELL OF KILLOWEN [read by LORD PORTER]: My Lords, the devices resorted to by people, who wished to evade liability for sur-tax, were many and ingenious. In 1922 the Finance Act of that year sought to defeat one of those devices. By sect. 21 it was provided that, where it appeared to the Special Commissioners that a company, to which the section applied, had not distributed to its members a reasonable part of its actual income from all sources for any accounting period in such a manner as to render the distributed amount liable to be included in the sur-tax returns of the members, the Commissioners might direct that, for the purpose of assessment to sur-tax, the company's income for the period should be deemed to be the income of the members and charged with sur-tax accordingly.

This provision, however, proved capable of evasion by the expedient of putting the company into liquidation, and maintaining it in that condition. A company in liquidation can make no distribution of its income as such. The provisions of the Finance Act, 1922, s. 21, had no operation in regard to income arising or accruing to a company after the commencement of its liquidation.

This situation was dealt with as regards certain companies to which sect. 21 of the Act of 1922 applied, by the Finance Act, 1936, s. 20. That section applies to companies which answer the terms of a particular definition, viz.:

> . . . companies . . . the income whereof consists mainly of investment income, that is to say, income which, if the company were an individual would not be earned income as defined in the Income Tax Act, 1918, s. 14 (3).

Those companies are referred to in sect. 20 of the Act of 1936 as "investment companies."

The provision of the section which is relevant to this case is subsect. 6 (*a*). It runs thus:

> (6) Where, whether before or after the passing of this Act, an order has been made or a resolution passed for the winding up of an investment company to which the Finance Act, 1922, s. 21, applies, the following provisions shall have effect:
>
> (*a*) the actual income of the company from all sources since the date of the order or resolution shall, for the purposes of assessment to sur-tax, be deemed to be the income of the members.

The question which we have to decide can now be stated. Was the appellant company when it went into liquidation, a company the income whereof consisted mainly of investment income as defined?

I need not repeat the particular facts of this case. It will be sufficient if I recall that the appellant company is a company to which sect. 21 of the Act of 1922 applies, and that it is conceded that the income which it received in the shape of interest and dividends was investment income as defined. My Lords, I have no hesitation in answering the question in the affirmative.

It was contended on behalf of the appellant company, that the words "the income whereof" meant the income as computed for income tax purposes, and that since the trading losses in the 15 months immediately preceding the liquidation exceeded the investment income received during that period, the income of the company at the commencement of the liquidation was *nil*, with the result that the company did not comply with the terms of the definition, and that, therefore, subsect. (6) did not apply to it.

I cannot accede to this argument. I see no reason for assigning this highly technical and artificial meaning to the word "income" in the context in which it occurs. That context is not a taxing provision; it is merely a definition clause stating the test which has to be applied for the purpose of ascertaining whether a company is one to which the provisions of the section are to apply. In a taxing clause one might well expect a reference to income to be a reference to income computed for the purpose of the taxation. That is exactly what is found in subsect. (6), which is a taxing provision, and which uses the well established phrase "actual income of the company from all sources." To my mind the contrast is eloquent and conclusive. Further, the frame of the definition clause indicates to my mind that a comparison is to be made between the company's investment income as defined and the company's other income, with a view to ascertaining whether the investment income as defined, does or does not preponderate. I agree with the view expressed by du Parcq, L.J., in the following words at p. 443:

> But, in my opinion, the Finance Act, 1936, s. 20 (1), requires us to look not at the aggregate income, but at two categories of income, (i) earned and (ii) everything that is not earned, and to compare them. If under category (i) we find a loss, and under category (ii) a profit, that is for this purpose immaterial, the object of the section being to classify a company according to the character of its income from various sources, and not to arrive at the true aggregate of its income.

Nor can I agree with another suggestion, *viz.*, that the words "consists mainly" should be read as meaning "normally consists mainly." There is nothing to justify us in adding to the provision this notion of normality. The subsection imposes as a test the existence of a state of affairs at a given point of time, not what was the normal state of affairs over a period of time.

It was contended, however, that the appeal should succeed upon another ground, *viz.*, that, before the Commissioners could decide that at the date of the liquidation the appellant company was an investment company within the definition, they were bound to consider the state of affairs in relation to the company's income over a reasonable period of time before the liquidation, that the Commissioners had selected a period of only 15 months which they had treated as conclusive without considering whether or not it was a reasonable period, and that the period so selected was both in fact and in law an unreasonable period.

I see no valid ground for the suggestion that the Commissioners treated the period chosen as conclusive, and omitted to consider whether this period of 15 months was reasonable or not. There is nothing in the case stated to justify this allegation of failure in their duty. They rightly treat the question of what is a reasonable period as a question of fact depending on the circumstances of each case, and they accept the Crown's contention that the circumstances of this case are sufficient to bring this company within the section. Consider the circumstances in this case. The company by going into liquidation put an end to its business of buying and selling stocks and shares. It could never again earn any trading income. Nor had it in its last complete financial year before the liquidation earned any trading income. Nor had it earned any trading income in the three months which intervened between the close of its last financial year and the commencement of the liquidation. During all that time its only income consisted of income from investments. In these circumstances it was, in my opinion, reasonable and right to take those 15 months as a period proper to be considered in answering the question whether this company, when it went into liquidation was a company the main income whereof consisted mainly of investment income as defined.

In my opinion, the Commissioners came to a right decision, and I feel a real difficulty in seeing how a different view can prevail without departing in some way from the words of the subsection, and substituting a different test from that which it prescribes. The case fits exactly into the words used, if they are read without gloss or addition. The appellant company comes under the special provisions of subsect. (6), not because it was an investment company in the general sense of those words (which it was not), or because of any failure on its part to distribute its income while it was a going concern (which is a matter with which subsect. (6) has no concern), but because it comes within the statutory definition of what constitutes a company to which (amongst other provisions) the provisions of subsect. (6) are to apply. The target of that subsection is the post-liquidation actual income from all sources of every company which answers the definition in subsect. (1), and to which the Finance Act, 1922, s. 21, applies. That income, which would otherwise be payable as capital in the liquidation, is for the purposes of assessment to sur-tax to be deemed to be the income of the members.

I agree with the judgments of MACNAGHTEN, J., and GODDARD and DU PARCQ, L.JJ., and would dismiss this appeal.

LORD PORTER: My Lords, this case involves two complicated and difficult points of law, but in the end the result depends upon the true construction of the Finance Act, 1936, s. 20. Subsect. (1) of that section is worded as follows:

> The following provisions of this section shall have effect as respects companies (hereafter in this section referred to as "investment companies") the income whereof consists mainly of investment income, that is to say, income which, if the company were an individual, would not be earned income as defined in the Income Tax Act, 1918, s. 14 (3).

The sole question in the case is whether the appellant company is an investment company as so defined, and two points are taken on its behalf.

It is said that (i) considering all the circumstances its income did not at the material time or times consist mainly of investment income, *i.e.*, of income which in the case of an individual would be classified as unearned. (ii) In fact it had at the material time no means at all, and, therefore, it could not be said that its income consisted mainly of anything.

The ultimate question is the same in either case, *viz.*, whether the appellant is an investment company, but the approach is different. In order to determine the first point, it must be accepted that there is an income, and one must then discover of what it consists at the material time. The important factor is to ascertain what is the material time and what (if any) period must be taken into consideration in deciding whether the income is or is not mainly investment income. In order to determine the second, it has to be conceded that the moment of time at which one must look to discover of what the income consists is either the moment of liquidation or that taken by the Commissioners, *viz.*, the last year and three months. Admittedly, the company's income up to that time was not mainly investment income. Thereafter the loss incurred in its trading greatly exceeded any sums derived from the interest and dividends on its holding of stocks and shares, and, accordingly, it claimed and obtained repayment of the tax deducted from them. The result, therefore, was that, if the company's income be regarded as consisting of the combined product of its trading activities and of the sums received as interest and dividends on its stocks and shares, it had made a loss and not a profit in respect of the last fifteen months of its life before going into liquidation.

I propose, with your Lordships' permission, to deal with the two questions in the order in which I have stated them, but, as will appear, I find it unnecessary, having regard to my view upon the former, to come to any conclusion upon the latter.

(i) In order that the section may apply, the income of the company must consist mainly of investment income.

If it has to be ascertained whether income is mainly investment or non-investment income, the income referred to must be capable of including both. Both must be taken into consideration and the one compared with the other, but there still remains to be decided the time at which and the period over which that comparison has to be made.

Was then this company's income mainly investment income ? Undoubtedly at the moment at which the liquidation began it was investment income, and it was urged upon us that we should look neither forward nor backward but only at that moment. Indeed, it was contended that, if at that moment a company had ceased to do profitable business even for a short time and held no investments except Government stock, the income of which accrued *de die in diem,* its only relevant income was that derived from the Government stock. Neither the past nor the future must be looked at, the only question was whether there was any other income at the moment of liquidation.

Alternatively it was said you must take the income of the preceding year of assessment or such further time as, in the opinion of the Commissioners, gives a true picture of the source from which the company's income is derived.

The difficulty of the first suggestion is that it takes account only of income accruing from moment to moment and disregards even that which would normally be earned by the investments which the company holds. If, for example, the illustration given in argument for the respondent is varied and the company be supposed to hold not Government stock but shares upon which no dividend had been declared, the company's income would be nil, with the result that, however long it had ceased to trade and however large its holding of shares, it would not be an investment company as defined in the section. I cannot think that this is correct or that its members would escape liability for tax upon this assumption. The second contention can perhaps best be dealt with by taking the suggestion most favourable to the respondent, *viz.,* that the period to be considered being a question of fact and the Commissioners having determined as a question of fact that the preceding full year and the succeeding broken quarter were the proper period, your Lordships would not interfere with their finding.

No doubt when a company goes into liquidation the circumstances may be such that it is proper to have regard to a short period only of its previous activities and, if I saw any ground for distinguishing between the period before Jan. 1, 1937, and that after that date, I should think the decision of the Commissioners ought not to be disturbed ; but I see no facts upon which such a distinction could be drawn. As I read paras. 9 and 10 of the case, the Commissioners accept the argument that the fact that for the 15 months before the company went into liquidation the appellant had been drawing an income from investments only was conclusive of the case. The previous history of the company or the fact that it continued to trade until the last moment did not weigh with them, nor in their view need those facts be taken into consideration. It was enough that for 15 months it had no other income.

I do not accept this view. In every case I think that the activities of the company as a whole must be looked at. Of course, if it be found that there has been a definite change in the type of business carried on or in the method of carrying it on, so that the income of the company is thereafter derived mainly or entirely either from investment or from non-investment income as the case may be, consideration of the previous earnings of the company may be ruled out. But in the present case until liquidation there was no such change. The company continued to carry on its dealings in stocks and shares as before.

It is suggested that in taking this view one is answering the question, of what does the company's business consist, not of what does its income consist, whereas the act poses the latter and not the former question. If the position at the moment of winding up is alone to be regarded, such a criticism is justified, but unless one adopts that view some period of time must be taken into consideration, and I can see no reason for confining the enquiry to the company's income during the previous year or 15 months. The section does not say of what does the income consist, having regard to the position during the previous completed income tax year or during that period and any broken period thereafter. It enquires simply of what does the major portion of the income consist, and that, I think, obliges one to look at the income as a whole, subject, of course, as I have said, to any change of business in the course of the company's career. So regarded the income of this company mainly consists of non-investment income. The company's activities were directed to earning profits from its dealings in stocks and shares, and not, except incidentally, to deriving income from the interest and dividends of the stocks and shares in which it dealt. It is true that only 8 years' results have been taken for the purpose of enabling a judgment to be formed as to what is the main income of the company, but that appears to be the period selected by the parties as representative of its income during the whole of its existence, if that be the material period. At any rate the respondents have not suggested that they are discontented with it or that any further information would change the result. In their submission, however representative the 8 years may be, the Commissioners should not have looked, or, at any rate, were not obliged to look at any period beyond the last 15 months.

If the section applied only to companies in liquidation there would be greater force in this argument, since it might be said that the income referred to was that which the company was actually receiving at the moment of liquidation and possibly to interest and dividends receivable thereafter, since these latter are income in the hands of the company and recognised as such by subsect. (6), though they are distributable as capital to its members in the liquidation.

But the section does not apply solely to a company which is in liquidation. Subsects. (2) to (5) inclusive are concerned with companies which continue to carry on business, and it is not until subsect. (6) is reached that liquidation is mentioned. The chameleon-like quality which might be imparted to a living company in changing from year to year from an investment to a non-investment company or vice versa is, to my mind, at least an odd result of the Crown's contention.

The section defines an investment company and where the question arises the proper tribunal has to determine whether a particular company comes within the definition or not. The answer it is true depends upon whether one type of income preponderates or not, but not necessarily upon whether that type preponderates at a particular moment of time or over a particular period. I prefer to look at the company as having a continuing character and to ask of what does the income of that company consist, having regard to its whole life or such portion of that life as truly represents its character.

The income is that of a living entity and should, I think, be representative of its receipts in general and not of those which arise or accrue at a particular point of time or (subject to what I have said about a general change in its methods of business) over part only of its existence. The inquiry as to what its income consists of must be answered with that fact in view, and is, I think, correctly answered in the present case by saying that it mainly consists of non-investment income.

Having regard to my view as to the first point, I do not think it necessary to express any opinion on the second, and I must not be taken as having formed any opinion upon it. It will be open to argument in any future case where it comes in issue.

I am of opinion that the appeal should be allowed.

Appeal allowed.

Solicitors: *Birkbeck, Julius, Edwards & Co.* (for the appellants); *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

CHESTERTON RURAL DISTRICT COUNCIL *v.* RALPH THOMPSON, LTD.

[King's Bench Division (Viscount Caldecote, L.C.J., Macnaghten and Cassels, JJ.), **March 17, 1944.**]

Magistrates—Appeal—Appeal from quarter sessions—Case stated—Jurisdiction of appeal committee—Application for case to be stated made 7 days after judgment given by appeal committee but after closing of sessions.

On May 21, 1943, the appeal committee of quarter sessions affirmed a decision of a court of summary jurisdiction against the appellants. The committee had not been asked by the appellants to state a case for the opinion of the High Court and in giving their judgment no reference was made to its being subject to a case stated. On May 28, 1943, after the closing of the sessions the appellants applied in writing to the committee to state a case, which the committee then did. It was contended on behalf of the respondent, as a preliminary objection at the hearing before the Divisional Court, that, in the circumstances, quarter sessions had no jurisdiction to state a case, since an application for a case to be stated must be made when judgment is given or, at latest, before the session is concluded. On behalf of the appellant it was contended that quarter sessions have complete discretion at common law with regard to stating a case and that the application had been made within a reasonable time :—

Held : the application had been made within a reasonable time and while the appeal committee was in power.

[**EDITORIAL NOTE.** At common law, each sittings or session of Quarter Sessions is for many purposes a watertight compartment and matters cannot be dealt with out of sessions or at a subsequent sessions unless they are formally adjourned. It was here contended that this rule of procedure operated to prevent an application for a case to be stated after the session had been closed. The decision is, however, that there is no objection to such an application.

As to Cases Stated by Quarter Sessions, see HALSBURY, Hailsham Edn., Vol. 21, pp. 740-742, paras. 1281, 1282 ; and for Cases, see DIGEST, Vol. 33, pp. 448, 449, Nos. 1589-1595.]

Case referred to :

(1) *R.* v. *Lincoln JJ., Ex parte Trafford,* [1944] 1 K.B. 243 ; [1944] 1 All E.R. 286.

Appeal by way of case stated from a decision of the appeal committee of the Cambridge Quarter Sessions, given on May 21, 1943. A preliminary objection was taken on behalf of the respondents that quarter sessions had no jurisdiction to state the case since the case stated was stated not in pursuance of a statutory power to state case, but under the court's common law powers, and the application for the case to be stated had not been made at the time judgment was given nor before the session had been concluded. The application, though made after the conclusion of the session, was made 7 days after the decision was given.

Sydney G. Turner, K.C., and *C. E. W. Simes* for the appellants.

G. D. Squibb for the respondents.

Viscount Caldecote, L.C.J. [delivering the judgment of the court on the preliminary point] : We think we should hear this appeal on the case which has been stated. The application for a case to be stated was made to the appeal committee while the appeal committee was in power ; that is to say, the appeal committee was appointed for a period and the application was made to the appeal committee before its members were *functi officio.* The case has been stated on a request made within a reasonable time, and we see no reason why we should not hear the appeal upon the case stated. We do not think the *Lincoln* case (1) has any bearing on the point which we have had to consider.

Objection overruled.

Solicitors : *J. J. McIntyre* (for the appellants) ; *Blyth, Dutton, Hartley & Blyth,* agents for *W. J. & J. G. Taylor,* Newmarket (for the respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

INLAND REVENUE COMMISSIONERS *v.* TRINIDAD PETROLEUM DEVELOPMENT CO., LTD.

[COURT OF APPEAL (Scott, Goddard and du Parcq, L.JJ.), **May 4, 1944.**]

Revenue—Excess profits tax—Computation of capital—Deduction of debt—Companies interconnected in standard period but not in chargeable accounting period—Finance (No. 2) Act, 1939 (*c.* 109), *ss.* 13 (4), 14 (1), 17, *Sched. VII, Pt. I, paras.* 1, 4, *Pt. II, paras.* 2 (1), 4.

The respondent company had selected the years 1935 and 1937 as its standard period for the purposes of excess profits tax. Until January, 1937, the whole of the respondent's share capital was beneficially owned by another company to whom the respondent was also indebted for money lent. In January, 1937, the debt was discharged and, since that date, the respondent has ceased to be a subsidiary of the lending company. It was contended for the Crown that, in computing the capital of the respondent company for its standard period, the debt due to the lending company could not be deducted in accordance with the Finance (No. 2) Act, 1939, Sched. VII, Pt. II, para. 2 (1), since during that period the respondent was a subsidiary of the lending company, and, by sect. 17 (1) of the Act, the debt must, therefore, be ignored in computing the capital of both companies. On behalf of the respondents it was contended that sect. 17 (1) applied only to companies interconnected after April 1, 1939.

HELD: the Finance (No. 2) Act, 1939, s. 17 (1) applies not only to a company which is subsidiary in both the standard and chargeable accounting periods, but also to one which is a subsidiary only in the standard period or a part thereof.

Decision of MACNAGHTEN, J. (*p.* 141, *ante*) *reversed.*

[**EDITORIAL NOTE.** Special rules govern the calculations of the profits of associated or interconnected companies. The only point here is whether a company must be a subsidiary company both in the standard and the accounting period, or whether it is sufficient that it was a subsidiary company in the standard period or a part thereof and has ceased to be such since.

FOR THE FINANCE (No. 2) Act, 1939, s. 17, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, pp. 1202, 1203.]

APPEAL by the Crown from a decision of MACNAGHTEN, J., given on Nov. 3, 1943, and reported p. 141, *ante,* where the facts are fully stated.

The Attorney-General (*Rt. Hon. Sir Donald B. Somervell, K.C.*), and *Reginald P. Hills* for the appellants.

J. Millard Tucker, K.C., Frederick Grant, K.C., and *J. W. P. Clements* for the respondent company.

SCOTT, L.J.: This appeal relates to the calculation of excess profits tax in the case of a company, registered and carrying on business in the United Kingdom which, during part of its "standard" period was a subsidiary of another company called the British Controlled Oilfields Co. (referred to in the proceedings as the B.C.O.), but in its chargeable accounting period was independent. The two relevant chargeable periods are Apr. 1, 1939, to July 31, 1939; and Aug. 1, 1939, to July 31, 1940. The appeal turns upon the correct interpretation of the Finance (No. 2) Act, 1939, s. 17 (1), which, so far as relevant is in the following terms:

> Where any interest . . . is paid by one body corporate to another body corporate, and one of those bodies corporate is a subsidiary of the other . . . the capital . . . of both bodies corporate shall be computed for the purposes of this part of this Act as if (*a*) the interest . . . were not payable; (*b*) any debt in respect of which any such interest is payable did not exist . . .

The questions in issue are as to the basis on which the Commissioners ought to compute the respondent company's capital, as a component of profits, in the standard period, and complementary interest in connection with it, for the purposes of comparing the standard profits with the profits of the two "chargeable accounting periods." The court is not concerned with the resultant figures;

these will be worked out by the Commissioners according to the court's decision on the questions raised by the special case. In exercise of the option conferred by sect. 13 (4) of the Act, the company elected to make the two years, 1935 and 1937, its standard period. From 1918, when the company was incorporated, to the end of 1936, it is common ground that the company was a subsidiary of the B.C.O. within the definition of the Act ; but in Jan., 1937, it ceased to be subsidiary. Whilst it was a subsidiary it was paying interest on over £800,000 lent to it by the B.C.O., but when it ceased to be subsidiary that loan was paid off.

Where a company is independent and not subsidiary to another, the income tax principle, which forbids the deduction of interest in assessing profits, does not operate for the ascertainment of excess profits tax, being expressly excluded by the Finance (No. 2) Act, 1939, s. 14 (1), and Sched. VII, Pt. I, para. 4 ; and the actual profits in each period are the basis (Sched. VII, Pt. I, para. 1). Similarly borrowed money and debts are to be deducted in the computation of capital (Sched. VII, Pt. II, para. 2 (1)) ; and capital is averaged in any period (Sched. VII, Pt. II, para. 4). But in the case of a subsidiary company the statutory position is materially different ; for, under sect. 17 (1), which I have read, interest is to be disregarded, and debts are to be treated as non-existing. The question is whether that subsection applies to the standard period of a company which is subsidiary during the whole, or even (like this one) during only one-half of its standard period, but is wholly independent during the one or more chargeable accounting periods which are material for the ascertainment of excess profits tax. That subsection is perfectly general, and contains no hint of a condition that it is not to be applied in the standard period, unless the company is still subsidiary in the chargeable accounting period, and, on the plain language, it must, in my opinion, be construed as applying not only in the case of a company which is subsidiary in both periods, but also of one which is subsidiary only in the standard period.

It was argued rather attractively that, as the basis of the tax is a comparison, the comparer must be put in a position to compare like with like ; and that a term must, therefore, be implied that subsect. (1) is only to apply to one limb of the comparison if the company is also subsidiary in the other. The argument is tempting ; but I am not persuaded. I see no ground in the language used, either in the section or in any other provision of the statute, to justify any such implication. That consideration is sufficient to dispose of the appeal ; but I agree with Goddard, L.J., whose judgment I have had the advantage of reading, that the above conclusion is also supported by the legislative fact that the detailed and special provisions about the chargeable accounting period contained in sect. 17 (3)-(5) were repealed by the Finance Act, 1940, s. 28 (1), and replaced in Sched. V of that Act by an elaborate system of excess profits tax for interconnected or grouped companies, and there sect. 17 (1) was left untouched. The new statutory system affected the company after the end of March, 1940, but not before that time ; and the appeal is only concerned with the earlier time.

For these reasons, I cannot agree with the Commissioners and Macnaghten, J., who both held that sect. 17 (1) had no application to a company which, though subsidiary in its standard period, is not subsidiary in the relevant chargeable accounting period. I arrive at this legal conclusion with regret, as I think it would be a fairer basis for excess profits tax if the special treatment obtains also in both accounting periods. The appeal must be allowed with costs here and below and the case remitted to the Commissioners to compute the excess profits in accordance with this judgment.

Goddard, L.J. : This appeal raises a short point as to the construction of the Finance (No. 2) Act, 1939, s. 17 (1), dealing with the method of computing excess profits in the case of what are called interconnected or subsidiary companies. Shortly stated, the section provides that interest and certain other annual sums paid by a subsidiary to its parent company shall, for the purposes of computing the capital profits and losses of both companies, be ignored and treated as though they were not payable. The question is whether, for this provision to apply, the subsidiary company must be a subsidiary of its parent company, not only during the period in which its standard profits have to be ascertained, but also during the chargeable accounting period.

In the present case the company elected to choose for its standard period the years 1935 and 1937; and during 1935 the appellant company was admittedly a subsidiary of British Controlled Oilfields, Ltd., though not in 1937. It was not a subsidiary company in the chargeable accounting periods of 1939 and 1940, which are relevant to this case.

Although I have formed an opinion different from that of the Commissioners, with which MACNAGHTEN, J., agreed (though, as he said, not without doubt), I agree with the view submitted by the Attorney-General that this is a very clear case. Sect. 17 (1) is unqualified and unlimited in its terms. No point, I think, can be made that it uses the present tense throughout; it is true that its words are " Where . . . one of those bodies corporate *is* a subsidiary of the other "; equally, it refers to the case where interest *is* paid by one corporate body to the other. It is an obvious use of what, I believe, grammarians call the historic present.

It is also true that, in making the computation, allowance has to be made for any increase or decrease of capital; but a basic figure representing capital must in all cases be first ascertained, which is the average amount of the capital employed in the standard period. If when ascertaining what the average capital of a company was during the standard period, it appears that it was a subsidiary of some other company, sect. 17 (1) appears to require that interest paid to its parent company should be ignored. As I have said, that subsection is quite unqualified; and from its terms appears to be of general application. Subsect. (2) is qualified. It deals with a particular class of interconnected companies, namely a parent company resident in the United Kingdom and not itself a subsidiary of another resident company, and a company which may or may not be resident in the United Kingdom which is a subsidiary of the former. Those companies are regulated by subsects. (3) to (5). If, then, subsect. (2) does not apply, it seems to me clear beyond doubt that subsect. (1) does.

If the argument for the respondents be right, it seems to me that it is necessary to read into the subsection, after the words " and one of those bodies corporate is," some such words as " throughout or any time within the chargeable period "; and I can find nothing to compel me to read those, or any other words, into it; and it would be contrary to all canons of construction to do so. Support for this construction is to be found in the position that the respective subsections occupy in the section. The fact that the subsection in question is put at the head of the section seems to indicate that it is of general application and that those which follow are dealing with a limited class. When the Act was amended by the Finance Act of the following year, while subsects. (2) to (5) disappeared, subsect. (1) was left unamended.

In my opinion subsect. (1) applies to the respondent company and the appeal ought to be allowed.

DU PARCQ, L.J.: I have had an opportunity of reading the judgments which have just been delivered; and I can only add that I agree with them.

Appeal allowed with costs. Leave to appeal to the House of Lords.

Solicitors: *Solicitor of Inland Revenue* (for the appellants); *Elvy Robb & Co.*, (for the respondent company).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Distinguished and Criticised. *Re*
Greenwood's Agreement. [1950]
1 All E.R. 436.

GREEN *v.* PALMER.

[Chancery Division (Uthwatt, J.), **May 16, 1944.**]

Landlord and Tenant—Lease—Option to renew—Option to renew tenancy for "period of 6 months on the same terms and conditions including this clause"—Whether tenant has perpetual right of renewal.

The parties entered into a tenancy agreement for 6 months. The agreement contained the following clause: "The tenant is hereby granted the option of continuing the tenancy for a further period of 6 months on the same terms and conditions including this clause . . ." The tenant contended that the clause gave him a perpetual right of renewal:—

Held: upon the true construction of the agreement the tenant was not entitled to a perpetual right of renewal, but, if the option was exercised, he was entitled to occupy for a period not exceeding 18 months from the time the original lease was granted.

[**EDITORIAL NOTE.** It has generally been understood that there is a leaning against a right of perpetual renewal, but it was considered that, if such a right could be given, the words used in the tenancy agreement here considered were the appropriate ones to grant such a right. It has, however, been decided that these words give a right to two renewals and no more.

As to Covenants for Renewal, see HALSBURY, Hailsham Edn., Vol. 20, pp. 152-157, paras. 165-168; and for Cases, see DIGEST, Vol. 31, pp. 68-82, Nos. 2156-2267.]

Cases referred to:

(1) *North Eastern Ry. Co.* v. *Hastings* (*Lord*), [1900] A.C. 260; 30 Digest 454, *1160*; 69 L.J.Ch. 516; 82 L.T. 429; *affg.* S.C. *sub nom. Hastings* (*Lord*) v. *North Eastern Ry. Co.*, [1899] 1 Ch. 656.

(2) *Swinburne* v. *Milburn* (1884), 9 App. Cas. 844; 31 Digest 76, *2220*; 54 L.J.Q.B. 6; 52 L.T. 222.

Action by the landlord against the tenant for possession of the premises in question and for a declaration that upon the true construction of the tenancy agreement the tenant was not entitled to a perpetual right of renewal. The facts are fully set out in the judgment.

F. C. Watmough for the plaintiff.

J. F. Bowyer for the defendant.

Uthwatt, J.: By a tenancy agreement made July 1, 1940, between the plaintiff Green and the defendant Palmer, it was agreed that the landlord would let and the tenant would take a house at Llandudno together with the furniture, fixtures and effects therein described in the Schedule at a weekly rent of 3 guineas.

The term was to commence on July 9, 1940, and to end on Jan. 7, 1941. Therefore, it was for six months. Then there are certain provisions, the first of which is to pay the rent on particular days clear of all deductions to a named firm of agents and auctioneers, Blake & Williams. The next is to make good, repair and restore all articles of furniture or fixtures which may have been "damaged or destroyed by the tenant or any of them or his or her family, servants or others during the said term."

Then there are some usual common form covenants which do not bear on the matter at all. At the end of them there occurs this provision:

> The tenant is hereby granted the option of continuing the tenancy for a further period of six months on the same terms and conditions including this clause, provided the tenant gives to the landlord in writing four weeks' notice of his intention to exercise his option.

Then there is the usual provision for re-entry on failure to comply with any of the covenants.

Then the landlord undertakes the burden of all rates, taxes, assessments and outgoings in respect of the property except charges for gas, electric light and telephone, and also the obligation to keep the house in repair.

After the usual covenant for quiet enjoyment, there is a provision to this effect:

> The landlord and the tenant agree that if the tenant take the house on a subsequent occasion or introduce another tenant, the letting shall be done through the agency of Blake & Williams.

The effect of an agreement between landlord and tenant as to such a matter may be open to dispute.

The question I have to decide is the proper construction of the clause giving the tenant an option of continuing the tenancy. The parties for some time, apparently, acted upon the footing, as far as one can gather—I am speaking only from what I have garnered from the correspondence—that there was, in substance, a perpetual right of renewal. But it is quite clear that the construction the parties themselves put upon an agreement by their conduct does not in any way affect the construction proper to be put upon the agreement. That was decided, I think, by the House of Lords, in *North Eastern Ry. Co.* v. *Hastings* (1).

The point in question is a very short point of construction. It depends upon the actual words which have been used, read in the light of the surrounding circumstances. The first fact is that this is a letting of a house, including the furniture. It was a letting under which the landlord agrees to bear the burden of rates and taxes. An incidental matter to observe is that, under the covenant to pay the rent, it is to be paid to Blake & Williams, named estate agents, who may or may not continue to function during the continuance of the tenancy if, on its true construction, it does contain an obligation to renew in perpetuity at the tenant's option.

However, those are minor matters. The real question is how, fairly, one can read the particular clause I have mentioned. Upon that, there are some statements to be found in the cases suggesting that the courts rather lean against construing a covenant as containing a perpetual right of renewal. I think that the proper rule is stated by LORD SELBORNE in *Swinburne* v. *Milburn* (2), at p. 850, where he says:

> I am not inclined to adopt the language which is to be found in some authorities, to the effect that there is a sort of legal presumption against a right of perpetual renewal in cases of this kind; but those authorities certainly do impose upon anyone claiming such a right the burden of strict proof, and are strongly against inferring it from any equivocal expressions which may fairly be capable of being otherwise interpreted.

It is not a question really of proof, but of reading the document strictly in the light of the surrounding circumstances.

Turning to the actual language of the clause, the first thing one observes is that, in terms, there is granted to the tenant a single option exercisable only once upon the named event, and the subject-matter of that option is an option "of continuing the tenancy for a further period of six months on the same terms and conditions including this clause." To my mind, what that means is this: the tenant is to be allowed once, and once only, the opportunity of continuing the tenancy—continuing it for a further six months. Then we come to the critical words "on the same terms and conditions including this clause." As I read it, that means there is included in the new tenancy agreement a right in the tenant, if he thinks fit, to go on for one further six months, and when you have got to that stage you have finished with the whole matter. In other words, it comes to this: "Here is your present lease. You may continue that, but I tell you, if you continue it, you continue it on the same terms as you were granted the original lease. You may continue it for a further 6 months with the right to go on for another 6 months."

Upon that footing, in the events which have happened, all the landlord was bound to do under this arrangement was to permit the tenant to occupy for a period not exceeding 18 months in the whole from the time when the original lease was granted.

Declaration accordingly with costs. Order for possession subject to a stay of execution for purposes of appeal.

Solicitors: *Newton G. Driver & Co.*, agents for *Bone & Payne*, Llandudno (for the plaintiff); *Bell, Brodrick & Gray*, agents for *Henderson & Hallmark*, Llandudno (for the defendant).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

Re SEBAG-MONTEFIORE, SEBAG-MONTEFIORE *v.* ALLIANCE ASSURANCE CO., LTD.

[Court of Appeal (Lord Greene, M.R., MacKinnon and Luxmoore, L.JJ.), **April 19, 20, May 15, 1944.**]

Rentcharges and Annuities—Annuities given free of income tax—Statutory variation of tax burden—Will and codicil—Codicil confirming will—Codicil increasing amount of annuity—When provision "made"—Whether provision "varied"—Finance Act, 1941 (*c.* 30), *s.* 25.

By her will made on Aug. 28, 1937, the testatrix bequeathed a number of annuities free of all duty and income tax thereon but not sur-tax. By a codicil made on Sept. 25, 1939, the testatrix directed that one of those annuities, namely, an annuity of £300 bequeathed to E.M.H., should be "increased to £400." The codicil further provided: "In all other respects I confirm my said will which is dated Aug. 28, 1937." The questions to be determined were (i) whether the provisions for the payment of stated amounts free of income tax were "made," within the meaning of the Finance Act, 1941, s. 25 (1), on Aug. 28, 1937, or Sept. 25, 1939, and (ii) whether the provision as to the £300 annuity was "varied" by the codicil within the meaning of sect. 25 (1) (*c*):—

Held: (i) where the will contains a complete provision for the payment of a stated amount free of income tax and all that the codicil does is to confirm it, the provision is "made" by the will within the meaning of sect. 25 (1).

(ii) as to the annuity to E.M.H., the sum of £300 was subject to the section, but the additional sum of £100 added by the codicil was not so subject and was payable free of all income tax.

Decision in Re Tredgold, Midland Bank Executor and Trustee Co., Ltd. v. *Tredgold and the Royal Society of Musicians of Great Britain* (*Incorporated*) ([1943] 1 All E.R., at p. 120) *overruled.*

[**EDITORIAL NOTE.** The Finance Act, 1941, s. 25, was designed to place some part of the tax burden on the recipient of a tax-free payment in cases where the provision for the payment was made before Sept. 3, 1939. *Re Waring* (2) decided that, where a will containing such a provision was made before Sept. 3, 1939, but there was a codicil made after that date dealing with other matters and not expressly confirming the will in other respects, the provision was not made for the purposes of the section after that date. The position where the codicil did confirm the will was there left open, but it is here decided by the Court of Appeal, reversing the view taken in *Re Tredgold* (1), that the inclusion of the confirmatory clause makes no difference. The provision was made at the date of the will and not at the date of the codicil. The decision herein goes a step further. Where the annuity is increased in amount, the original amount given by the will is subject to the Act, but the amount of the increase is not. As regards the additional sum that annuitant gets that free of tax and does not have to make the contribution to tax prescribed by the 1941 Act.

As to Tax-Free Payments, see HALSBURY, Hailsham Edn., Vol. 28, pp. 214-217, paras. 386-391; and for Cases, see DIGEST, Vol. 39, pp. 165-168, Nos. 562-593.]

Cases referred to:

*(1) *Re Tredgold, Midland Bank Executor and Trustee Co., Ltd.* v. *Tredgold and the Royal Society of Musicians of Great Britain* (*Incorporated*), [1943] Ch. 69; [1943] 1 All E.R. 120.

*(2) *Re Waring, Westminster Bank, Ltd.* v. *Awdry*, [1942] Ch. 426; [1942] 2 All E.R. 250; Digest Supp.; 111 L.J.Ch. 284; 167 L.T. 145.

*(3) *Dudley* v. *Dudley*, [1944] K.B. 264; [1944] 1 All E.R. 29.

*(4) *Anderson* v. *Anderson* (1872), L.R. 13 Eq. 381; 44 Digest 275, *1052*; 41 L.J.Ch. 247; 26 L.T. 12.

*(5) *Re Elcom, Layborn* v. *Grover Wright*, [1894] 1 Ch. 303; 44 Digest 380, *2144*; 63 L.J.Ch. 392; 70 L.T. 54.

Appeal from a decision of Simonds, J., dated Feb. 16, 1944. The Finance Act, 1941, s. 25, is as follows:

(1) Subject to the provisions of this section, any provision, however worded, for the payment, whether periodically or otherwise, of a stated amount free of income tax, or free of income tax other than sur-tax, being a provision which (*a*) is contained in any deed or other instrument, in any will or codicil, in any order of any court, in any local or personal Act, or in any contract, whether oral or in writing; and (*b*) was made before Sept. 3, 1939; and (*c*) has not been varied on or after that date, shall, as respects payments falling to be made during any year of assessment, the standard rate of income tax for which is ten shillings in the pound, have effect as if for the stated

amount there were substituted an amount equal to twenty twenty-ninths thereof.

I. J. Lindner for the residuary legatees.

J. S. Pennycuick for the executors of the will.

J. A. Reid for certain of the annuitants.

Lord Greene, M.R. [read by Luxmoore, L.J.]: This is an appeal from a judgment of Simonds, J., as he then was, raising, so far as the main point is concerned, the same question as that which he had already decided in *Re Tredgold* (1). Simonds, J., followed his own decision without giving any further reasons and the appeal is accordingly in substance an appeal from that decision.

The testatrix made her will on Aug. 28, 1937, and by cl. 7 she bequeathed a number of annuities " free of all duty and income tax thereon but not sur-tax." By cl. 10 all rebates allowances or repayments in respect of income tax to which an annuitant may be entitled are to enure for the benefit of the annuitant. On Sept. 25, 1939, the testatrix made a codicil whereby, among other provisions not material to be here stated, she directed that one of these annuities, namely, an annuity of £300 bequeathed to the respondent Eleanor Marjorie Haynes should be " increased to £400." Cl. 7 of the codicil was as follows:

> In all other respects I confirm my said will which is dated the 28th day of August 1937.

The testatrix died on Apr. 21, 1940.

The question for decision relates to the effect of the Finance Act, 1941, s. 25 (1), upon these dispositions. That Act received the royal assent on July 22, 1941, that is to say 15 months after the death of the testatrix.

If the codicil which is dated Sept. 25, 1939, had not in terms confirmed the will the provisions of the subsection would unquestionably have applied under the decision of this court in *Re Waring* (2). But in that case the question was left open whether the position would be different where a codicil, made after Sept. 3, 1939, contained an express confirmation of a will made before that date. That question Simonds, J., answered in the affirmative in *Re Tredgold* (1), holding that the disposition for the payment of the tax-free annuity in that case, although originally made in a will made in 1936, must for the purposes of the subsection be treated as having been made by a codicil made in 1941 by reason of the fact that the codicil contained a confirmation of the will. The main question which we have to decide is whether or not this view is correct. There is a subsidiary question in the case of the annuitant Miss Haynes, whose annuity was increased by the codicil from £300 to £400, namely, whether the provision as to the £300 contained in the will was " varied " by the codicil within the meaning of that expression in subsect. 1 (*c*). It is not disputed that the provision as to the additional £100 was made by the codicil so that the subsection does not apply to it.

The effect of the subsection is to give to provisions for payment of sums free of tax a statutory effect different from that which they would otherwise have had. In order that such a provision may receive this statutory effect it must comply with certain requirements: (*a*) it must be contained in a document of one of the specified types, one of which is a will, another of which is a codicil; (*b*) it must have been " made " before Sept. 3, 1939; (*c*) it must not have been " varied " on or after that date.

The question as it appears to me is primarily one of the construction of the subsection. It is, of course, necessary also to construe the will and codicil for the purpose of seeing whether or not the statutory conditions are complied with. But before approaching the will and codicil we must first know what it is we have to look for in them and the answer to that question depends upon the true interpretation of the words of the statute. The first thing to be looked for is a document, which in the case of a testamentary provision may be either a will or a codicil, containing a provision for payment of a tax-free sum. Having found such a document we must then look for the date when the provision which it contains was made, which in the case of a provision contained in a will or codicil will be the date when the will or codicil (as the case may be) was completed by execution and attestation: *Re Waring* (2). If the provision thus identified was made before Sept. 3, 1939, that is, if the will or codicil containing it was completed before that date, we must look to see whether or not it has been " varied " on or after that date. If it has not been so " varied," the subsection applies to it.

This being the nature of the inquiry which the subsection directs us to make, we can now turn to the will and codicil. The first question of construction which arises in relation to them appears to me to be simply this: does either and which of those two documents upon its true interpretation contain a provision for payment of a tax-free sum? The answer to this question, in my opinion, clearly is that the will is a document containing such a provision. As to this there can be no controversy. This provision (subject to the question in the case of Miss Haynes) has not been varied on or after Sept. 3, 1939. *Prima facie,* therefore, the subsection applies. But for the purposes of applying the subsection, it is necessary to look at the codicil in order to see whether upon its true construction it has the effect of taking the provision out of the document by which it was originally made and inserting it in the codicil. Now all that the codicil, as construed for this purpose, purports to do is to confirm the provision contained in the will. In the case of a provision contained in a document *inter vivos,* for example, a separation deed, it has been held by this court that a mere confirmation of the provision has no effect—what is required to exclude the operation of the subsection is a "variation:" *Dudley* v. *Dudley* (3). I can see no ground for distinguishing the case of a confirmation by codicil of a provision contained in a will and a confirmation such as was made in *Dudley* v. *Dudley* (3) of a provision contained in a deed. Once it appears that all that the later document does is to confirm the earlier document in which the provision is contained, it seems to me to follow of necessity that the section applies. The section is concerned with provisions made in documents which have not been varied on or after Sept. 3, 1939. Of course, there may be cases where the provision is, for the purposes of the section, "made" by the codicil and not by the will. For example, if a testator having bequeathed tax-free annuities by a clause in his will, revokes that clause by a codicil and substitutes a list of annuitants containing the name of one of the original annuitants as legatee for an annuity similar in all respects to that originally given, the provision of that annuity would obviously, for the purposes of the subsection, be made in the codicil and not in the will. Another example would be where a testator by his will gave to a legatee a tax-free annuity of such an amount as he might by codicil prescribe and subsequently by a codicil prescribed the amount. Here for the purposes of the subsection the provision would clearly be made by the codicil since, before the making of the codicil, there was no complete provision. But, where the will contains a complete provision and all that the codicil does is to confirm it, I cannot so construe the subsection as to say that the provision is "made" by the codicil.

In his judgment in *Re Tredgold* (1), SIMONDS, J., approached the matter from a different angle. He construed the confirmation clause in the codicil as being in effect a repetition of the words of the will, the result in his view being that the provision of the annuity is contained in the codicil. Speaking of the testator he says, at p. 78 ([1943] 1 All E.R., at p. 125):

> The fact that he makes a codicil shows that he is reviewing his testamentary dispositions and, reviewing them, he in effect says: "This and this I want to alter. This and this I want to stand." He is there and then stating by reference to an existing and identifiable document his last and final wishes. He is in fact making his last will.

With great respect to SIMONDS, J., this method of dealing with the matter does not appear to me to take into account what is to my mind the fundamental question, namely, the true construction of the subsection. There can be no doubt that, for certain purposes, the effect of a confirmation contained in a codicil is important. Examples are to be found in the two cases on which SIMONDS, J., principally relied. In *Anderson* v. *Anderson* (4), the testatrix, having made an invalid bequest to the husband of one of the attesting witnesses, confirmed her will by a codicil which was not attested by the wife. It was said that "the whole contents of the previously existing will were incorporated in the codicil." This was merely a case where the testatrix, by confirming the document which she described as her will, a document which was in the material respect incapable of taking effect, declared by a perfectly valid codicil that the contents of that document embodied her testamentary dispositions. It seems to me that the decision does not give any assistance in deciding the present question, which is of a quite different character. The same observation applies to *Re Blackburn* (5), where a testator by will made during the lifetime of his wife used words sufficient in themselves to exercise a power of appointment. But the power which he in fact had was only exercisable after the death of his wife who was living at the date of the will. By his codicil made after her death he confirmed the will. This again was merely a case of incorporating by reference an invalid disposition contained in an earlier document identified in the codicil and quite obviously the codicil operated as a valid exercise of the power. In each of these cases the disposition contained in the will was incapable of taking effect and it was only by virtue of the incorporation of the contents of the will in the codicil that the disposition became a valid one.

The only other authority to which I need refer is *Re Elcom* (6). That was a case under Malins Act, and the question was: when was the instrument made under which the assignor acquired her title to the property? The disposition was contained in a will made before the statutory date, but the testatrix who made it made a codicil after that date. The codicil did not contain an express confirmatory clause. CHITTY, J., said that nothing turned upon the absence of such a clause. In this court LINDLEY, L.J., said that it was immaterial that the testatrix "did not in terms republish her will." In spite of the doubts expressed by SIMONDS, J., as to the meaning of these expressions, I am of opinion that both of them refer to a confirmatory clause and not to the general doctrine of republication. They are no doubt *dicta*, but they are, in my opinion, correct and accord, as does the whole reasoning of the judgments in that case, with my own view as to the right approach to the present problem.

I now turn to the case of Miss Haynes. The point is a short one—was the provision as to her £300 tax-free annuity contained in the will "varied" by the codicil within the meaning of that expression in the subsection? I do not think that it was. The "variation" referred to in the subsection must, I think, be a variation of the provisions contained in the original disposition for payment free of income tax. A mere variation in the amount of the tax-free sum does not appear to me to be sufficient and I can see no reason why the legislature should have said that it should. If mere increase of the amount is a variation, mere decrease also must be a variation.

It must be borne in mind that the section is designed to cover the cases of testators who had completed their testamentary dispositions and in many cases had died before the Act became law and at a time when no testator could have had in mind the possibility of such an Act being passed. The legislature has not thought fit to exclude the operation of the section in cases where the disposition has been confirmed since Sept. 3, 1939. A provision that a mere variation of the amount is to exclude the operation of the section appears to me to be capricious and unreasonable and no explanation could be suggested by counsel why the legislature should have so intended. The words, in my opinion, are capable of being construed in the way that I have suggested and I agree with the argument that this is their true meaning. There is nothing in the judgment in *Dudley* v. *Dudley* (3) inconsistent with this view.

However, if I am wrong in this, I am still of opinion that the disposition as to the original £300 has not been varied. All that the testatrix has done is to add something to the annuity she had already given by the will. The gift of that annuity by the will is in no sense revoked—it still stands and the provision for it is, I think, "contained" in the will within the meaning of the subsection. It is only the provision for the additional £100 which is contained in the codicil and, as I have already stated, it was not disputed that the section does not apply to that additional sum, which is payable free of all income tax,

In my opinion, the appeal should be allowed.

MACKINNON, L.J.: I find myself unable to agree with the decision of SIMONDS, J., as he then was, in *Re Tredgold* (1). The material words in the Finance Act, 1941, s. 25, are:

> A provision . . . which is contained in any will or codicil . . . and was made before Sept. 3, 1939, and has not been varied on or after that date shall . . .

There was a provision of the type in question "contained in the will" which the testatrix executed in due form on Aug. 28, 1937, that is, before Sept. 3, 1939.

Prima facie this will was "made" on Aug. 28, 1937, as was held in this court in *Re Waring* (2). The word "made" in the section is not a term of art, but has merely its meaning as a simple English word. If in March, 1940, a month before her death, the testatrix was asked: "Have you *made* your will and, if so, when did you *make* it ?" I think she would have correctly answered : "Yes, I made my will on Aug. 28, 1937." And I think she would be with reason astonished if her questioner had said : "No, you didn't ; you *made* your will when you executed a codicil on Sept. 25, 1939," and as much astonished as the testator in *Re Waring* (2) who, having answered a similar question, was told : "No, when you are dead you will only have made your will on the day of your death."

In the court below Simonds, J., held that the provision in this will was "made" on Sept. 25, 1939, when the testatrix, having by a codicil varied other provisions in the will executed on Aug. 28, 1937, added the words : "In all other respects I confirm my said will which is dated Aug. 28, 1937." As to this, I remark (i) that I think the words in this sentence might truly have been "I confirm my said will which I *made* on Aug. 28, 1937" ; and (ii) if these words had been omitted from the codicil, the will of Aug. 28, 1937, as varied by the codicil, would have been as valid and effective as it is now. It is, indeed, strange that by reason of the insertion of a few words in the codicil that were entirely unnecessary the date of the "making" of the provision in the will of Aug. 28, 1937, has to be treated as postponed to Sept. 25, 1939, when the codicil was signed and witnessed.

A number of cases were cited and discussed by Simonds, J. None of them appear to me to be relevant. The only question that concerns us is : When was the provision which appears in the document dated Aug. 25, 1937, *made* ? And that question is solely one as to the construction of these few words in this Act of Parliament of 1941. Cases before that Act was ever dreamed of as to the construction of other documents or Acts can be of very little assistance ; for myself, I find them embarrassing rather than helpful.

In my opinion, the provision in the will in question in *Re Tredgold* (1) was clearly "made" upon Mar. 23, 1936 ; and in the present case the provision in the will we are concerned with was "made" on Aug. 28, 1937, that is, in both cases before Sept. 3, 1939.

There remains, however, the separate question as to the annuity given by the will of Aug. 28, 1937, and increased in amount by the codicil of Sept. 25, 1939. Can it be said that the provision in the will has been "varied" by the codicil within the meaning of that word in sect. 25 of the Act of 1941 ? I think not. The language of the section deals with "a provision for the payment of a stated amount free of income tax," and it is this provision that must be "varied" in order to prevent the section applying. There was here no "variation" of the direction in the will that the annuity should be paid "free of income tax." All that the codicil did was to increase, and, therefore, to "vary" the amount "stated" in the will. Nothing at all is said in the codicil as to the provision in the will that the annuity should be paid "free of income tax," and, therefore, nothing in the codicil can possibly have "varied" this provision in the will. I agree that the appeal should be allowed.

Luxmoore, L.J. : I agree that this appeal must be allowed on both points. The main question is whether the Finance Act, 1941, s. 25 (1), affects annuities given by the testatrix "free of all duty and income tax thereon but not sur-tax." The second question is whether the section referred to affects one of the annuities, namely, that in favour of the respondent Eleanor Marjorie Haynes. Originally, this was fixed by the will at £300, but it was subsequently increased by a codicil to the will to £400.

It was held by Simonds, J., that none of the annuities were affected by the section and consequently that they were payable out of the testatrix's estate free of duty and income tax. In so holding he followed his previous decision in *Re Tredgold* (1), without expressing any additional reasons : So that, on the main question this appeal is in substance an appeal from that decision.

As has been pointed out by Lord Greene, M.R., the main question was expressly left open by this court in *Re Waring* (2). In that case it was held that a will executed before Sept. 3, 1939, although republished by a codicil made after that date, but containing no confirmatory clause, fell within the section and was affected by it. The question left open was whether a different result would be reached if the codicil had contained a clause expressly confirming the will.

In my judgment, the answer to the main question is primarily one of construction of the section and only incidentally of the will and codicil. The material words of the section are:

> any provision, however worded, for the payment, whether periodically or otherwise, of a stated amount free of income tax . . . being a provision which (*a*) is contained . . . in any will or codicil . . . and (*b*) was made before Sept. 3, 1939, and (*c*) has not been varied on or after that date, shall, as respects payments falling to be made during any year of assessment, the standard rate of income tax for which is ten shillings in the pound, have effect as if for the stated amount there were substituted an amount equal to 20/29ths thereof.

It is to be observed that the first requisite required to bring the section into operation is that there should be the provision of a stated amount free of income tax. The second requisite is that that provision should be contained in a document of a particular class—in the present case a will or a codicil. The third requisite is that the provision (not, be it observed, the document) should be made before Sept. 3, 1939. The fourth and last requisite is that the provision should not have been varied on or after that date. Consequently, the first thing to seek is a provision. In the present case there is such a provision. It is to be found in the will of the testatrix, while there is no such express provision (apart from the annuity of £400 given to Eleanor Marjorie Haynes) in any codicil to that will. In this connection it is, I think, well to bear in mind that a will is a different document from a codicil. The distinction between the two is perhaps most clearly explained in the definition of a codicil contained in TERMES DE LA LEY, the authorship of which is assigned by Sir Edward Coke to William Rastal, Justice of the Common Pleas in the reign of Queen Mary. I quote from the edition published in 1721, at p. 135:

> Codicil is . . . an addition or supplement added unto a will or testament after the finishing of it, for the supply of something which the testator had forgotten, or to help some defect in the will.

The distinction between a will and a codicil is also pointed out in a quaint passage in SWINBURNE ON WILLS, Vol. 1, p. 29. The passage reads:

> Whereupon the writers conferring a testament and a codicil together, and perceiving the odds betwixt the one and the other, they call a testament a great will, and a codicil a little will. And do compare the testament to a ship, and the codicil to a boat, tied most commonly to the ship.

The next step is to ascertain when the provision was made. Obviously, it was made when the will was executed, namely, on Aug. 28, 1937, that is, before Sept. 3, 1939. The last inquiry is: Has the provision been varied and, if so, by what document? The only document by which the provision in the will might have been varied is the codicil of Sept. 25, 1939. Turning to the codicil, apart from the annuity provided for Eleanor Marjorie Haynes, there can be no question of variation because none of the provisions with regard to annuities (except as above mentioned) are referred to, and so far from the codicil containing any variation, there is an express confirmation of the will. In this connection I would refer to the decision of this court in *Dudley* v. *Dudley* (3), which seems to me to be equally applicable to a testamentary document as to a deed.

Apart, therefore, from any authority, I should have no hesitation in holding that the section applies to all the annuities other than that in favour of Eleanor Marjorie Haynes which in this respect is the subject of what I have styled the second question.

The only ground on which it is said that the section does not apply to those annuities is that the provision for them, notwithstanding that the will was executed before Sept. 3, was not made before Sept. 3, 1939, because the codicil made on Sept. 25, 1939, in effect republished the will and consequently the provision must be treated as made at the later date. In *Re Waring* (2), the codicil made after Sept. 3, 1939, admittedly republished the will although it contained no express confirmation of it. In my judgment, there is no magic in the confirmatory clause. So far as republishing the will is concerned, a codicil has just the same effect whether or not it contains an express confirmation of the will, and I think the *ratio decidendi* in *Re Waring* (2) is as applicable to the facts in the present case and *Re Tredgold* (1) as to the facts in that case. That the express confirmation has no greater weight in republishing the will than the fact that a codicil is made to the will has been pointed out in many cases. It is sufficient for present purposes to refer to the judgment of CHITTY, J., in *Re*

Elcom (5). I agree with Lord Greene, M.R., that when Lindley, L.J., in the same case (see p. 312) said that it was immaterial that the testatrix did not in terms "republish her will," he was in truth referring to the absence of an express confirmation in the codicil and not to the doctrine of republication.

In *Re Tredgold* (1), Simonds, J., said, at pp. 73, 74 ([1943] 1 All E.R., at p. 122):

> If . . . the true meaning of a confirmatory clause is that it is to be read as if the testator had written out anew in the codicil itself the words of his will with such alterations as were therein contained, it can, I think, be said that the provision is contained A
> in the codicil, for the testator is there in his codicil expressing in shorthand his testamentary intentions. The codicil is the final expression of his whole will.

With all respect, I think so to regard the codicil for the purposes of the section under consideration is to ignore the words of the section itself, the essential difference between a will and a codicil, and the real relationship of the one to the other. Using Swinburne's simile, it is to transform the codicil from the boat commonly tied to the ship into the ship itself and then to scuttle the ship. B

I have not thought it necessary to deal further with the cases cited. They have been dealt with in the judgment of Lord Greene, M.R., which I have had the opportunity of considering, and with which I am in complete agreement.

With regard to the second question, after some hesitation I find myself in agreement with the conclusion at which Lord Greene, M.R., and MacKinnon, L.J., have arrived.

For these reasons I agree that the appeal should be allowed. C

Appeal allowed. Declaration that annuities are only free of tax to the amount specified in sect. 25 (2), *except the* £100 *part of the annuity payable to the defendant Haynes which is free of all income tax. Costs of all parties to be paid out of the estate.*

Solicitors: *Waltons & Co.* (for all parties).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*] D

DENNY, MOTT AND DICKSON, LTD. *v.* JAMES B. FRASER AND CO., LTD.

[House of Lords (Viscount Simon, L.C., Lord Thankerton, Lord Macmillan, E
Lord Wright and Lord Porter), **March 20, 21, 23, May 22, 1944.**]

Contract—Impossibility of performance—Frustration—Trading contract with option to purchase or lease land—Option incidental to contract—Contract frustrated as a whole.

A contract made in July, 1929, recited that one party should purchase its supplies of red and white pine wood from the other and that one party F
should let a timber yard to the other with an option to that other party to purchase the timber yard or take a long lease thereof. Clauses 1-5 of the agreement dealt with the trading arrangements. Clause 6 allowed the appellants to occupy the respondents' timber yard at Grangemouth rent-free but the appellants were to keep the yard and its buildings in repair. It was provided that the appellants might determine the agreement on giving 12 months' notice and the respondents might determine it on giving G
3 years' notice. Then an option to purchase the timber yard was given to the appellants "in the event of the foregoing trade agreement being terminated by either party as aforesaid." It was further provided that the appellant might take a long lease as an alternative to purchasing the property under the option. The agreement for sale of timber was admittedly frustrated by the timber control orders. However, on July 17, 1941, some time after the trading agreement had been frustrated, the appellants H
gave notice to determine the agreement and purported to exercise the option to purchase. The appellants contended that the option was a separate agreement and remained exercisable by them after the frustration of the main contract:—

Held: the contract taken as a whole was one for the sale of timber to which the option was incidental and the option, therefore, fell with the contract when it was frustrated. In any event the option in its terms was exercisable only upon the contract being determined by notice and the true view of the facts was that the contract had been frustrated by war legislation and had been so determined before the notice purporting to determine it was given.

[**EDITORIAL NOTE.** The doctrine of frustration does not apply to all contracts. It has been held not to apply to a lease and here, though the facts prevent any proper consideration of the point, it is held that a contract to grant a lease and one to purchase land may be frustrated. They may be frustrated when they are mere appendages of a trading contract, which itself is frustrated. The case is important in that LORD WRIGHT again considers the basis on which the doctrine of frustration rests and has expressed a view which he admits is somewhat heretical; but the judges are now so much given to asking the question based on the implied condition theory and determining cases upon the appropriate answer to that question, that any argument against that theory is important.

AS TO FRUSTRATION OF CONTRACTS, see HALSBURY, Hailsham Edn., Vol. 7, pp. 213, 214; and FOR CASES, see DIGEST, Vol. 12, pp. 386-404, Nos. 3172-3252.]

Cases referred to:

*(1) *Leiston Gas Co.* v. *Leiston-Cum-Sizewell U.D.C.*, [1916] 2 K.B. 428; 12 Digest 403, *3251*; 85 L.J.K.B. 1759; 115 L.T. 172.

*(2) *F. A. Tamplin S.S. Co., Ltd.* v. *Anglo-Mexican Petroleum Products Co., Ltd.*, [1916] 2 A.C. 397; 12 Digest 390, *3194*; 85 L.J.K.B. 1389; 115 L.T. 315.

*(3) *Bank Line, Ltd.* v. *Capel (A.) & Co.*, [1919] A.C. 435; 12 Digest 391, *3198*; 88 L.J.K.B. 211; 120 L.T. 129.

*(4) *Hirji Mulji* v. *Cheong Yue S.S. Co., Ltd.*, [1926] A.C. 497; Digest Supp.; 95 L.J.P.C. 121; 134 L.T. 737.

(5) *Fibrosa Spolka Ancyjna* v. *Fairbairn Lawson Combe Barbour, Ltd.*, [1943] A.C. 32; [1942] 2 All E.R. 122.

(6) *Geipel* v. *Smith* (1872), L.R. 7 Q.B. 404; 12 Digest 372, *3095*; 41 L.J.K.B. 153; 26 L.T. 361.

(7) *Metropolitan Water Board* v. *Dick Kerr & Co.*, [1918] A.C. 119; 12 Digest 399, *3233*; 87 L.J.K.B. 370; 117 L.T. 766.

*(8) *Heyman* v. *Darwins, Ltd.*, [1942] A.C. 356; [1942] 1 All E.R. 337.

(9) *London & Northern Estates Co.* v. *Schlesinger*, [1916] 1 K.B. 20; 30 Digest 343, *14*; 85 L.J.K.B. 369; 114 L.T. 74.

APPEAL by the owners of the option to purchase from a decision of the majority of the Second Division of Inner House of the Court of Session (the LORD JUSTICE-CLERK, LORD MACKAY and LORD WARK, LORD JAMIESON dissenting). The facts are fully stated in the opinion of VISCOUNT SIMON, L.C.

Charles MacKintosh, K.C. (of the Scottish Bar), and *A. J. Hodgson* for the appellants.

G. R. Thompson, K.C., and *J. R. Philip* (both of the Scottish Bar) for the respondents.

VISCOUNT SIMON, L.C.: My Lords, this appeal raises once again the question which has been so often discussed and decided in the "frustration" cases arising out of the last war and now also out of the present war, whether a particular contract entered into before the war has been brought to a premature conclusion by war regulations which render illegal, and therefore prevent, the due performance of some of the obligations or the due enjoyment of some of the rights under the contract. The decision in the present case depends upon the application of principles already well settled and, in my view, the conclusion reached by the majority of the Inner House, reversing that of the late LORD ROBERTSON, is correct. Of the various opinions of the majority, that of LORD WARK expresses with great clarity the course of reasoning which has led me to the view that the appeal should be dismissed.

The agreement made between the parties in July, 1929, was, as its preamble stated, an arrangement that the respondents, who are timber merchants with saw mills at Glasgow, should purchase all their supplies (which appears to mean all their requirements) of red and white pine wood from the appellants. In cl. 1 the appellants bound themselves to supply the respondents with such wood, so far as their stocks would permit, and provided that the wood should be available to the respondents either at a timber yard at Grangemouth belonging to the respondents, or at the respondents' saw mills at Glasgow. It is plain from the language of the agreement that what is contemplated is that the wood should be imported, and that this part of the agreement constituted arrangements for trading in such timber between the parties on the terms therein set out. Clause 4 provided for certain adjustments which do not, in my opinion, affect the present case. Clause 6 provided that, in order to enable the trading agreement to be carried out, the respondents would let the appellants occupy their timber yard at Grangemouth as long as the period of the trading agreement continued, the appellants not paying any rent to the respondents therefor, but undertaking to discharge the annual feu duty and local charges, and to maintain the buildings and other constructions in the yard in good condition and repair, with the right to alter or add to the railway sidings on the premises. By cl. 5 the agreement might be terminated by the appellants at 12 months' notice or by the respondents at three years' notice. There followed cl. 8, out of which the dispute mainly arose, the beginning of which I must quote textually :

> 8. In the event of the foregoing trade agreement being terminated by either party as aforesaid the second parties [the appellants] shall have the right as at the date of determination of the said agreement to purchase the said ground and all buildings and erections thereon [i.e., the Grangemouth timber yard] at a price of £4,000 in exchange for which price the first parties [the respondents] shall grant to the second parties [the appellants] or their nominees a valid and marketable title and clear searches.

There followed in the same clause an alternative provision, under which the appellants might take the timber yard on lease at a rent of £500 per annum, and cl. 9 provided that such a lease should be " for a period of five years from and after the date of the termination of the trading agreement as aforesaid," and should be renewable at the option of the appellants for further periods of five years up to a total of ninety-nine years.

After the war broke out, various war-time regulations were made under the authority of the Emergency Powers Acts, which restricted transactions in red and white pine wood of the type referred to in the agreement. One effect of these regulations was to render it impossible and unlawful for the appellants to supply the respondents with wood at the price stipulated in the agreement, and later regulations prevented the import of timber as contemplated in the agreement at all. It is not necessary to go into details, as the appellants in an amendment to the relevant answer in the pleadings :

> . . . admitted that the effect of the Government Orders controlling transactions in timber was wholly to prevent the current operation of the agreement in so far as it related to the supply of timber by the defenders to the pursuers.

Clause 4 of the agreement, as both the Lord Ordinary and the Inner House pointed out, cannot be read as anticipating and providing for an indefinite and complete stoppage of trade such as this, and the Government Orders therefore operated to frustrate the trade agreed upon.

On July 17, 1941, the appellants by letter of that date purported, under cl. 5 of the agreement, to terminate it by giving twelve calendar months' notice and to exercise at the end of that time the option under cl. 8 to purchase the Grangemouth timber yard at the agreed price of £4,000. The question is whether, in the circumstances that have happened, the appellants can by these means acquire the timber yard and make it their own property. The conclusion of the majority of the Second Division (the Lord Justice-Clerk, Lord Mackay and Lord Wark, Lord Jamieson dissenting) was that they could not, and I entirely agree with that view.

The option of purchase conferred by cl. 8 on the appellants only arises " in the event of the foregoing trade agreement being terminated by either party as aforesaid " (i.e., by notice under cl. 5). If, therefore, the agreement had already been terminated by intervening events such as the war regulations above referred to, and its further performance had been frustrated by supervening illegality, the basis upon which the option might have been exercised by the appellants had ceased to exist. The termination by either party to which cl. 8 refers is the termination of the agreement when it is alive and operative, but the notice of termination in the respondents' letter of July 17, 1941, refers to an agreement which has already been brought to an end by supervening events.

This view of the case really concludes the matter ; but I should mention two arguments which have been urged by the appellants against the inevitable result. The first is that the contract is, as the Lord Ordinary describes it, " of a composite character " with the result that the part dealing with the sale and purchase of timber might be terminated by frustration without the part dealing with the option to buy the land being brought to an end. This contention breaks down upon an examination of the terms of the agreement. It is one agreement; and, as already pointed out, the exercise of the option as to the land depends upon the termination of the purchase agreement arising by notice from either party.

The other contention was that the substantial purpose of the whole agreement was to provide the option, and that the trading clauses were quite subsidiary, so that the contract survived as a whole and advantage could still be taken of the option clause. It is undoubtedly true that the principles upon which frustration depends require the contract to be examined as a whole, and it may be that the supervening impossibility of fulfilling some minute provision may not be regarded as going to the length of preventing substantial performance of the contract as a whole. If *Leiston Gas Co.* v. *Leiston U.D.C.* (1) was rightly decided, that case would furnish an instance. But on the facts of the present case there is no room for the application of such an argument. The preamble of the contract indicates and the language of most of its clauses shows that the trading in timber was the main object of the contract. This trading was frustrated and the opportunity for exercising the option thereupon lapsed.

I move that the decision of the Court of Session be affirmed and that the appeal be dismissed with costs.

LORD THANKERTON: My Lords, I agree with the opinion of VISCOUNT SIMON, L.C., and I have little to add.

Counsel for the appellants found himself unable to support the view taken by the LORD ORDINARY, that there were in substance two separate agreements. Counsel was rightly impressed by the opening words of cl. 8 of the agreement, which make the termination of the trading agreement under cl. 5 a condition precedent to the arising of the option to purchase the timber yard. But it seems to me that it is equally difficult—for the same reason—for the appellants to maintain that the provisions of cll. 8 and 9 were not ancillary to the trading agreement. If so, it only remains to consider whether, in the words of LORD LOREBURN, in *F. A. Tamplin S.S. Co., Ltd.* v. *Anglo-Mexican Petroleum Products Co., Ltd.* (2), at p. 403, the discontinuance of the trading agreement admittedly caused in the present case was such as to upset altogether the purpose of the trading agreement, and I agree with my noble and learned friend that the purpose of the trading agreement was so upset, and that the opportunity for exercising the option lapsed. I agree with the proposed motion.

I may add that it is not necessary in this appeal to consider the consequences arising out of the defeat of the contract, as to which it may be suggested that the law of Scotland and the law of England are not identical.

LORD MACMILLAN: My Lords, the principle of contract law which has come to be known as the doctrine of frustration and which has recently in England been accorded statutory recognition, is common to the jurisprudence alike of Scotland and of England, although the leading cases are to be found in the English law reports. It is a principle so inherently just as inevitably to find a place in any civilised system of law. The manner in which it has developed in order to meet the problems arising from the disturbances of business due to world wars is a tribute to the progressive adaptability of the common law. In the works of the Scottish institutional writers the matter receives only rudimentary treatment. In BELL'S PRINCIPLES OF THE LAW OF SCOTLAND it is not until after the death of the original author that, in the editions which we owe to Sheriff Guthrie, the doctrine begins to assume its modern shape, and is well stated in sect. 29 as follows:

> When by nature of the contract its performance depends on the existence of a particular thing or state of things, the failure or destruction of that thing or state of things, without default on either side, liberates both parties.

The earlier cases both in England and in Scotland are mostly concerned with the consequences of the perishing of the thing on whose continued existence the contract depended for its fulfilment. But many of the recent cases have arisen from the supervention of emergency legislation rendering the implement of the contract illegal. It is plain that a contract to do what it has become illegal to do cannot be legally enforceable: there cannot be default in not doing what the law forbids to be done.

The present case belongs to the latter category. It seems to me a very clear one for the application of the principle I have just enunciated. Here is an agreement between two parties for carrying on dealings in imported timber. By emergency legislation the importation of timber has been rendered illegal. Neither party can be said to be in default. The further fulfilment of their mutual obligations has been brought to an abrupt stop by an irresistible extraneous cause for which neither party is responsible. But it has been suggested and the Lord Ordinary and Lord Jamieson have taken the view that one of the stipulations of the contract is severable from the rest and remains enforceable, inasmuch as its fulfilment would involve no illegality. This contention is in my opinion untenable. It is true that the respondents could, without infringing the emergency legislation, sell or let their Grangemouth timber yard to the appellants on the terms stated in the agreement. But the right to require such a sale or lease is conferred upon the appellants only as a consequence of one or other of the parties having voluntarily taken advantage of the right to terminate the agreement on notice. The operation of the agreement having been compulsorily terminated, neither party can thereafter terminate it voluntarily. You cannot slay the slain.

I would only add that in judging whether a contract has been frustrated, the contract must be looked at as a whole. The question is whether its purpose as gathered from its terms has been defeated. A contract whose purpose has been defeated may contain subsidiary stipulations which it would still be possible and lawful to fulfil. But to segregate and enforce such a stipulation would be to do something which the parties never intended. It cannot be suggested with any reason in the present case that the respondents would have conferred on the appellants an option to purchase or take on lease the respondents' timber yard independently of the trading arrangements into which they had agreed to enter. The consideration for the option was the fulfilment of those arrangements and there was no severable consideration. The House is not concerned in this appeal with any question as to the reliefs consequent on frustration as to which the law of Scotland may differ from the law of England.

I agree with your Lordships that the appeal should be dismissed and the interlocutor of the Second Division affirmed.

Lord Wright [read by **Lord Porter**]: My Lords, frustration of a contract, which though as an expression criticised in the past has now received legislative sanction in the recent Law Reform (Frustrated Contracts) Act, 1943, has been described by Professor Winfield, in Pollock on Contracts, 11th Edn., which he has edited, in the following terms, at p. 235 ·

> After the formation of a contract, certain sets of circumstances arise which owing to the fault of neither party, render fulfilment of the contract by one or both of the parties impossible in any sense or mode contemplated by them. These sets of circumstances have been more or less defined by the courts and are held by them to release both parties from any further obligation to fulfil the contract.

The rule has sometimes been described as an exception to the general principle that parties must perform their obligations or pay damages for breach of contract. I should prefer to describe it as a substantive and particular rule which the common law has evolved. Where it applies there is no breach of contract. What happens is that the contract is held on its true construction not to apply at all from the time when the frustrating circumstances supervene. From that moment there is no longer any obligation as to future performance, though up to that moment obligations which have accrued remain in force. The rule finds its simplest and earliest exemplification where a contract for personal service is frustrated by the death of the contractor during the period of covenanted service. For breaches of contract before his death, his representatives may be held liable, but no one has ever heard of them being held liable in damages for the dead man's failure to perform his contract as from the date of his death.

A rule of this character obviously admits of almost indefinite exemplifications, as numerous and diverse as are the possibilities of the performance of a contract being interrupted by a vital change of circumstances. The law, however, has examined a great variety of cases in which it has held or refused to hold that a contract is nullified as to its future by the impact of the frustrating event. The application of the general principle must depend on the circumstances of the particular case. No detailed absolute rules can be stated. A certain elasticity is essential. The topic has been repeatedly elucidated by numerous decisions of this House. Thus in 1919 in *Bank Line, Ltd.* v. *Capel* (3), at p. 441, LORD FINLAY, L.C., felt able to say that the law of the subject was well settled. He referred to the general principle, not particular applications.

It is now, I think, well settled that, where there is frustration, a dissolution of a contract occurs automatically. It does not depend, as does rescission of a contract on the ground of repudiation or breach, on the choice or election of either party. It depends on the effect on the possibility of performing the contract of what has actually happened. Where as generally happens, and actually happened in the present case, one party claims that there has been frustration and the other party contests it, the court decides the issue and decides it *ex post facto* on the actual circumstances of the case. The data for decision are, on the one hand, the terms and construction of the contract, read in the light of the surrounding circumstances, and, on the other hand, the events which have occurred. It is the court which has to decide what is the true position between the parties. The decision is as LORD SUMNER said in the *Hirji Mulji* case (4), at p. 570, " irrespective of the individuals concerned, their temperaments and failings, their interest and circumstances." The court has formulated the doctrine by virtue of its inherent jurisdiction, just as it has developed the rules of liability for negligence, or for the restitution or repayment of money where otherwise there would be unjust enrichment. I find the theory of the basis of the rule in the pregnant statement (*loc. cit.*) of LORD SUMNER that the doctrine of frustration is really a device by which the rules as to absolute contracts are reconciled with the special exceptions which justice demands. Though it has been constantly said by high authority, including LORD SUMNER, that the explanation of the rule is to be found in the theory that it depends on an implied condition of the contract, that is really no explanation. It only pushes back the problem a single stage. It leaves the question what is the reason for implying a term. Nor can I reconcile that theory with the view that the result does not depend on what the parties might, or would as hard bargainers, have agreed. The doctrine is invented by the court in order to supplement the defects of the actual contract. The parties did not anticipate fully and completely, if at all, or provide for what actually happened. It is not possible to my mind to say that, if they had thought of it, they would have said, " Well, if that happens, all is over between us." On the contrary, they would almost certainly on the one side or the other have sought to introduce reservations or qualifications or compensations. As to that the court cannot guess. What it can say is that the contract either binds or does not bind. It is a separate matter whether some ancillary relief should be given, as for a failure of consideration consequent on the frustration, as was held to be proper in *Fibrosa Spolka Ancyjna* v. *Fairbairn, Lawson & Co.* (5). To my mind the theory of the implied condition is not really consistent with the true theory of frustration. It has never been acted upon by the court as a ground of decision but is merely stated as a theoretical explanation. I only refer to the point here because it seems to me that the conclusions of both LORD ROBERTSON and LORD JAMIESON were affected to some extent by reflecting on what the parties as individuals might or would have decided if they had thought of the possible frustrating cause. I must admit that the view I have stated is somewhat heretical. But the general nature of the doctrine of frustration has given rise to many irreconcilable explanations. In the *Bank Line* case (3) LORD SUMNER made an interesting anthology of some of them. In *Hirji Mulji's* case (4) about seven years later his analysis is more exact and penetrating. But he again, at p. 509, emphasises that when frustration occurs it is automatic, and that its legal effect does not depend on the intention of the parties or even on their knowledge as to the event, but on its occurrence in such circumstances as to show it to be inconsistent with the further prosecution of the adventure. I mention these two aspects of the principle here because they are important for the decision of the present case.

The event is something which happens in the world of fact, and has to be found as a fact by the judge. Its effect on the contract depends on the meaning of the contract, which is matter of law. Whether there is frustration or not in any case depends on the view taken of the event and of its relation to the express contract by "informed and experienced minds."

What the event was in the present case is not in controversy. In order to ascertain its effect, examination must now be made of the contract.

The contract was entered into in July, 1929. It was to commence as from May 28, 1929. It is not a long document, but some of the provisions need to be examined precisely. Its main peculiarity is that one part of the contract, cll. 1 to 6, provides for a continuous course of trading in timber which it was contemplated would be imported from the timber exporting regions on the east shores of the North Sea by the appellants, an important firm of timber importers and merchants, for their sale to the respondents, who were to satisfy their requirements as timber merchants by the timber so supplied by the appellants. But there was a complication which has led to this litigation. The respondents owned a timber yard at Grangemouth, the Drumalbyn Timber Yard, which was brought into the agreement. I can best explain the general scope of the agreement by quoting from the preamble:

> Whereas it has been arranged between the parties that the first parties [the respondents] shall purchase all their supplies of red and white pine wood from the second parties [the appellants] and that the first parties shall let to the second parties the timber yard at Grangemouth known as Drumalbyn Timber Yard, with an option to the second parties to purchase or take on long lease the said timber yard upon certain terms and conditions.

It is thus possible to distinguish for some purposes at least three separate matters: first, the provisions of the agreement which deal with the trading in timber, that is the purchase and sale of it, secondly, the provisions which deal with the letting of the yard while the trading is going on, and, thirdly, the provisions which deal with the option to purchase the yard or take it on long lease which may come into effect when the trading operations cease. The stoppage of trading was in fact due to General Orders of the Timber Controller acting under his powers under the Emergency Powers (Defence) Act, 1939, made after the outbreak of war. The judges in the courts below have held (LORD JAMIESON not dissenting) that these Orders had the effect of rendering illegal and impossible for an indefinite time the further conduct of the trading operators. If, therefore, the provisions as to trading stood by themselves, it could scarcely have been questioned that the trading adventure was frustrated. Some objections to this conclusion were overruled in the court below and were scarcely relied upon before this House. But assuming that the trading adventure was frustrated, there remained to be considered the effect of that upon the provisions for the letting of the yard "to enable the trading agreement to be carried out." It was not difficult to conclude that this letting was to be concurrent with the trading operations which it was intended to enable and would fall with them when they were frustrated. But it was different with the option to purchase provided for by cl. 8. That option was only to come into force when the trading operations were terminated and only when they were terminated by the election of one party. In the words of the clause:

> In the event of the foregoing trading agreement being terminated by either party as aforesaid [that is under cl. 5] the second parties [the appellants] shall have the right as at the date of the termination of said agreement to purchase the said ground and all buildings and erections thereon at the price of £4,000.

There was also in cl. 9 an alternative option for the appellants to take the said ground and buildings and railway sidings thereon at an annual rent of £500; the lease was in the first instance to be for 5 years, but renewable up to the total period of 99 years from May 28, 1929.

It is these last two clauses which have caused the difficulty in the case. The earlier clauses may be shortly summarised. Clause 1 provides that the respondents agreed to buy from the appellants all their supplies of red and white pine wood, with one exception, and the appellants bound themselves to supply respondents with the wood so far as their stocks should permit, subject to all purchases being of fair specification of lengths as imported. The wood was to be available at the Drumalbyn Timber Yard or at the respondents' saw mills at Glasgow. Clause 2 contained a formula for ascertaining the price. It is enough to say that it was from time to time to be based on landed cost, with the addition of landing and other charges and with 2½ per cent. added to the total cost as a guaranteed profit. Clause 5, after stating the date at which "this agreement" was to commence, went on as follows:

> . . . and may be terminated at the instance of the second parties by their giving at least twelve calendar months' notice in writing by registered letter prior to the date on which the termination shall take place, and the first parties shall have the right to terminate the agreement at their instance by giving three years' notice of termination in writing by registered letter of the date on which the termination is to take place.

This is important because cl. 8, to which I have already referred, defines its condition to be "in the event of the trading agreement being terminated by either party as aforesaid." This relates back to the provisions of cl. 5, but there is a difference which will be noticed later. Clauses 6 and 7 deal with the use and occupation of the respondents' yard during the working of the agreement: "To enable the foresaid trading agreement to be carried out," the premises were to be "let." That "let" was to "continue during the period of the foresaid trading agreement." Clause 7 detailed the consideration which was to be paid for the use and occupation granted to the appellants which included the right to alter the railway line siding to suit their trade and to lay additional line sidings.

The events relied upon as constituting frustration were the Control of Timber Orders made under the Defence Regulations and necessitated by the state of war. The agreement had been in operation for about 10 years at the date of the earliest of the Orders, the Control of Timber No. 4 Order, 1939, which came into force on Sept. 16, 1939, and was replaced and continued thereafter by similar Orders. It was beyond controversy and was indeed agreed that the effect of these Orders was to prevent the current operation of the agreement so far as it related to the supply of timber by the appellants to the respondents. The appellants' stock of timber was exhausted about the end of September, 1939, and from that date it was impossible to supply further timber to the respondents. In addition, the Orders would have made it illegal for the appellants, even if they had timber to supply, to supply it in accordance with the conditions of the agreement as to price and otherwise. It is true that the agreement was for an indefinite time, and that the war might end within a comparatively short period. The position must be determined as at the date when the parties came to know of the prevention and the probabilities of its length as they appeared at the date of the Order. But subsequent events ascertained at or before the trial may assist in showing what the probabilities really were (as LORD SUMNER said in *Bank Line* v. *Capel* (3), at p. 454). In addition there is to be remembered the principle stated by LUSH, J., in *Geipel* v. *Smith* (6), that a state of war must be presumed to be likely to continue so long and so to disturb the commerce of merchants as to defeat and destroy the object of a commercial adventure. It is true that LUSH, J., was there referring to a single definite adventure, not to a continuous trading. But the real principle which applies in these cases is that business men must not be left in indefinite suspense. If there is a reasonable probability from the nature of the interruption that it will be of indefinite duration, they ought to be free to turn their assets, their plant and equipment and their business operations into activities which are open to them, and to be free from commitments which are struck with sterility for an uncertain future period. LORD SHAW emphasised this principle in the *Bank Line* case (3), at p. 449, and so did LORD SUMNER in the same case, at p. 454. This, I think, is the true basis of the rule. It does not depend simply on the consideration that when the interruption ceases conditions of performance may be different, though that may also be worth dwelling upon in certain cases, as in *Metropolitan Water Board* v. *Dick Kerr & Co.* (7), where it was said that the interruption destroyed the identity of the performance contracted for. In the present case the suspense has already lasted for more than 5 years, and it may be many years still before the government controls are removed.

It has been held by LORD ROBERTSON and the judges in the Second Division, LORD JAMIESON not dissenting on that point, that *qua* trading and the ancillary use and occupation of the yard for the purpose of trading, the contract was frustrated. But there still remained the crucial question, what effect that frustration had upon the option to purchase the yard, which was the subject of cl. 8. The language of the clause was very precise and specific. It was to operate in the event of the trading agreement being terminated by either party by the notice specified in cl. 5. LORD ROBERTSON was not unconscious that this raised a difficulty in the way of the appellants' claim that they were entitled to exercise the option to purchase, and had in fact duly exercised the option by their notice of July 17, 1941. But he decided in their favour on the ground that, notwithstanding the precise language of the clause conferring the option, what the parties would have agreed, if their minds had been directed to the point, would have been that the event of a frustration of the trading agreement would not have cancelled the option, but have opened the door to its exercise. He treated the "purchase agreement," as he called it, as a separate and self-subsistent agreement, standing on its own legs and remaining in force though the legs were cut from under the trading agreement. But he failed to observe that, even so, the right of exercising the option to purchase was expressly dependent on the single event of the trading agreement being terminated by notice. That being the condition precedent, the right could not arise if it was not fulfilled. The LORD JUSTICE-CLERK, in his cogent judgment, rejected the appellants' contention. A notice to terminate must imply that there is something to terminate. According to the conditions expressed in cl. 8 the right to exercise the option to purchase never arose and cannot now arise if, as the fact is, the trading agreement was terminated by frustration.

Counsel for the appellants, faced with this difficulty, based his contentions before this House on a different ground. He argued that the whole agreement was one and indivisible, of which the trading agreement and the option to purchase formed integral parts, and that the impossibility of fulfilling the trading agreement did not destroy the contract as a whole because cl. 8 remained in effect. It was still capable of fulfilment and remained open to the appellants, unless and until they thought fit to give notice of termination of the trading agreement, which they did by their letter of July 17, 1941, in accordance with cl. 5. Thereupon they became entitled to exercise the option to purchase, and did exercise it by the letter. The result of this view would be that the appellants could postpone indefinitely giving notice of termination and thus keep alive for an indefinite time their right of election and so retain their hold upon the yard. This would be an unreasonable and inequitable position. But I do not think that the contention is sound. I do not question that the right to exercise the option, whatever it may be, is part of the consideration for the entire agreement. Nor do I doubt the possibility that there might be cases in which the contract provides for various matters to be performed in such a way that the impossibility of performing some of the stipulations might not frustrate the contract as a whole. Such a case may be illustrated by the decision of the Court of Appeal in *Leiston Gas Co.* v. *Leiston-cum-Sizewell U.D.C.* (1). The contract there was for the supply of gas and lighting, and for the repair and maintenance of the lighting system. In January, 1915, lighting regulations, by reason of the war, prohibited the lighting of the lamps. The case was heard before the law had been settled and elucidated, as it has since been, by the three decisions already referred to, the *Metropolitan Water Board* case (7) the *Bank Line* case (3) and the *Hirji Mulji* case (4), and much that was said by the Court of Appeal in the *Leiston* case (1) would not have been said at all, or would have been said differently, if the court had had the advantage of the views of this House. SCRUTTON, J., however (p. 439), does state the issue to be whether the failure to supply was of such lengthy and permanent character as substantially to alter the mode of performance so as to terminate the contract. He decided that it was not, treating it as a question of fact and degree. I am not clear that the same decision would be given to-day. But questions of applying the doctrine may always be difficult to solve. So far as principle goes, the decision is important, in so far as it directs attention to the test, which is, what is the substantial contract and is that frustrated. Looking at this contract and to the frustrating event, I think it would be unreasonable not to regard the trading agreement as the substantial matter, so that when that is frustrated so is the contract as a whole. It would not be possible, in my opinion, to regard the whole contract as surviving when the trading agreement became frustrated. I need not consider another possible view, namely, that cll. 8 and 9 survived as a separate agreement in the way that the arbitration clause in *Heyman* v. *Darwins, Ltd.* (8) was in the opinion of VISCOUNT SIMON, L.C. at p. 367 ([1942] 1 All E.R. at p. 343)), capable of surviving as an independent clause. That would not help the appellants here, because cl. 8, for whatever reason, is quite plain and specific, as I have already said, in the limited and grudging terms in which it grants the option to purchase. The option does not derive from the general character of the contract, but from the specific words of cl. 8. When the trading ceased the free use of the yard would revert to its owners in the absence of a new and special grant. The stringent and limited character of the express condition of the option under cl. 8 must receive effect from the court. The condition was not, and in the events could not be, complied with by the appellants.

The question whether Scots law would give any or what restitution to the appellants for alterations and improvements effected upon the yard during the period of their occupation is not before the House.

I should dismiss the appeal.

LORD PORTER: My Lords, the dispute which has arisen in this case requires for its solution the determination whether a contract between the parties dated July 10 and 25, 1929, has or has not been discharged by supervening impossibility of performance or—to use the current but inelegant phraseology—has its future performance been frustrated? The respondents maintain that it has, the appellants contend that it has not. The vital terms have been set out and it is not necessary that I should do so again, though I must refer to some of the provisions in order to explain my conclusions.

The principles upon which it will now be held that a contract has been frustrated are well established. Probably they have nowhere been more succinctly stated than by LORD LOREBURN in *Tamplin (F. A.) S.S. Co., Ltd.* v. *Anglo-Mexican Petroleum Products Co., Ltd.* (2), at p. 403:

> The court . . . ought to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to that effect will be implied, though it be not expressed in the contract . . . No court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was a foundation on which the parties contracted.

Whether this result follows from a true construction of the contract or whether it is necessary to imply a term or whether again it is more accurate to say that the result follows because the basis of the contract is overthrown, it is not necessary to decide; the principle is well established. But it is the contract as a whole which has to be considered, not a part only. As is said in POLLOCK ON CONTRACTS, 11th Edn., edited by Professor Winfield, at p. 255:

> Further, it is to be observed that the disturbing cause must go to the extent of substantially preventing the performance of the whole contract. Interference leaving a considerable part capable of performance will not be an excuse.

For this proposition *London and Northern Estates Company* v. *Schlesinger* (9) is quoted, and I think *Leiston Gas Co.* v. *Leiston U.D.C.* (1), if it be rightly decided, might have been added. I would willingly adopt this view except that I should prefer the expression " contract as a whole " instead of " the whole contract."

The dispute, however, as in so many of these cases, centres not upon the principles to be applied, but upon their application to the facts of the individual case. The contract under consideration stated in its preamble that it had been arranged between the parties that the respondents should purchase all their supplies of red and white pine wood from the appellants, and should let a certain timber yard to them without rent, but upon payment of the feu duties, with an option of purchase or long lease on certain terms and conditions which it was right and proper to reduce to writing. After this preamble the first seven clauses deal with the purchase and sale of the wood and the letting without rent. Three of these clauses were much relied upon by the appellants. Clause 2 fixed the price of the timber on a sliding scale dependent upon the landed cost to and expenses of the appellants. It was said that this showed an intention that the contract should be a long term one, and that even a considerable interruption in possibility of supply would not bring it to an end. Clause 4 after placing an obligation upon the respondents to use their best endeavours to sell the wood, declares that they shall have no control over the buying or selling of the appellants, that the contract shall in no way limit the appellants' right to sell to others, and that nothing in the agreement should override or otherwise affect any arrangements entered or to be entered into by the appellants, or any conditions imposed on them as to price or otherwise in regard to the purchase or disposal thereof. This provision was said to deal with the very matter under consideration and to be an express term arranging that no governmental control should defeat or frustrate the contract. Finally it was said that the right given by cl. 7 to the appellants to alter the railway lines to suit the trade and to lay additional lines showed an intention that the option to purchase should not readily be terminated.

It was also urged in general support of the appellants' case that there was no provision in the contract compelling the appellants to use the yard for the purpose of their trade with the respondents. On the contrary, by cl. 1, they were expressly entitled to deliver the timber at Phoenix Saw Mills, and from this it was deduced that the terms of sale and purchase of the timber were independent of those dealing with the lease or sale of the land.

It is not until cl. 8 is reached that the agreement giving the right of purchase or long lease is set out, but it is urged that a purchase outright or a long lease extending up to 99 years from the making of the agreement is an important and far-reaching term of the contract, at least as important as the sale and purchase of the timber, and might of itself be said to be the basis or one of the bases of the contract. I have set out the provisions of the contract somewhat fully, because, as is indicated above, the question for your Lordships' determination as I see it, is not a question of principle but of the interpretation of a particular contract.

Before, however, I express a view upon this point, I ought to state that originally it was argued on behalf of the appellants that the contract could in reality be divided into two parts : one being a contract for the sale and purchase of timber and the other dealing with the land. It was said that, if this were so, the former might be frustrated, whereas the latter would not. This argument appears to have prevailed with the LORD ORDINARY and would be formidable were it not for the express terms of cl. 8 which do not seem to have been brought to the notice of the judge. It was eventually abandoned by counsel for the appellants and, as I believe all your Lordships think, rightly so. It is true that the contract itself does refer in more than one place to "the trading agreement," as distinguished from the rest of the contract, but the contract itself is a single one and so inter-related in its parts as to make it difficult completely to separate some from the others. Moreover, the right of purchasing or leasing the land is not given upon the termination of the "trading agreement" simpliciter, but by cl. 8 upon termination of the trading agreement "as aforesaid," i.e., by notice from either party. Unless, then, the trading agreement survived at the time when notice was given by the appellants, the termination had not taken place in that particular way and a condition precedent to the right to purchase or lease was missing.

Recognising this difficulty, the appellants' advocates argued alternatively that the contract as a whole survived, that one of its more important provisions had not been affected by the governmental restrictions upon the importation of timber, and that though one of the objects of the contract, viz., the sale and purchase of timber, was prevented, yet that prevention was only a temporary interference with the fulfilment of the contract, which could still be fulfilled so far as concerned the transfer of the land, and therefore survived as a whole, none the less that the trading agreement, if it had stood alone, would have been frustrated.

So far as concerns the specific clauses upon which reliance was placed, I think they can all be explained as intended to deal with a normal state of affairs and having no reference to a complete cessation of the timber supply by governmental interference ; and it is a commonplace of this class of case that a provision meant to deal with a temporary interference will not be construed to have application to a complete prevention of the underlying object of the contract. In this connection it is enough to quote the *Tamplin* case (2), where there was an exception of restraint of princes, and *Metropolitan Water Board v. Dick Kerr* (7), which contained express terms dealing with the effect of delay by reason of the contract being impeded.

As to the basis or underlying object of the contract, I cannot doubt but that throughout it was the carrying out of the contract to supply and to take the timber contracted for. The agreement to let the yard with the option of purchase appears to have had for its object the provision of space which could be used either for the delivery of timber under this contract or to fulfil other contracts if timber for this contract was supplied at the Phoenix Saw Mills. No doubt both parties contemplated, as part of the scheme, that a long series of transactions and a long period of dealing might induce the appellants to alter the railway lines and otherwise accommodate the yard to their own use, and that for this reason they should be given the option. But, to my mind, this was part of the timber selling scheme, and in itself neither formed a basis of the contract nor would have been thought of had not the relation of buyer and seller of timber been entered into.

As in many questions where the law has to be applied to the facts, I recognise that the weight to be attributed to the different considerations will affect different minds in different ways. Indeed, in the present case LORD JAMIESON took the view that, having regard to the importance of the provisions in reference to selling or leasing the land, the contract was not frustrated. The conclusion must depend upon a question of proportion: how much importance one attaches to the disposition of the land in relation to the timber contract. With all respect to the opinion of LORD JAMIESON, and though I feel the force of his arguments, I find myself in agreement with the majority of the Second Division of the Court of Session in thinking that the contract as a whole was frustrated at some time before the notice to terminate was given, and accordingly I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Stephenson, Harwood & Tatham*, agents for *Dundas & Wilson*, Edinburgh (for the appellants); *Neve Beck & Co.*, agents for *Cowan & Stewart*, Edinburgh (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Distinguished. ALLIANCE PROPERTY CO., LTD. *v.* SHAFFER., [1948] 2 All E.R. 224.

Distinguished. ALLIANCE PROPERTY CO., LTD. *v.* SHAFFER. [1949] 1 All E.R. 312.

WHITE *v.* RICHMOND COURT, LTD.

[COURT OF APPEAL (Scott, MacKinnon and Luxmoore, L.JJ.), **May 18, 1944.**]

Landlord and Tenant—Rent restriction—Standard rent—Lease reserving rent of £200—*Agreement of same date reducing rent to* £150.

A dwellinghouse which had not been previously let was on Mar. 24, 1941, let to a tenant by a lease under seal. The rent reserved by the lease was £200 per annum. By an agreement of the same date the landlords agreed that, in consideration of the flat being taken in its then undecorated condition, the rent during the continuation of the lease should be reduced to £150:—

HELD: the standard rent was the rent reserved by the lease, namely, £200.

[**EDITORIAL NOTE.** It was here argued that, both the lease and the agreement being entered into on the same day, the substance of the transaction was a letting at £150 per annum. The Court of Appeal, however, have rejected this contention. There was a completed lease under seal before the agreement was entered into and, therefore, a complete letting at £200 per annum and that figure is the standard rent.

AS TO STANDARD RENT, see HALSBURY, Hailsham Edn., Vol. 20, pp. 312-315, paras. 369, 370; and FOR CASES, see DIGEST, Vol. 31, pp. 564-566, Nos. 7117-7132.]

Cases referred to:

*(1) *Bryanston Property Co., Ltd.* v. *Edwards*, [1944] 1 K.B. 32; [1943] 2 All E.R. 646.
(2) *Tedman* v. *Wickham*, [1944] 1 All E.R. 26.

APPEAL by the landlords from a decision of His Honour JUDGE HARGREAVES at the West London County Court. The facts are fully set out in the judgment of SCOTT, L.J.

W. Gorman, K.C., and *Wynn Wernick* for the appellants.

C. Erskine Simes for the respondent.

Scott, L.J.: This is a question, under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (1) (*a*), as amended by the Act of 1939, as to what was the standard rent reserved by a lease of a flat in London when the flat was first let at a date subsequent to Sept. 1, 1939. The subsection, as amended by the Act of 1939, says:

> The expression "standard rent" means the rent at which the dwellinghouse was let on Sept. 1, 1939, or, where the dwellinghouse was not let on that date, the rent at which it was last let before that date, or, in the case of a dwellinghouse which was first A let after the said Sept. 1, the rent at which it was first let.

The flat in question in this appeal had never been let at all to anybody till Mar. 24, 1941, and it was then let under a lease executed as a deed by the appellant company at a rent of £200 per annum to the tenant. It was a lease which contained obligations on the part of the landlord in respect of services in a block of flats, but that is, I think, irrelevant to the question with which we have to deal. *Prima facie*, the rent reserved by the lease is "the rent at which the flat B was first let," and the words of the lease are:

> . . . paying therefor yearly during the said term hereby granted and so in proportion for any less time than a year the rent of £200 to be paid without deduction (except for landlord's property tax) by 4 equal quarterly payments.

On the same day on which that lease was granted a letter was written by the solicitors for the lessors: C

> We thank you for returning the counterpart lease duly executed together with our account and cheque for £8 11*s*. in settlement. We have pleasure in sending you herewith the lease and letter relating to the reduction in the rent both dated with even date and sealed by our clients. You will observe that the lease has been stamped. Kindly acknowledge receipt of these documents.

The letter in question says this: D

> Richmond Court, Ltd., hereby confirms that the rent of £200 per annum reserved by the lease dated Mar. 24, 1941, made between the said Richmond Court, Ltd. of the one part and yourself of the other part of the above-mentioned flat shall, in consideration of the said flat being taken in its present undecorated condition, be reduced by the sum of £50 per annum during the continuation of the said lease so that the rent actually payable by you shall be at the rate of £150 per annum.

It was decided by His Honour Judge Hargreaves, that the rent at which the E flat was first let was £150 per annum and not £200 and, accordingly, he fixed the standard rent at £150. The lessors appeal, submitting that he ought to have fixed it at £200. I agree with the lessors. It is to be observed that the lease was completely self-contained and that the agreement signed on the same date by the landlords as a deed necessarily followed after the lease in point of time because it expressed a reduction of the rent fixed by the lease; and the accompanying letter shows that the counterpart of the lease had been F previously executed by the tenant. It was submitted on behalf of the lessors that that ends the matter, and I think it does. Where the rent is fixed by a written agreement or a deed, you can only look at the deed to ascertain the rent which is payable; and I think "the rent at which the dwellinghouse was first let," is determined conclusively by the deed that creates the letting. A subsequent variation does not alter the effect of the lease, which is, as I say, conclusive to show that that was the rent at which the dwellinghouse was first let. G

It was argued on behalf of the respondent, the tenant, that the phrases used by two members of this court in *Bryanston Property Co., Ltd.* v. *Edwards* (1) entitled the tenant to ask the court to take a wider view of the word "let" than that which I have indicated. That case turned on whether the rent was a progressive rent within the Acts, and has no direct bearing on the present case. Counsel for the respondent relied upon the following words of Lord H Greene, M.R., at p. 36 ([1943] 2 All E.R. at p. 648):

> Moreover, in applying an Act like the Rent Restriction Act to a document of this kind I do not think that too much attention should be paid to technical argument. The Act contemplates the substance of the obligations of the tenant, and here the tenant is to pay £190 and no more.

That was the lower rent: it was to rise to £275; and sect. 12 (1) (*a*) of the Act of 1920 constituted the rent a progressive rent, both enabling and requiring the court to fix the higher figure as the standard rent. du Parcq, L.J., taking not quite the same view as LORD GREENE, M.R., on the subject of the progressive rent, agreed in the conclusion arrived at by the court. He also expressed the view that the substance has to be looked at. At p. 41, ([1943] 2 All E.R. at p. 651) at the beginning of his judgment, he says: "I agree that one ought not to be too technical in construing this Act."

In my view, there is no room for a liberal interpretation of the word "let" in the Act where the letting is expressed by a lease executed as a deed, as it was in this case. It was quite clearly a rent of £200, and that, in my view, is necessarily the end of the matter. The appeal must be allowed with costs here and below.

MACKINNON, L.J.: I agree. I do not think I need add anything.

LUXMOORE, L.J.: I also agree.

Appeal allowed with costs.

Solicitors: *Boyce, Evans & Sheppard* (for the appellants); *Glover, Scott & Apthorpe-Webb* (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

R. *v.* I.C.R. HAULAGE, LTD.

[COURT OF CRIMINAL APPEAL (Humphreys, Croom-Johnson and Stable, JJ.), **May 10, 1944.**]

Criminal Law—Criminal liability—Corporations—Mens rea—Conspiracy to defraud—Whether intention of company's agent imputable to company.

The appellant company was a limited company with two directors, Robarts, who was the managing director, and his wife. The appellant company, Robarts and nine other persons were charged with conspiring to defraud in that they agreed to charge another company for a quantity of goods in excess of that which was in fact delivered. The question for the decision of the court was whether the appellant company could be indicted for a conspiracy to defraud. Counsel for the appellants contended that a company not being a natural person could not have a mind and, therefore, an indictment against the company for an offence involving as an essential ingredient *mens rea* in the restricted sense of a dishonest or criminal mind must be bad:—

HELD: Whether the criminal act of an agent including his state of mind, intention, knowledge or belief is the act of the company employing him depends on the nature of the charge, the relative position of the officer or agent to the company and other relevant facts and circumstances. In the present case the fraud of Robarts was the fraud of the company.

[**EDITORIAL NOTE.** A company is in law a separate entity from its directors and agents, and it cannot in fact commit a criminal offence apart from some act of the latter. The question here is whether a company can be indicted for the offence of conspiracy, an offence which postulates an intention or act of the will. A company cannot be indicted for certain offences because individual persons only can commit them, e.g., bigamy and it cannot be indicted for murder because it could not undergo the appropriate punishment. Subject to these considerations, the position seems now settled that a company can be indicted for any offence to which these limitations do not apply.

AS TO CRIMINAL LIABILITY OF CORPORATIONS, see HALSBURY, Hailsham Edn., Vol. 8, pp. 111-113, paras. 178, 179; and FOR CASES, see DIGEST, Vol. 13, pp. 408-411, paras. 1286-1308.]

Cases referred to:

(1) *Pearks, Gunston & Tee, Ltd.* v. *Ward, Hennen* v. *Southern Counties Dairies Co.*, [1902] 2 K.B. 1; 14 Digest 40, *102*; 71 L.J.K.B. 656; 87 L.T. 51.

(2) *Mousell Bros.* v. *London & North Western Ry. Co.*, [1917] 2 K.B. 836; 14 Digest 44, *133*; 87 L.J.K.B. 82; 118 L.T. 25.

(3) *Chuter* v. *Freeth & Pocock, Ltd.*, [1911] 2 K.B. 832; 13 Digest 352, *899*; 80 L.J.K.B. 1322; 105 L.T. 238.

(4) *R.* v. *Cory Bros. & Co.*, [1927] 1 K.B. 810; Digest Supp.; 96 L.J.K.B. 761; 136 L.T. 735.

*(5) *Director of Public Prosecutions* v. *Kent & Sussex Contractors, Ltd.*, [1944] 1 K.B. 146; [1944] 1 All E.R. 119.

(6) *Pharmaceutical Society* v. *The London & Provincial Supply Assocn.* (1880), 5 App. Cas. 857; 13 Digest 408, *1286*; 49 L.J.Q.B. 736; 43 L.T. 389.

(7) *Triplex Safety Glass Co.* v. *Lancegaye Safety Glass* (1934), *Ltd.*, [1939] 2 K.B. 395; [1939] 2 All E.R. 613; Digest Supp.; 108 L.J.K.B. 762; 160 L.T. 595.

Appeal by the company from a decision of the Kent County Assizes refusing to quash an indictment against the company for conspiring to defraud. The facts are fully set out in the judgment of the court, delivered by Stable, J.

Serjeant Sullivan, K.C., and *W. A. L. Raeburn* for the appellants.

A. S. Comyns Carr, K.C., and *A. Aiken Watson* for the Crown.

Stable, J. [delivering the judgment of the court] : I.C.R. Haulage, Ltd., the appellant company, was charged at the last autumn assizes for the county of Kent, together with ten other defendants, including one limited company, in an indictment containing only one count with a common law conspiracy to defraud.

The appellant company is a private company incorporated under the Companies Acts. It had two directors, Ivor Cyril Robarts, who was the managing director and the registered owner of all but one of the issued shares, and his wife, who was the owner of the one remaining share. Their daughter was the secretary of the company and seems to have taken some part in the management of its affairs. The charge arose out of a contract between the appellant company and Rice & Son, Ltd., public work contractors, under which the appellant company was to deliver loads of hard core and ballast at a certain site to be paid for at the rate of 8*s*. per cubic yard.

This contract the appellant company performed partly by loading and delivering the hard core in its own lorries driven by its own servants and partly by sub-contractors who were paid by the appellant company at the rate of 7*s*. 6*d*. per cubic yard. The substance of the charge against the defendants, who consisted of Robarts, the managing director of the appellant company, two of the appellant company's lorry drivers, a number of sub-contractors and two servants of Rice & Son, Ltd., who it was alleged were in a position to check the deliveries of hard core, was that they agreed together to charge Rice & Son, Ltd., for a quantity of hard core in excess of that which was in fact delivered.

At the trial a motion was made on behalf of the appellant company to quash the indictment against it which the commissioner refused. After the trial at the Kent Assizes, which lasted twelve days, the jury returned a verdict of guilty against the appellant company, Robarts, the two drivers of the company, the two servants of Rice & Son, Ltd., and one of the sub-contractors. The other defendants, who were all sub-contractors, were found not guilty and were discharged. All the defendants against whom a verdict of guilty was returned, with the exception of the one sub-contractor, appealed to this court, which on Apr. 26, 1944, gave judgment dismissing all the appeals and setting out the grounds of decision, with the exception of those dealing with the point peculiar to the company, namely, that an indictment alleging a common law conspiracy to defraud, which this unquestionably was, cannot lie against a limited company. We rejected this contention but reserved the statement of the grounds on which we based that part of our decision. With those grounds this judgment is solely concerned.

The question before us is whether a limited company can be indicted for a conspiracy to defraud. The Criminal Justice Act, 1925, s. 33, removed certain procedural obstacles which had hitherto existed in connection with the trial of criminal offences alleged against corporations, but this section did not enlarge the ambit of a company's criminal responsibility but provided machinery for simplifying its enforcement.

It was conceded by counsel for the appellant that a limited company can be indicted for some criminal offences, while it was conceded by counsel for the respondent that there were some criminal offences for which a limited company cannot be indicted. The controversy centred round the question as to where and on what principle the line must be drawn and on which side of the line an indictment such as the present one falls. Counsel for the appellant contended that the true principle was that an indictment against a limited company for any offence involving as an essential ingredient *mens rea* in the restricted sense of a dishonest or criminal mind must be bad, for the reason that a company not being a natural person cannot have a mind honest or otherwise, and that consequently though under certain circumstances it is civilly liable for the fraud of its officers, agents or servants, it is immune from criminal process.

Counsel for the respondent contended that a limited company, like any other entity recognised by the law, can as a general rule be indicted for its criminal acts, which from the very necessity of the case must be performed by human agency and which in given circumstances become the acts of the company, and that for this purpose there was no distinction between an intention or other function of the mind and any other form of activity.

The offences for which a limited company cannot be indicted are, it was argued, exceptions to the general rule arising from the limitations which must inevitably attach to an artificial entity, such as a company. Included in these exceptions are the cases where, from its very nature, the offence cannot be committed by a corporation, as, for example, perjury, an offence which cannot be vicariously committed, or bigamy, an offence which a limited company, not being a natural person, cannot commit vicariously or otherwise.

A further exception, but for a different reason, comprises offences of which murder is an example, where the only punishment the court can impose is corporal, the basis on which this exception rests being that the court will not stultify itself by embarking on a trial in which, if a verdict of guilty is returned, no effective order by way of sentence can be made. In our judgment these contentions of the respondent are substantially sound, and the existence of these exceptions, and it may be that there are others, is by no means inconsistent with the general rule.

The appellant relied on a number of authorities, including *Pearks, Gunston and Tee Ltd.* v. *Ward* (1), a decision under the Food and Drugs Act, 1875, s. 6, and more particularly on a passage in the judgment of CHANNELL, J., at p. 11, where he said:

> By the general principles of the criminal law, if a matter is made a criminal offence, it is essential that there should be something in the nature of *mens rea*, and, therefore, in ordinary cases a corporation cannot be guilty of a criminal offence, nor can a master be liable criminally for an offence committed by his servant.

This passage was cited with approval in *Mousell's* case (2), at p. 843, per LORD READING, L.C.J. The actual decision in *Pearks*' case (1) does not help the appellant, as it was held that the limited company was properly convicted of the offence charged, nor do we think that the *dictum* of the learned judge contains the implication suggested, inasmuch as, at p. 12 in the same judgment, CHANNELL, J., expressed his inclination to the view that a corporation could be convicted of an offence under sect. 3 of the same Act in which criminal intention or knowledge is an essential ingredient.

This view was adopted as the law in a subsequent case, *Chuter* v. *Freeth & Pocock, Ltd.* (3). In *Chuter* v. *Freeth & Pocock, Ltd.* (3) a limited company was charged before a magistrate under the Sale of Food and Drugs Act, 1899, s. 20 (6), with giving a purchaser of food a false warranty. The section contains a proviso to the effect that it is a defence to a charge under the section if the person charged proves that, when he gave the warranty, he believed that it was true. The magistrate, although of opinion that the evidence established the giving of a knowingly false warranty by the company's servant, dismissed the charge against the company on substantially the grounds contended for by the appellant in this case. The case came before a Divisional Court by way of case stated, where it was decided that the magistrate had taken too narrow a view of the law. LORD ALVERSTONE, L.C.J., in giving the judgment, in which the other two members of the court, PICKFORD and LUSH, JJ., concurred, said, at p. 836:

> There is no reason why a warranty should not be given by a corporation. It can give a warranty through its agents, and through its agents it can believe or not believe, as the case may be, that the statements in the warranty are true.

This passage, in our judgment, is directly in point on the question we have to decide.

In *Mousell's* case (2) it was held that a limited company was properly convicted of an offence under the Railway Clauses Consolidation Act, 1845, s. 99, of giving a false account with intent to avoid the payment of tolls, the basis of the decision (see *per* LORD READING, L.C.J., at p. 845, and ATKIN, J., at p. 846) being that in relation to that section there was no distinction between a limited company and a natural principal. In our judgment *Mousell's* case (2) does not determine the question we have to decide one way or the other, inasmuch as the construction that the court placed on that section of the Act of Parliament was that it made the principal criminally responsible for the act of the servant, irrespective of whether the principal was a natural or artificial person or had or had not present in his own mind the intention which was a necessary ingredient in the offence. *Mousell's* case (2) did not decide that under no circumstances a criminal intention in the mind of a servant or agent can be imputed to a principal who is a limited company.

The authority latest in date which the appellant cited in support of his contention was *R.* v. *Cory Bros. & Co.* (4), where FINLAY, J., on motion quashed an indictment against a limited company containing two counts, the first for manslaughter, which is a felony, and the second for an offence under the Offences Against the Person Act, 1861, s. 31, a statutory misdemeanour punishable with penal servitude. Both these offences can be punished on conviction with the infliction of a fine, the felony under the Offences Against the Person Act, 1861, s. 5, and the misdemeanour by common law. It appears from the report that the substantial argument addressed to the court was that the Criminal Justice Act, 1925, s. 33, had enlarged the category of offences for which a corporation could be indicted, a contention which, as we think rightly, the learned judge rejected, holding that the section merely dealt with procedure. The learned judge advanced no reasons of his own for quashing the whole indictment, simply expressing the view that he felt compelled by the authorities to which his attention had been called to decide as he did.

It is sufficient in our judgment to say that, inasmuch as that case was decided before the decision in *Director of Public Prosecutions* v. *Kent & Sussex Contractors, Ltd.* (5), and that *Chuter* v. *Freeth & Pocock, Ltd.* (3) was not cited at all, if the matter came before the court to-day, the result might well be different. As was pointed out by HALLETT, J., in the *Kent & Sussex Contractors'* case (5), at p. 157 ([1944] 1 All E.R., at p. 125), this is a branch of the law to which the attitude of the courts has in the passage of time undergone a process of development.

In support of the respondent's contention we were referred to a number of authorities. The earliest of these to which we think it necessary to refer is *Pharmaceutical Society* v. *London & Provincial Supply Assocn.* (6). The decision in that case, which was earlier than the Interpretation Act, 1889, was that the word " person " in the Act then under consideration did not include an incorporated company, but, at p. 869, LORD BLACKBURN said :

> But I may also say now, in order to avoid coming back to it, that I do not feel the least difficulty arising from what seems to have troubled some of the learned judges in the court below. If this word does include a corporation—I quite agree that a corporation cannot, in one sense, commit a crime—a corporation cannot be imprisoned, if imprisonment be the sentence for the crime ; a corporation cannot be hanged or put to death if that be the punishment for the crime ; and so, in those senses a corporation cannot commit a crime. But a corporation may be fined, and a corporation may pay damages ; and therefore I must totally dissent, notwithstanding what BRAMWELL, L.J., said, or is reported to have said, upon the supposition that a body corporate or a corporation that incorporated itself for the purpose of publishing a newspaper could not be tried and fined, or an action for damages brought against it for a libel ; or that a corporation which commits a nuisance could not be convicted of the nuisance or the like. I must really say that I do not feel the slightest doubt upon that part of the case. If you could get over the first difficulty of saying that the word " person " here may be construed to include an artificial person, a corporation, I should not have the least difficulty upon those other grounds which have been suggested.

The emphatic expression of opinion of LORD BLACKBURN that a limited company can be indicted and convicted for publishing a criminal libel was later accepted by the Court of Appeal in *Triplex Safety Glass Co.* v. *Lancegaye Safety Glass* (1934), *Ltd.* (7), where it was held that a limited company was entitled to object to answering an interrogatory on the ground that the answer would tend to incriminate it. As an actual condition of mind amounting to express malice may be an element in the offence of libel, it is plain that the Court of Appeal decided that, whatever the principle may be that fixes the line between those offences for which a limited company can and those for which it cannot be indicted, it is not the presence or absence in the human agent of a particular condition of mind. It would be unreasonable to suppose that a limited company can be indicted for a criminal libel only in cases in which express malice is not proved or that it could defeat a prosecution by proving that its duly authorised agent was in fact actuated by malice.

The latest authority is *Director of Public Prosecutions* v. *Kent & Sussex Contractors, Ltd.* (5). A limited company was charged with offences under the Defence (General) Regulations, which involved an intent to deceive. The justices dismissed the informations on the ground that a body corporate could not be guilty of the offences charged inasmuch as an act of will or state of mind which could not be imputed to a corporation was implicit in the commission of these offences. On a case stated to a divisional court this conclusion of law on the part of the justices was held to be erroneous and the case was remitted to them to hear and determine. It is clear that the state of mind involved was a dishonest state of mind, namely, an intention to deceive and that the state of mind was an essential element in the offence. There is a distinction between that case and the present, in that there the offences were charged under a regulation having the effect of a statute, whereas here the offence is a common law misdemeanour; but in our judgment this distinction has no material bearing on the question we have to decide.

At p. 151 Viscount Caldecote, L.C.J., said:

> The real point we have to decide . . . is whether a company is capable of an act of will or of a state of mind, so as to be able to form an intention to deceive or to have knowledge of the truth or falsity of a statement.

And after dealing with a number of authorities, he proceeds at p. 155:

> The offences created by the regulation are those of doing something with intent to deceive or of making a statement known to be false in a material particular. There was ample evidence, on the facts as stated in the special case, that the company, by the only people who could act or speak or think for it had done both these things, and I can see nothing in any of the authorities to which we have been referred which requires us to say that a company is incapable of being found guilty of the offences with which the respondent company was charged.

In his judgment in the same case Macnaghten, J., says, at p. 156, as follows:

> It is true that a corporation can only have knowledge and form an intention through its human agents, but circumstances may be such that the knowledge and intention of the agent must be imputed to the body corporate . . . If the responsible agent of a company, acting within the scope of his authority, puts forward on its behalf a document which he knows to be false and by which he intends to deceive, I apprehend that according to the authorities that my Lord has cited, his knowledge and intention must be imputed to the company.

With both the decision in that case and the reasoning on which it rests, we agree.

In our judgment, both on principle and in accordance with the balance of authority, the present indictment was properly laid against the appellant company, and the Commissioner rightly refused to quash.

We are not deciding that in every case where an agent of a limited company acting in its business commits a crime the company is automatically to be held criminally responsible. Our decision only goes to the invalidity of the indictment on the face of it, an objection which is taken before any evidence is led and irrespective of the facts of the particular case.

Whether in any particular case there is evidence to go to a jury that the criminal act of an agent, including his state of mind, intention, knowledge or belief is the act of the company, and in cases where the presiding judge so rules whether the jury are satisfied that it has been so proved, must depend on the nature of the charge, the relative position of the officer or agent and the other relevant facts and circumstances of the case.

It was because we were satisfied on the hearing of the appeals in this case that the facts proved were amply sufficient to justify a finding that the acts of Robarts, the managing director, were the acts of the company and the fraud of that person was the fraud of the company, that we upheld the conviction against the company, and, indeed, on the appeal to this court no argument was advanced that the facts proved would not warrant a conviction of the company assuming that the conviction of Robarts was upheld and that the indictment was good in law.

Appeal dismissed.

Solicitors: *Braby & Waller* (for the appellants); *Wilkinson, Howlett, Moorhouse* (for the Crown).

[*Reported by* R. Boswell, Esq., *Barrister-at-Law*].

GREENFIELD *v.* LONDON & NORTH EASTERN RAILWAY CO.

[King's Bench Division (Charles, J.), **May 11, 1944.**]

Emergency Legislation—Personal injury—Fatal injury to engine-driver by reason of bomb crater on track—" War injury "—Personal Injuries (Emergency Provisions) Act, 1939 (*c.* 82), *ss.* 3 (1), 8.

Negligence—Bomb crater on railway track—Engine-driver ordered to proceed—Fatal injury—" War injury "—Exclusion of right to damages for negligence—Personal Injuries (Emergency Provisions) Act, 1939 (*c.* 82), *ss.* 3 (1), 8.

A bomb dropped by enemy aircraft caused a crater on a railway track belonging to the defendants. An engine-driver in the service of the defendants was, at the time, driving a train at some distance away. There was an interruption of traffic control, but it was not known what exactly had happened. The engine-driver was instructed by the defendants' control office to " proceed cautiously and be prepared to stop clear of any obstruction." It was quite dark at the time. The engine-driver obeyed the instructions given him, with the result that the engine fell into the bomb crater and the engine-driver was fatally injured. It was contended on behalf of the plaintiff, the administratrix of his estate, that the injury was caused by the negligence of the defendants or of one of their servants. On behalf of the defendants it was contended that this was a " war injury " within the meaning of the Personal Injuries (Emergency Provisions) Act, 1939, s. 8, and, therefore, by sect. 3 thereof damages for negligence were not recoverable :—

Held : the injury to the deceased engine-driver was a " war injury " within the meaning of the Personal Injuries (Emergency Provisions) Act, 1939, s. 8, and, therefore, by reason of sect. 3 thereof, the plaintiff was unable to recover in this action.

[**EDITORIAL NOTE.** This case involves first the difficult question whether there was a " war injury " within the meaning of the Act of 1939, in which the principal question is whether there was any intervening negligence on the part of the railway servants in allowing the train to go forward. The other question is whether damages for negligence are excluded by the Act of 1939 and in this the court has followed what was said in *Taylor* v. *Sims & Sims* (2).

For the Personal Injuries (Emergency Provisions) Act, 1939, s. 3, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, p. 1061.]

Cases referred to :

*(1) *Yorkshire Dale Steamship Co., Ltd.* v. *Minister of War Transport,* [1942] A.C. 691 ; [1942] 2 All E.R. 6 ; 111 L.J.K.B. 512 ; 167 L.T. 349.

*(2) *Taylor* v. *Sims and Sims,* [1942] 2 All E.R. 375 ; 167 L.T. 414.

(3) *Smith* v. *Davey, Paxman & Co.* (*Colchester*), *Ltd.*, [1943] 1 All E.R. 286 ; 36 B.W.C.C. 60.

Action for damages for negligence brought under the Fatal Accidents Acts, 1846-1908, and the Law Reform (Miscellaneous Provisions) Act, 1934. The plaintiff is suing as administratrix of the estate of her deceased husband. The facts are fully stated in the judgment.

F. W. Beney, K.C., and *W. A. L. Raeburn* for the plaintiff.

G. Justin Lynskey, K.C., and *J. Alun Pugh* for the defendants.

Charles, J. : In this case Alice Maud Greenfield, a widow, suing as the administratrix of the estate of William George Greenfield, brings action against the London and North Eastern Ry. Co. for damages sustained by reason of the death of her husband, upon whom she was almost totally dependent. The action is brought under the Fatal Accidents Acts, 1846-1908, and also under the Law Reform (Miscellaneous Provisions) Act, 1934.

It is a case which involves once more the consideration of an Act which, as I said in a previous case, is a little difficult to construe, which was passed almost directly this present war broke out or was entered upon, and is called the Personal Injuries (Emergency Provisions) Act, 1939, and deals with what are described as " war injuries " and the way in which they should be dealt with.

The circumstances of the case are, I think, sufficiently set out in the pleadings, to which I will refer :

On Mar. 3, 1943, at or about 9.45 p.m., it then being totally dark on the railway track belonging to the defendants between Shenfield and Ingatestone, in the county of

> Essex, the deceased was fatally injured when a railway engine that he was then driving for the defendants in obedience to their instructions on the said track overturned in an existing bomb crater which had been caused by the falling of an enemy bomb that exploded at or about 9.10 p.m. several miles away from the point on the line at which the deceased was driving at the moment when the said bomb exploded, the deceased having no reasonable opportunity of avoiding such accident. The deceased was fatally injured as aforesaid in consequence of the negligence of the defendants or of one Arthur Edwards (a chief clerk in the office of the traffic superintendent in the employ of the defendants) under whose supervision the control office of the defendants operated.

Those are the circumstances; and the defendants quite freely admit that they, by one of their servants, as indicated in the statement of claim, were guilty of negligence, that is to say, that they did what a prudent person would not do, or failed to do that which a prudent person would do. If nothing else intervened, there would be an end of the case in favour of the plaintiff in her action against the railway company under Lord Campbell's Act and also under the Law Reform (Miscellaneous Provisions) Act, 1934.

The defendants, however, take up this position. They say: "Assuming that we were negligent, or that we admit it, yet we cannot be called upon to pay damages for that negligence, by reason of the Personal Injuries (Emergency Provisions) Act, 1939"; and it is a consideration of sect. 3 of that Act to which I have to apply myself, as other courts have had to apply themselves, and it is a difficult section to construe. It is a section, in my view, which can only be construed by a close adherence to and examination of the circumstances of the actual case which is being tried and is then before the court. However, there are an infinite variety of occasions to which sect. 3 of that Act may or may not apply, a variety so great as possibly to cause an apparent divergence in the decisions of the courts. Let us then consider what that section says:

> (1) In respect of a war injury sustained during the period of the present emergency by any person . . . no such compensation or damages shall be payable, whether to the person injured or to any other person, as apart from the provisions of this subsection (*a*) would be payable under the Workmen's Compensation Acts, 1925 to 1938, or the Employers' Liability Act, 1880, or any corresponding enactment of the Parliament of Northern Ireland; or (*b*) would, whether by virtue of any enactment, by virtue of any contract, or at common law, be payable (i) in the case of a war injury, by any person . . . on the ground that the injury in question was attributable to some negligence, nuisance or breach of duty for which the person by whom the compensation or damages would be payable is responsible.

First, let it be observed that that section anticipates some possible negligence which may occur, and clearly says, as I think, that in spite of that negligence the recovery of compensation must be in the way indicated by this Act of Parliament and not by action at common law against the person who is guilty of the negligence. The method of compensation is compensation by the Minister, who can make, and has made, a schedule showing the allowances and pensions in respect of certain war injuries and war service injuries, so that it does not mean to say that a wife and children, left a widow and fatherless by an accident, are to be deprived of compensation, but only that, where the accident is caused by a war injury—and I will refer to the definition of that in a moment—the Minister makes the payment, and the action is not brought against the person to whose negligence, possibly, it may be said that the accident is due.

Now, what are war injuries? They are defined in sect. 8:

> . . . "war injuries" means physical injuries (*a*) caused by (i) the discharge of any missile (including liquids and gas); or (ii) the use of any weapon, explosive or other noxious thing; or (iii) the doing of any other injurious act; either by the enemy or in combating the enemy or in repelling an imagined attack by the enemy; or (*b*) caused by the impact on any person or property of any enemy aircraft, or any aircraft belonging to, or held by any person on behalf of or for the benefit of, His Majesty or any allied power, or any part of, or anything dropped from, any such aircraft.

In this case what happened was this. At 9.10 p.m. a bomb was dropped on the track at a point some miles away from where the plaintiff's husband, now deceased, was. He was the engine-driver. There was at once an interruption of traffic control, which showed that something was wrong, not necessarily that a bomb crater was there, but that something was wrong. That was communicated to the proper servants of the railway company, and they put into force r. 19 of the rules laid down by the defendants in a book called "Air

Raid Precautions," which says :

> A driver must be informed of the circumstances and instructed to proceed cautiously and be prepared to stop clear of any obstruction.

It is said that the deceased never ought to have been allowed to go forward at all unless and until it was ascertained that the damage that had interrupted the traffic control had been caused by a bomb crater in the line or a dislocation of the line which would prevent the passage of a train. Unfortunately, the authorities, having before them that rule, which is not sufficiently wide, instructed this driver to proceed cautiously and in accordance with the rule, so as to be prepared to stop clear of any obstruction. I am confident that he did proceed cautiously, but, cautiously as he did proceed, nevertheless he arrived in the darkness at a bomb crater, which, of course, was then undiscovered and unlighted, and his engine tumbled into the crater. So cautiously was he going that not a single passenger was injured ; but he and his fireman were both killed, being upon the engine.

What caused that accident ? It is said by counsel for the plaintiff that it was clearly caused by the improper and negligent action of the railway company's officials in allowing the driver to proceed at all ; and he quoted *Yorkshire Dale Steamship Co., Ltd.* v. *Minister of War Transport* (1), and said that VISCOUNT SIMON, L.C., there said quite clearly that in order to ascertain what was the cause of the injury, it was the duty of the judge to find the direct and effective cause. That was a different case because it concerned the stranding of a ship which it was alleged had been forced into a deviation from its course so that it got into a tideway which put it ashore and so into a position where it would not otherwise have been had it not been for the orders given to alter the course by the officer who was in command of the convoy. VISCOUNT SIMON, L.C., said, at pp. 697, 698 ([1942] 2 All E.R. at pp. 9, 10) :

> No misfortune could be more marine in its nature than this, but the question here is not whether this was a marine risk, but whether . . . this stranding is not to be regarded as " the consequence of warlike operations." That, in my opinion, depends on whether, in the practical sense in which a policy of insurance must be interpreted and applied, the " dominant " or " determining " cause of the disaster was warlike operations. The interpretation to be applied does not involve any metaphysical or scientific view of causation. Most results are brought about by a combination of causes, and a search for "*the* cause" involves a selection of the governing explanation in each case. It seems to me that there is no abstract proposition, the application of which will provide the answer in every case, except this : one has to ask oneself what was the effective and predominant cause of the accident that happened, whatever the nature of that accident may be. It is well settled that a marine risk does not become a war risk merely because the conditions of war may make it more probable that the marine risk will operate and a loss will be caused. It is for this reason that sailing without lights, or sailing in convoy, are regarded as circumstances which do not in themselves convert marine risks into war risks, but where the facts, as found by the judge, establish that the operation of a war peril is the " proximate " cause of the loss in the above sense, then the conclusion that the loss is due to war risk follows.

I have to consider in this case what was the dominant, effective or proximate cause, whichever word may seem in the circumstances to be the most appropriate. Have I any guidance by other cases ? There are cases in which this section has been considered, one particularly by LEWIS, J., in 1942, *Taylor* v. *Sims and Sims* (2). Inasmuch as it was one of the bases of the decision of LEWIS, J., I think it would be proper that I should read what he said concerning this particular section. At p. 380, he said :

> There only remains the very interesting point under the Personal Injuries (Emergency Provisions) Act, 1939, s. 3 (1) . . . In my view that means that where a person sustains a war injury during the period of the present emergency, he cannot recover compensation or damages from a person on the ground that his injury was attributable to that person's negligence. I think I am reinforced in that opinion by what counsel for the plaintiff and counsel for the defendants, I think, both said. I think that is the meaning of the section. Then, of course, you have to discover what is a war injury. A war injury does not mean every injury that anybody sustains during the war. If you are run over by a bus in broad daylight during the war, it does not mean that you are suffering a war injury. The legislature has been careful to define a war injury in sect. 8 of the Act in these words . . . Now, if such an injury caused by impact or one of those things mentioned in the section which I have first read out causes physical injury to a person, that is a war injury, and although I think that difficult questions

may arise under the section, I think it is sufficient to say that in this case the injury which this man received was an injury caused by the impact of something dropped from an aeroplane on the property. That is to say, that, as a result of this explosion of a bomb on May 10, and for this purpose I say quite frankly I consider blast as impact—I think that property was so damaged by something dropped from an aeroplane within the meaning of the section and that the plaintiff received his injuries as a result of that. I, therefore, think that this was a case of a war injury sustained within the meaning of the section and, therefore, for that reason alone this man is unable to A recover.

There was a case in the Court of Appeal to which my attention was drawn, *Smith* v. *Davey, Paxman & Co.* (*Colchester*), *Ltd.* (3), but it is a case, I think, which does not come very close to this one, and is not of any very great assistance to me. In that case there definitely was no causal *nexus* between the enemy act and the final effective injury, because there a shell had been found and then passed from hand to hand, going through, as SCOTT, L.J., said, "a series of B fortuitous interventions by curious boys or men acting for their own purposes," and so the injury would be outside the ambit of this section altogether. As I say, it is a case which does not assist me very much, because here the whole thing, the whole happening, is in a very small compass.

Here there is the explosion of a bomb some miles down the line, and just over half an hour later an accident happens, a man having been directed to C creep cautiously along the line with his engine. I have come to the conclusion that this accident, in spite of the fact that there were shortcomings on the part of the servants of the railway company, who perhaps should not have sent the train along at all, none the less resulted in war injuries, which, in the sense that I have indicated, and in the sense indicated by VISCOUNT SIMON, L.C., in *Yorkshire Dale Steamship Co., Ltd.* v. *Minister of War Transport* (1), were injuries actually caused by the dropping of a bomb by the enemy upon the D railway track so as to cause the crater into which the engine slipped.

These cases are not easy to decide. As I said in another case that I tried before, which had some special circumstances, it is an Act which was passed in a hurry almost directly the war broke out, and there have been, are, and will be, cases which sometimes are very near the line and which are difficult for any judge to decide, and concerning which different judges might very well take different views.

E In this case, as I say, I have come to the conclusion that this is a war injury which is governed by the Personal Injuries (Emergency Provisions) Act, 1939, s. 3, and the plaintiff's action fails.

It is to be observed that the railway company apparently took that view from the beginning, because the day after the death of the plaintiff's husband, the railway company gave notice, as they are bound to do, to the Ministry of F Pensions of the happening, and the Ministry of Pensions, again in accordance with their duty, at once and without delay, and upon that very day, sent down one of their representatives to the widow to enquire into her circumstances and to enquire into whether or not she needed any immediate help, and, having so enquired, assigned to her, under the scheme drawn up under this Act which I am considering, the sum of £2 10*s.* a week for thirteen weeks, and then £1 5*s.* as a life pension, which has since been increased to £1 6*s.* 8*d.* as a life pension, G and she has been receiving that ever since. Let me hasten to say that the reception of that would in no way, in my judgment, preclude her from suing here, for she had no advice and could not be said to have made any election. But it is a fact that those sums have now been paid over a considerable period—up to the present day, as I understand—by the Ministry, under this scheme set up under the Act.

H *Judgment for the defendants.*

Solicitors: *Kenneth Brown, Baker, Baker* (for the plaintiff); *W. H. Hanscombe* (for the defendants).

[*Reported by* R. BOSWELL, ESQ., *Barrister-at-Law.*]

RODWELL *v.* THOMAS AND OTHERS.

[King's Bench Division (Tucker, J.), **April 4, 1944.**]

Constitutional Law—Crown servants—Dismissal—Whether matters agreed by National (Whitley) Council incorporated as term of service—Dismissal at pleasure by the Crown.

The plaintiff was a civil servant holding an appointment with the Tithe Redemption Committee. In June, 1940, he was seconded to the Air Ministry. On Jan. 18, 1943, the Commission sent the plaintiff a letter which informed him that he was suspended from duty pending an inquiry of an accusation of grave misconduct made against him. The plaintiff denied the charge in writing and subsequently presented his case orally. The Commission however, considered that the charge had been made out and the plaintiff's appointment was terminated. The plaintiff brought an action against the Commissioners personally and also against the Commission as such claiming *inter alia* damages for wrongful dismissal. On behalf of the plaintiff it was contended that the procedure adopted for hearing the plaintiff's case was contrary to that expressly agreed at a meeting of the National (Whitley) Council between representatives of the Crown, the Treasury and representatives of the civil service, and which was set out in a Treasury circular and was impliedly incorporated in his contract of service:—

Held: (i) the procedure adopted for hearing the plaintiff's case was not a breach of his conditions of service.

(ii) the matters settled between the various parties at the National (Whitley) Council are not necessarily incorporated in a civil servant's term of employment.

(iii) a Crown servant may be dismissed at pleasure, and any contract providing for his employment for a specified time or that the employment can only be terminated in certain ways is a clog upon the power of the Crown to dismiss at pleasure.

[**EDITORIAL NOTE.** Collective bargaining is a common feature of private employment and it has been held that an agreement come to by representative bodies becomes an essential term of the contract of service. This, however, is held not to apply to service under the Crown, where service is always at His Majesty's pleasure.

As to Tenure of Office of Crown Servants, see HALSBURY, Hailsham Edn., Vol. 6, pp. 608, 609, para. 782; and for Cases, see DIGEST, Vol. 11, pp. 505-507, Nos. 76-89.]

Action by a civil servant against the Tithe Redemption Commission as such and against the members personally for damages for wrongful dismissal. The facts are fully set out in the judgment.

J. Platts Mills for the plaintiff.

Valentine Holmes for the defendants.

Tucker, J.: This action, claiming certain injunctions and declarations and damages for wrongful dismissal, arises in this way. Rodwell was for a number of years an established civil servant. He was employed for some time at the Board of Agriculture. From there he was transferred to the Tithe Redemption Commission shortly after that body had been brought into existence, as it was, by the Tithe Act, 1936. Sched. 2 of that Act deals with the staff, procedure and expenses of the Commission and provides as follows:

6. The functions of the Commission, and of the officers and servants of the Commission, shall be exercised on behalf of the Crown.

8. The Commission may sue and be sued, and may for all purposes be described, by the name of "The Tithe Redemption Commission."

11. The Commission may appoint such secretaries and other officers, and such servants, as the Commission may, with the consent of the Treasury, determine.

12. There shall be paid to the Commissioners, and to any person appointed under para. 2 of this Schedule to discharge the duties of a commissioner and to any such secretaries, officers and servants as aforesaid such remuneration as, in the case of the commissioners and of any person appointed as aforesaid, the Treasury, or, in the

case of any other person, the Commission with the approval of the Treasury, may determine.

Having taken up his duties with the Tithe Redemption Commission, the plaintiff worked there until June, 1940, when he was lent or seconded to the Air Ministry. On Jan. 18, 1943, he was returned by the Air Ministry to the Tithe Redemption Commission and on that day he was suspended from duty. He was ultimately dismissed by a letter of Feb. 22, which ante-dated his dismissal in effect back to Jan. 18, the day when he had been suspended.

The matter arose in this way. An accusation had apparently been made against the plaintiff whilst at the Air Ministry that he had been guilty of grave misconduct. That accusation having been made against him, on Jan. 18, a letter was sent from the establishment officer of the Tithe Redemption Commission confirming what he had been told verbally, that it was necessary for the Commission to make enquiries as to the circumstances in which he had been returned to the Commission before he could resume duty and, in the meanwhile, he was suspended. On Jan. 26 a letter was written to him telling him that the charge was now made against him. He was sent the enclosure to Treasury circular No. 12/35. The last paragraph of the letter said:

> You are accordingly required to submit a written reply to this charge, and thereafter, if you so desire, you will be permitted to make representations orally at a date and time which will be notified after your written reply has been considered.

The enclosure to that letter sets out this Treasury circular enclosure which I will refer to in more detail hereafter. The plaintiff said he would submit a written reply on receipt of a written statement defining the charge and setting out the particulars and facts relied upon in support of the charge. He was told the charge had been already sufficiently indicated to him and, finally, on Feb. 2, he sent quite a long letter setting out his version of the matter which amounted to a complete denial.

That letter was acknowledged, and he was told that if he wished, as there was a conflict of evidence between the charge and his reply, he could present his case orally. He did so desire and, finally, he was asked to attend at the office of the Tithe Redemption Commission, on Feb. 19, 1943. He had with him G. F. Green, the assistant secretary of the Civil Service Clerical Association, of which body Rodwell was a member. When he got there he was told before he was asked any questions that there was no intention to take criminal proceedings against him and that he was not bound to answer any of the questions which were put to him, but of course, if he did not, the Commission might be compelled to draw inferences adverse to him. After having been told that, he gave his explanation and was questioned and, ultimately, by a letter of Feb. 22, it was intimated to him that he had been dismissed. The letter runs:

> After considering the representations you made when you attended this office with Mr. G. F. Green on Feb. 19, 1943, the Commission have come to the conclusion that the charge of grave misconduct, as stated in the memoradum of Jan. 26, 1943, has been made out. They regret that there is no alternative but to dispense with your services and your appointment is, therefore, terminated. No salary will be paid to you in respect of the period from Jan. 18 when you were suspended.

That having happened, Rodwell brings this action. He says that his employment has been wrongfully terminated by that procedure and by that letter and, besides asking for damages, he asks for an injunction restraining the defendants from acting or purporting to act upon the enclosure to the Treasury circular, an injunction restraining the defendants:

> . . . from acting or purporting to act upon a pretended presentation and hearing of a case against the plaintiff on Feb. 19, 1943, and a pretended consideration thereof on or before Feb. 22, 1943, and the pretended termination of the plaintiff's appointment by letter dated Feb. 22, 1943. (*c*) A declaration that the charge contained in the letter dated Jan. 26, 1943, aforesaid is a charge which may give rise to criminal proceedings. (*d*) a declaration that the pretended presentation of the case and hearing of the case held by the Commission on Feb. 19, 1943, was irregular and invalid and contrary to the provisions of Treasury circular No. 12/35 and its enclosure and is not binding upon the plaintiff and that the defendants and each of them were and are not entitled to dismiss the plaintiff from their employment or from his appointment under the said Commission either pursuant to the pretended hearing of the case on Feb. 19, 1943, or pursuant to the letter of Feb. 22, 1943, pretending to dismiss the plaintiff.

The claim is based upon a breach by the defendants of an implied term of the plaintiff's employment.

Para. 3 of the statement of claim says :

> It was a term of the plaintiff's employment or appointment with the Tithe Redemption Commission as set out in the enclosure to Treasury circular No. 12/35 that if any serious disciplinary charge were brought against the plaintiff which was of a kind which might give rise to criminal proceedings then the Tithe Redemption Commission was not entitled to adopt any procedure of its own to investigate such charge.

Then particulars were given of the agreement relied upon under para. 3 and that is put in this way :

> The term alleged was expressly agreed orally as a term or condition of employment between the representatives of the Crown and of His Majesty's Treasury and the duly appointed representatives of the staff on behalf of the plaintiff (as an established civil servant) at a meeting of the National (Whitley) Council held on or about Mar. 8, 1935, and of which Council the said representatives are members.

Then it goes on to say that :

> On the coming into existence of the defendant Commission and the appointment of the defendant Commissioners to the said Commission they became subject to the agreements and conditions made and agreed by the Crown and the Treasury as members of the said National (Whitley) Council. The established civil servants of whom the plaintiff was one, who were transferred to or appointed to serve with or were employed by the defendants were so transferred, appointed or employed subject to the like agreements and conditions.

It is necessary for the purposes of this case to see how the enclosure to the Treasury circular which is referred to came into existence. There was a Royal Commission on the conditions of the civil service ; and that Royal Commission made a report. Then the Whitley Council, which was a body which had been established for settling matters in dispute between the Crown and civil servants as to the terms of employment and so forth, met and considered certain recommendations of this Royal Commission. The report or findings of the Whitley Council on this matter have been put in evidence and they appear as an enclosure to this Treasury letter. This is the finding of this body set up by the Government and the civil servants to settle matters between the two of them in regard to employment :

> We have noted paras. 598-601 of the report of the Royal Commission. As regards the recommendations in paras. 602-603 of their report on the subject of the procedure to be followed in cases where a serious disciplinary charge is brought against an established civil servant, e.g., where the penalty may be dismissal, the Committee agree to the adoption of the following procedure : (*a*) When a charge of this kind [that is to say a serious disciplinary charge where the penalty may be dismissal] (other than one which may give rise to criminal proceedings) is brought against an officer, he should be given, in advance, a written statement defining the charge and setting out particulars of the facts relied upon to support the charge ; (*b*) the officer should be required to submit a written reply to the charge made against him, but in cases where there is a conflict of evidence between the charge and the officer's written reply the officer may, if he so desires, represent his case orally ; (*c*) the officer, in such circumstances, will have the right to represent his case orally before a suitable officer of his department other than his immediate superior. In the case of departments with large provincial staffs this officer would necessarily often be a local officer and not an officer from headquarters ; (*d*) in representing his case orally the officer should be allowed, if he so desires, to have the assistance of a friend or colleague (who may be an Association representative) present with him.

Then the document goes on as follows :

> We appreciate that undue formality is undesirable in conducting these enquiries and that no one standardised practice would be applicable in all cases. We also desire to make it clear that in recommending the above principles of procedure we have no intention of impairing the responsibility of heads of departments in dealing with disciplinary questions, or of affecting any existing right of ultimate appeal to the head of a department.

That being the recommendation or agreed finding of the Whitley Council, the matter was circulated to departments by the Treasury on May 22, 1935, with this covering letter :

> Sir, I am directed by the Lords Commissioners of His Majesty's Treasury to transmit herewith an extract from the report of a joint committee of the National Council for the Administrative and Legal Departments of the Civil Service (Committee "C") which was appointed to consider certain matters dealt with in the report of the Royal Commission on the civil service 1929-1931 (Cmd. 3909 of 1931). It will be observed that the

report, while recommending certain principles of procedure for dealing with serious disciplinary charges, makes it clear that the responsibility of heads of departments in this matter is unimpaired and that any existing right of ultimate appeal to the head of a department is unaffected. My Lords suggest that the procedure outlined in the attached extract should, as far as practicable, be followed in dealing with serious disciplinary charges (other than charges which may give rise to criminal proceedings) against established civil servants.

It is said that in this case this particular charge is one which might give rise to criminal proceedings because it states facts which must amount to larceny or embezzlement by a clerk or servant and that that being so, whether or not criminal proceedings are in fact actually taken, the procedure laid down in this Treasury letter and enclosure is not only inapplicable to such a case but that, if the department concerned applies this procedure to such a case, they are breaking the terms of the contract between themselves and the civil servant. The result of this circular and this finding of the Whitley Council appears to be that a specific form of procedure is laid down and recommended in certain cases, namely, those which may not give rise to criminal proceedings; but in dealing with charges of a kind which may give rise to criminal proceedings there is apparently no recommendation laid down at all as to what the appropriate procedure to be followed in such a case is.

It is conceded by counsel for the plaintiff here that a civil servant can at any time be dismissed at the pleasure of the Crown at a moment's notice and that for that he has no remedy whatever the grounds may be which have brought about his dismissal. That being the position, it seems to me that where it is proposed to dispense with the services of a civil servant forthwith or where there are facts which may be likely to bring about that result, even if they may involve a criminal charge, none the less it is only fair, right and reasonable that the man concerned should be given some opportunity of presenting his side of the case before he is dismissed. Nobody suggests that in these cases a man has always got to be prosecuted and, as the Whitley Council and the Treasury are silent as to what is the proper procedure to be followed in such cases, it seems to me to rest with the discretion of the officials in any particular case as to what method they will adopt in order to give a man a reasonable opportunity of presenting his case. I quite fail to see how it can be said that, if they apply this other procedure, which it is perfectly true was framed to meet a different case, they are in any way breaking their contract. Assuming it to form part of the contract between the civil servant and the department, I cannot read into these provisions anything to the effect that they may not be used and adapted to meet other cases where the department consider it fair to make some inquiry. Therefore, I think this case fails at the outset, because assuming these provisions to be contractual, I am unable to see that there has been any breach.

Having regard to the argument addressed to me by counsel for the plaintiff, I think it is only right to consider whether they can be considered to form part of the contract between the parties. By "contract" is meant, of course, a legally binding contract which will give the civil servant the right of access to a court of law to enforce compliance with any one of the provisions contained therein. It is not suggested that there was at any time—at any rate there has not been shown to me—any written contract which established the terms of this particular man's employment when he was engaged or at any other time, but it is said because the members of the trade union representing him have been parties to this Whitley Council agreement that gives him the right to come to a court of law and say: Every one of the findings of that committee must be considered as part of the terms of my employment for breach of any one of which I am entitled to have access to the courts. It is well-known that it has been found convenient to settle these matters with regard to conditions of employment and so forth by representative bodies of civil servants, but I am at a loss to understand how every matter which is disposed of by give and take in that way can be incorporated into the civil servant's terms of employment so as to give him a cause of action for deviation from any one of those terms and conditions. I, therefore, think that counsel for the plaintiff has not got within measurable distance of establishing that this Treasury circular is a contractual document forming part of the plaintiff's employment by the Tithe Redemption Commission.

I think there would be further difficulty in this particular case in the plaintiff's way in succeeding in this action in regard to any of the forms of remedy which he seeks, namely, that the authorities show not only that generally speaking a civil servant can be dismissed at pleasure, but that the court will disregard any term of his contract, however clear, which expressly provides for employment for a specified period or that such employment can be terminated only in a specified manner. The court will regard any such provisions in a contract as clogs on the Crown's right to dismiss at pleasure at any time. I think that this action being in substance one in which the contention is that the plaintiff has been wrongly dismissed and alleging in effect that the procedure adopted has been ineffective legally to terminate his employment and was wrongly adopted, and claiming relief founded on such allegations, does amount to an attempt to interfere with the right of the Crown to dismiss at any time for any reasons stated or unstated. It seems to me that when they wrote this letter on Feb. 22, dismissing the plaintiff, there was an end of the matter altogether, and that letter must have had the result of terminating and of properly terminating the plaintiff's employment, whether or not it is founded upon this preliminary inquiry. To attempt to get behind that matter and to invite the court to hold that it had not achieved its object would be in effect asking the court to interfere with, or put a clog upon, the Crown's power to dismiss at pleasure.

For these reasons I think that this action fails, and there must be judgment for the defendants with costs.

Judgment for the defendants with costs.

Solicitors: *Bracewell & Leaver* (for the plaintiff); *Official Solicitor, Tithe Redemption Commission* (for the defendants).

[*Reported by* R. Boswell, Esq., *Barrister-at-Law.*]

SAFFORD *v.* SAFFORD.

[Court of Appeal (Lord Greene, M.R., MacKinnon and Luxmoore, L.JJ.), **May 3, 4, 26, 1944.**]

Divorce—Incurable unsoundness of mind—"Person under care and treatment"—Respondent "absent on trial"—Whether detention discontinued—Detention a status rather than a physical fact—Lunacy Act, 1890 (*c.* 5), *ss.* 55, 275—*Matrimonial Causes Act,* 1937 (*c.* 57), *s.* 3.

A wife petitioned for divorce on the ground that her husband was incurably of unsound mind and had been continuously under care and treatment for at least five years immediately preceding the presentation of the petition. It was proved that the respondent while detained in an institution under the Lunacy and Mental Treatment Acts, 1890-1930, had been allowed leave under the provisions of sect. 55 of the Lunacy Act, 1890, and had stayed with his father on two separate occasions for about six weeks in all during the relevant period. It was contended that the period of "detention under care and treatment" had not been "continuous" in view of his visits to his father:—

Held: (i) absence on leave authorised by sect. 55 did not interrupt the period during which the respondent had been under care and treatment and, on the facts, he had been continuously under care and treatment for a period of five years and the appellant was entitled to a decree *nisi.*

(ii) detention is to be regarded rather as a status than as the physical fact of being kept in an institution.

[**EDITORIAL NOTE.** It had been held that the words "under care and treatment" must be strictly construed and that persons allowed out on leave for any other than the short period of 4 days under the Lunacy Act, 1890, s. 275, were not continuously under care and treatment. The Court of Appeal have overruled this decision and have stated that detention is a status rather than a physical fact. While the detention order remains in force, the patient can be recalled to the institution and is "under care and treatment" for the purposes of the Act of 1937.

As to Divorce on Ground of Insanity, see HALSBURY, Supp. Divorce, para. 981.]

Cases referred to:

*(1) *Shipman* v. *Shipman*, [1939] P. 147; [1938] 4 All E.R. 732; Digest Supp.; 108 L.J.P. 69; 160 L.T. 299.

*(2) *Green* v. *Green*, [1939] P. 309; [1939] 3 All E.R. 89; Digest Supp.; 109 L.J.P. 3; 161 L.T. 253.

(3) *Re Fleet Prison* (1824), 2 Bing. 163.

Appeal by the petitioner from a decision of Lord Merriman, P., dismissing a wife's petition on the ground of incurable unsoundness of mind. The facts are fully stated in the judgment of Lord Greene, M.R.

H. B. Durley Grazebrook, K.C., and *D. Tolstoy* for the appellant.

E. Holroyd Pearce and *J. G. P. Comyn* for the respondent.

Lord Greene, M.R.: By the Supreme Court of Judicature Act, 1925, s. 176 (the new section substituted for the original by the Matrimonial Causes Act, 1937, s. 2) a petition for divorce may be presented on the ground that the respondent is:

> . . . incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition.

By sect. 3 of the last mentioned Act a person of unsound mind is to be deemed to be under care and treatment:

> . . . (*a*) while he is detained in pursuance of any order or inquisition under the Lunacy and Mental Treatment Acts, 1890 to 1930 . . . and not otherwise.

The appellant petitioned for divorce from her husband alleging that (as Lord Merriman, P., held) he was incurably of unsound mind and that he had been continuously under care and treatment for the statutory period. She alleged continuous detention under the Lunacy and Mental Treatment Acts at the East Riding Mental Hospital, at Beverley, pursuant to a reception order made on Dec. 7, 1937. The order was in the usual statutory form for a rate-aided person. It certified that the respondent was a person of unsound mind and was a "proper person to be taken charge of and detained under care and treatment," and directed the superintendent of the hospital to receive him as a patient. The order was still in force at the date of the presentation of the petition pursuant to the Lunacy Act, 1896, s. 37 (4), as amended by the Lunacy Act, 1891, s. 7.

From the date of the reception order down to the presentation of the petition the respondent remained at the hospital save for certain periods of absence. These periods fall under two classes. Under the powers conferred by the Lunacy Act, 1890, s. 275 (5), and regulations made thereunder, the respondent was granted leave of absence by the medical superintendent on 19 occasions amounting in all to 43 nights. Of these occasions, five were for three successive nights and 14 were for two successive nights. The maximum period allowed by the subsection is four days. All these periods of absence were spent by the respondent at his father's house. The other class consisted of absence on trial permitted by two visitors of the hospital with the advice in writing of the medical superintendent under sect. 55 (1) of the Act. There were two leaves of absence granted in this way, one in 1942, which lasted for two weeks and one day, and the other, later in the same year, which lasted for six weeks and three days, some eleven days less than the period for which leave had been granted. On each of these occasions the respondent was under the control of his father, who promised to keep him under observation and to report from time to time as to his condition to the medical superintendent. The father duly carried out this promise. On the second occasion he brought the respondent back to the hospital before the expiration of the period of absence owing to his condition. He did so pursuant to instructions given to him when the leaves of absence were granted. Lord Merriman, P., dismissed the petition on the ground, putting it shortly, that the two last-mentioned absences constituted an interruption of the detention which is required to exist during the statutory period. The absences of the first class he considered might be disregarded under the principle of *de minimis*. In taking this view he followed previous decisions of his own. Before considering these decisions and that in the present case, it will be convenient to make my own examination of the relevant statutory provisions.

Under the Supreme Court of Judicature Act, 1925, s. 176, in its present form, so far as it applies to the present case, "detention" pursuant to an order under the Lunacy Act, 1890, is made the sole test of the continuous "care and treatment" which has to be established. In using the phrase "care and treatment" and "detention" the legislature clearly had in mind the language of the Lunacy

Act, 1890, in which both those phrases often appear, and, what is more important, often appear in collocation. Neither of them is defined in the Lunacy Act, 1890, and their meaning is to be ascertained by considering the Act as a whole. Examples of the collocation of the two phrases are to be found in sect. 11, under which an urgency order may be made for the reception and detention of an alleged lunatic where it is expedient that he be forthwith placed under care and treatment; in sect. 13 (2), where the phrase appears "a proper person to be taken charge of and detained under care and treatment"; and the same phrase appears in the statutory forms: see Form 8 (the form of the certificate of the medical practitioner) and in particular Forms 12 and 15, which are the forms of reception orders. Thus the reception order itself is based on the justice's certificate that the lunatic is a proper person to be detained under care and treatment. Care and treatment are the object of the detention. When the detention comes to an end, care and treatment come to an end; when care and treatment are no longer required, the detention is brought to an end by discharge.

The part of the Act which is concerned with care and treatment is Part II, which is headed "Care and Treatment." Part II is subdivided under a number of sub-headings relating to care and treatment, one of which is "Absence on Trial or for Health." It is under this sub-heading that sect. 55 is found. This appears to me to be a matter of crucial significance for the decision of this appeal. Section 55 provides for three classes, namely, absence on trial under subsects. (1), (3) (*b*) and (6), the sending or taking of a private patient to a specified place for the benefit of his health under subsect. (3) (*a*); and under subsect. (7) absence (not for any specified purpose) for a period not exceeding 48 hours by permission of the medical officer of a hospital or licenced house. It seems to me to be clear that all these absences are treated by the legislature not as an interruption of the care and treatment with which Part II is dealing but as part of the care and treatment. They are methods of taking care of and treating the patient and obviously are or may be highly beneficial when the circumstances are such as to make them justifiable. If these absences are not interruptions of but methods of providing care and treatment, and if I am right in thinking that detention is for the purpose of care and treatment, it must, I think, follow that they ought not to be regarded as interruptions of the detention. Detention is, I think, a matter so to speak of status during the existence of which certain methods of care and treatment are prescribed. If this view is right, detention is not interrupted by the application of these methods.

That detention is to be regarded rather as a status than as the physical fact of being kept under lock and key is, I think, confirmed by a consideration of certain other provisions of the Act. As Luxmoore, L.J., pointed out during the argument, under sect. 116 (1) the powers and provisions of Part IV of the Act relating to management and administration apply to "every person lawfully detained as a lunatic though not so found by inquisition." It cannot be said that the powers of the court or of the Maintenance and Administration Department do not exist or are suspended or in any way affected during a period when the patient is absent on trial under sect. 55. Yet this would appear to be the result if it were true to say that during such periods the patient is not "detained." There are other sections which point in the same direction. Thus under sect. 38 (2) the Commissioners may in the case of any institution direct that the reception orders of patients detained therein shall expire as therein mentioned. Such a direction must surely cover the case of a patient who at the time is absent on trial without the necessity of bringing him back to the institution before the direction can be effective. Similarly, under sect. 76 (1), where Commissioners make an order for discharge, they must serve it upon the manager of the institution where the patient is "detained." There would be no compliance with this direction in the case of a patient who at the date of the service was absent on trial if during such absence he is not "detained." There are other sections to which similar observations apply, notably sect. 56, which provides that "where any person is detained as a lunatic" inquiries may be directed as to his property.

The regulations dealing with the period of short absences on the authority of the medical superintendent were made under sect. 275 (5), which comes under

Part IX of the Act. Under sect. 238 local authorities are directed to provide and maintain asylums "for the accommodation of pauper lunatics." The argument based on the fact that sect. 55 falls under Part II of the Act does not in strictness apply to these regulations. But these absences may, I think, be properly regarded in the same light as absences pursuant to sect. 55. They are part of the treatment of the patients for whom accommodation is to be provided.

It is legitimate to infer that in using the word "detained" in connection with the Lunacy Act and making such "detention" the sole test for determining whether a person has been "under care and treatment," Parliament must have had in mind the provisions of the Lunacy Act, 1890, which I have examined. It can scarcely have intended that the persons entrusted with the beneficial powers given by that Act with regard to leave of absence should be placed in the position where they will know that, if they exercise them, the husband or wife of the patient for whose benefit the powers are given may find himself or herself deprived—for ever, if the powers are exercised during every period of five years—of any hope of obtaining release from the matrimonial tie. The alternative would be to deprive the patient of a type of care and treatment for which the legislature has provided.

In three carefully considered judgments, including that in the present case, LORD MERRIMAN, P., has taken a different view. The first of them is that in *Shipman* v. *Shipman* (1). In that case the absences were, as LORD MERRIMAN, P., held, absences on trial. During the period of five years these absences totalled in all close on a year. At p. 165 ([1938] 4 All E.R., at p. 744), he drew a distinction between the case where there is "liability to be detained if and when a reception order is called out of abeyance" and the case of an "actual detention under an order which is being enforced." If I may respectfully criticise this language, the suggestion that during absence on trial the reception order is in abeyance is really not correct. The reception order is in force throughout. The absence is merely a method of the care and treatment which is given under and by virtue of the reception order and pursuant to the statutory powers given to the persons authorised to receive the patient under the order. In fact LORD MERRIMAN, P., is, I think, paying too much attention to detention as a physical fact and is not regarding it, as I think it ought to be regarded, as a status. This, in brief, is my broad reason for taking a different view from that of LORD MERRIMAN, P.

The second decision was that in *Green* v. *Green* (2). In that case there had been short periods of absence under the regulations and also a period of absence on trial under sect. 55 (1). This latter period was spent in a house belonging to the Mental After-Care Association which had been approved by the London County Council for the reception of patients absent on trial. LORD MERRIMAN, P., thought that the Association ought to be treated as agents of the council and that accordingly there was no break in the detention. With great respect, I find it difficult to follow this argument. The council and nobody but the council had the right to detain the patient. Neither the right nor the duty to detain the patient could be delegated. The only justification for sending the patient to the house of the association was the grant of leave of absence on trial. The case, therefore, as it seems to me, was indistinguishable from any other case of absence on trial.

The short absences were treated by LORD MERRIMAN, P., as falling under the principle of *de minimis*. In this he followed a *dictum* of his own in the case of *Shipman* v. *Shipman* (1). He realised the difficulty of so treating short absences under the regulations if in the aggregate they amounted to a substantial period. I am very doubtful whether the principle of *de minimis* ought to be applied. If detention means detention in a physical sense, it is interrupted by four days absence just as much (though not for so long) as by forty. The real reason why these short absences ought not to be regarded as interruptions is, in my opinion, that which I have already given.

In his judgment in the present case LORD MERRIMAN, P., explained his decision in *Green* v. *Green* (2) as being a case where the detention by the association was "a lawful incident of a reception order." But the leave of absence in that case could only be a lawful incident of the reception order because it was a leave of absence on trial duly granted: if it was to be regarded as a delegation of the right of detention which the London County Council had under the detention order, it could not have been a lawful incident of the reception order, since no such right to delegate is to be found in the Act. Neither on the facts nor as a matter of law could the house of the association be regarded as, to use the expression of Lord Merriman, P., an "annexe" of the London County Council hospital. Lord Merriman, P., distinguished the present case from *Green* v. *Green* (2) on the facts, the patient here not having been during the absences on trial in (as he put it) "what can fairly be regarded as the equivalent of the institution." A

As will appear from what I have said, I have come to the conclusion that *Shipman* v. *Shipman* (1) was wrongly decided and that *Green* v. *Green* (2) was rightly decided, but for the wrong reasons. I appreciate the point to which Lord Merriman, P., attached importance, namely, that there is no limit under the Act to the length of time for which leave of absence on trial may be granted. If the conclusion to which I have come is thought to open the door too widely in this respect, it is for the legislature to adjust the opening to the point desired. B

The present case is one in which the court is asked to exercise its discretion. Lord Merriman, P., felt no difficulty about this, and I agree with his view. In the result the appeal must be allowed and a decree *nisi* granted.

MacKinnon, L.J.: The Matrimonial Causes Act, 1937, s. 2, provides that a petition for divorce may be presented by a husband or a wife on the ground that the respondent is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years. C

In this case the wife petitioned for a divorce. She alleged in her petition, dated Jan. 9, 1943:

> . . . that the respondent is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the date of this petition namely from and continuously since Dec. 7, 1937.

This allegation of the petitioner was established by unchallenged evidence on her behalf. The husband was admitted to the East Riding Mental Hospital, at Beverley, on Dec. 7, 1937, on a reception order which certified him as of unsound mind. On May 28, 1943 (the date of Dr. Davies' affidavit) he was still a patient of that hospital under that order of Dec., 1937, and had been so continuously since Dec., 1937. At all times he suffered frequently from severe attacks of epilepsy. D

Upon this statement it would seem that the petitioner must succeed and be granted a decree *nisi* of divorce. Yet Lord Merriman, P., has dismissed her petition. He did so having regard to the provisions of sect. 3 of the Act of 1937, and the effect which, upon other facts that were proved, he felt bound to give to those provisions. Sect. 3 says: E

> A person of unsound mind shall be deemed to be under care and treatment (*a*) while he is detained in pursuance of any order or inquisition under the Lunacy and Mental Treatment Acts, 1890 to 1930, or of any order or warrant under [six other specified Acts] and not otherwise. F

The "other facts" which Lord Merriman, P., thought constrained him to reject the petition were that during the period from Dec. 7, 1937, to Jan. 9, 1943, the husband had not been continuously inside the walls or bounds of the East Riding Mental Hospital, but had been permitted on certain occasions to go outside them. Such permission could be granted under one or other of two sections of the Lunacy Act, 1890, namely (i) under sect. 55 (headed "Absence on Trial for Health") by the permission of two visitors with the advice in writing of the medical officer, and (ii) under sect. 275 (5), whereby regulations made by the visiting committee of an asylum may provide "for the absence for a period not exceeding four days of a patient from the asylum by the permission of the manager." In this case the lunatic husband had been twice let out "on trial for health" under sect. 55, namely, from June 27 to July 12, 1943 (15 days) and from July 18 to Sept. 1, 1942 (45 days). He had also, under a regulation made under sect. 275, been given short leave of absence upon 19 occasions, and he was absent altogether in this way for 43 nights. G H

With avowed regret Lord Merriman, P., felt constrained to hold that during these two "absences on trial for health" in 1942, under sect. 55, the respondent was not within sect. 3 of the Act of 1937, "detained" in pursuance of the order of Dec. 7, 1937, and, therefore, cannot be "deemed to have been continuously under care and treatment" within sect. 2 of that Act. In this view of the effect of absence, under sect. 55 he followed his own previous decision in *Shipman* v. *Shipman* (1). In that case he also thought that short absences under sect. 275 need not be held to defeat the continuity of "detention" on the principle of *de minimis non curat lex.* He indicated that, if the husband had only been let out in this case under sect. 275, "for short absences overnight in accordance with the regulations," as he expresses it, he would have applied that principle. It is manifest, however, that on the review of five years the total of days of absence under sect. 275 might be enormously greater than a single absence under sect. 55, or as in this case, two such absences of a combined total of 60 days.

I cannot agree with the decision of Lord Merriman, P. On the facts it appears from the evidence of Dr. Davies that these two "absences on trial for health" were granted on condition that the patient was to be in the care of his father, who was to watch his condition, report on it from time to time, and bring him back to the hospital if the patient's condition seemed to require it. The care and custody of the father seems to vary but little in kind from that of the voluntary association whose care and custody of a patient for 14 days was held by Lord Merriman, P., in *Green* v. *Green* (2) not to be an interruption of detention in the mental hospital required by sect. 3 of the Act of 1937.

Apart from the facts of this case, in my view neither an absence on trial for health under sect. 55, nor a short absence under sect. 275, can cause an interruption of detention so as to defeat the manifest intention of sect. 2 of the Act of 1937, provided that they occur while the order or inquisition under one of the Acts specified in sect. 3 of the Act is still in force, and the patient is liable to be brought back to the hospital directly such permitted absence has ended. It is quite certain, I think, that the legislature never intended by sect. 3 to achieve such an absurd result. I am satisfied that they have not by the faulty language of sect. 3 compelled us so to hold. I do not think the word "detained" is used with exact insistence on its precise meaning. "Detained" and "confined" are used many times in the Lunacy Act, 1890—for example, sect. 47, "confined in an institution for lunatics"; sect. 49, "detained as a lunatic in any institution for lunatics"; sect. 50, "detained as a lunatic"; sect. 51, "confined in any institution for lunatics"; sect. 116 (1) (*c*), "lawfully detained as a lunatic"; sect. 198, "detained as a lunatic"; sect. 206, "detained or treated as a lunatic." In every one of these places I think the person referred to would be "detained" or "confined" as a lunatic even at a time when he or she was in fact "absent on trial for health" under sect. 55. It is perhaps to be especially noted that, if it were not so, the administrative powers of a judge under sect. 116 (1) (*c*) as to a person "lawfully detained as a lunatic" would come to an end directly he was let out for a fortnight under sect. 55. Sect. 3 of the Act of 1937 refers to six other Acts besides the Lunacy and Mental Treatment Acts, 1890 to 1930. I have referred to only one of them—The Yarmouth Naval Hospital Act, 1931. That is much shorter and less elaborate than the Lunacy Act, 1890. The material provisions are: sect. 1: "The Admiralty may order that a man be removed to and detained as a patient in the Hospital"; sect. 3 (2), "the Admiralty may order his discharge"; sect. 4 (1), "The officer in charge of the Hospital may grant permission to any person detained thereat to be absent therefrom for such period as he may think fit but he may at any time require a person to whom such permission has been granted to return forthwith to the Hospital." This simpler language seems to me to express the real effect of the more elaborate provisions in sects. 55 and 275 of the Lunacy Act, 1890. And a person let out only on such terms seems to me to be clearly "detained."

Similarly, if some Act a century ago referred to a person being "detained for five years in a debtor's prison," I apprehend that a man who was living in the Rules of the Fleet, and not inside the prison itself, would be "detained in a debtor's prison." As to this see *Re Fleet Prison* (3). When the man Safford was allowed to visit his father under the conditions imposed by Dr. Davies he was much more "detained" in the East Riding Mental Hospital than a man was "detained" in the Fleet Prison while he lived in the Rules. And the dirty man in the brown coat (No. 20 on the Coffee Room Flight) whose story was told to Mr. Pickwick by Sam Weller in the Fleet was, I think, "detained" in that prison until he died, although after 17 years strict incarceration (for a debt of nine pounds multiplied by five for costs) he was for a long period let out daily by the turnkeys to spend his time in public houses.

LUXMOORE, L.J.: I have read the considered judgments that have just been delivered, and I find myself in complete agreement with the views expressed by my Lords. It is not through any want of respect for LORD MERRIMAN, P., that I have, in the circumstances, thought it unnecessary to write a judgment reiterating the reasons which have been expressed by my Lords.

Appeal allowed. Decree nisi granted.

Solicitors: *Redpath, Marshall & Holdsworth*, agents *for Shackles, Dunkerly & Barton*, Hull (for the appellant); *Official Solicitor* (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

REPRESENTATIVE BODY OF THE CHURCH IN WALES *v.* TITHE REDEMPTION COMMISSION AND OTHERS. PLYMOUTH ESTATES, LTD. *v.* TITHE REDEMPTION COMMISSION AND OTHERS.

[HOUSE OF LORDS (Viscount Simon, L.C., Lord Macmillan, Lord Wright, Lord Porter, Lord Simonds), **April 18, 19, 20, 21, 24, 25, 26, May 24, 1944.**]

Ecclesiastical Law—Church in Wales—Tithe rentcharge—Capitular tithe rentcharge vested in Ecclesiastical Commissioners before disestablishment—Vesting in Welsh Church Commissioners and ultimately in University of Wales—Lay impropriators—Liability to repair chancel—Welsh Church Act, 1914 (*c.* 91), *ss.* 6, 28 (1).

By the Welsh Church Act, 1914, s. 28 (1), nothing in that Act was to affect the liability of any lay impropriator of tithe rentcharge to repair any ecclesiastical building. Certain tithe rentcharge was before the disestablishment of the Church in Wales vested in the Ecclesiastical Commissioners. By the Welsh Church Acts, 1914-1919, this tithe rentcharge became vested temporarily in the Welsh Church Commissioners and ultimately would become vested in the University of Wales. It was contended that by operation of the said Acts the tithe rentcharge ceased to be liable for the repair of the chancel of the parish church:—

HELD: upon the proper construction of the Welsh Church Act, 1914, s. 28 (1), both the Ecclesiastical Commissioners and the University of Wales were lay impropriators and the tithe rentcharge in question remained liable to chancel repair. During the temporary vesting in the Welsh Church Commissioners the incidents attached to the tithe rentcharge must be the same as those ultimately attaching to it when it should become vested in the University of Wales.

Decision of the Court of Appeal ([1943] 1 All E.R. 605) *reversed.*

[**EDITORIAL NOTE.** The House have here reversed the decision of the Court of Appeal and would seem to be content to rest their decision almost entirely upon the construction of sect. 28 of the 1914 Act. However, the House has also gone into the history of the lay impropriator and takes the view that upon this ground also the University of Wales, as and when it receives the tithe redemption annuity, will be a lay impropriator and that the Welsh Church Commissioners, being trustees to hold and manage the property until its eventual transfer, must partake of the same nature as the ultimate beneficiaries. Some remarks are made as to the power of management of the Commissioners which should be noted.

AS TO TRANSFER OF ECCLESIASTICAL PROPERTY ON DISESTABLISHMENT OF THE CHURCH IN WALES, see HALSBURY, Hailsham Edn., Vol. 11, pp. 581, 582, para. 1026; and FOR CASES, see DIGEST, Vol. 19, p. 307, Nos. 1062-1065.]

Cases referred to:

(1) *Wickhambrook Parochial Church Council* v. *Croxford*, [1935] 2 K.B. 417; Digest Supp.; 104 L.J.K.B. 635; 153 L.T. 187.

(2) *Veley* v. *Burder* (1841), 12 Ad. & El. 265; 19 Digest 265, *487*; 10 L.J.Ex. 532.

(3) *Nicholson* v. *Masters*, cited Burn's Ecclesiastical Law, Vol. I, 414.
*(4) *Welsh Church Comrs.* v. *Representative Body of the Church in Wales and Tithe Redemption Commission*, [1940] Ch. 607 ; [1940] 3 All E.R. 1 ; Digest Supp. ; 109 L.J.Ch. 245 ; 165 L.T. 80.
(5) *Hawkins* v. *Rous* (1695), Carthew 360 ; 19 Digest 260, *420*.

APPEAL by the Representative Body and the Plymouth Estates, Ltd., from a decision of the Court of Appeal (LORD GREENE, M.R., LUXMOORE and DU PARCQ, L.JJ.), reported [1943] 1 All E.R. 605. The facts are fully stated in the opinion of VISCOUNT SIMON, L.C.

Sir Walter Monckton, K.C., *R. Gwyn Rees* and *B. J. M. McKenna* for the appellants the Representative Body of the Church in Wales.

Wilfrid M. Hunt for the appellants the Plymouth Estates, Ltd.

W. F. Waite for the respondents the Tithe Redemption Commission.

C. S. Rewcastle, K.C., and *Meyrick Beebee* for the respondents the Commissioners of Church Temporalities in Wales and the University of Wales.

VISCOUNT SIMON, L.C. : My Lords, these appeals are from the decision of the Court of Appeal (LORD GREENE, M.R., LUXMOORE and GODDARD, L.JJ.) affirming an order of BENNETT, J., in an action commenced by originating summons in which the Tithe Redemption Commission were plaintiffs and the Commissioners of Church Temporalities in Wales (hereafter called the Welsh Commissioners), the Representative Body of the Church in Wales (hereinafter called the Representative Body), the Plymouth Estates, Ltd., and the University of Wales were defendants.

The question formulated for decision in the summons is whether upon the true construction of the Welsh Church Acts, 1914 and 1919, certain tithe rentcharges which were formerly vested in the Ecclesiastical Commissioners for England, and which, if the Tithe Act, 1936, had not been passed, would have been transferable by the Welsh Church Commissioners to the University of Wales under the Welsh Church Acts, 1914 and 1919, became under the said Acts and were immediately before Oct. 2, 1936 (the date when all tithe rentcharge was extinguished by the Tithe Act, 1936), vested in the Welsh Commissioners (*a*) subject to the liability for the repair of chancels of churches to which they were subject or gave rise immediately before the vesting thereof in the Welsh Commissioners ; or (*b*) freed from the liability aforesaid.

The Welsh Church Acts, 1914 and 1919, provided for the disestablishment and partial disendowment of the Church in Wales, and the date of disestablishment was finally fixed at Mar. 31, 1920. At that date every cathedral and ecclesiastical corporation of the Church in Wales, whether sole or aggregate, was dissolved, and by sect. 3 of the Act of 1914 ecclesiastical courts and persons in Wales ceased to exercise any jurisdiction, and the ecclesiastical law of the Church in Wales ceased to exist as law. I must return to this section at a later stage of this opinion.

The method by which the partial disendowment was to be carried out was to vest in the Welsh Commissioners—a statutory body created by sect. 10 of the Act of 1914 and originally intended to be dissolved at the end of 1917—as from the date of disestablishment all Welsh ecclesiastical property of every kind, and then to impose on the Welsh Commissioners the duty of distributing various types of property to their prescribed recipients—on the one hand, to the Representative Body which represented the disestablished Church, and, on the other hand, to two classes of lay recipients, the Welsh County Councils and the University of Wales, according to the nature and incidents of the property taken from the Church. Broadly speaking, the Commissioners were to transfer to the newly created Representative Body all churches and ecclesiastical residences, all restoration funds and property derived from Queen Anne's Bounty, and all private benefactions, which last were defined to include gifts and the like made to the Church in Wales since the year 1662. It would appear from the Welsh Church (Temporalities) Act, 1919, s. 4 (2), that among the property that might come to be transferred to the Representative Body was certain tithe rentcharge—presumably arising from private benefaction—but this is quite exceptional.

The great bulk of tithe rentcharge in Wales after vesting at disestablishment in the Welsh Commissioners was to be transferred in due course either to the

Welsh County Councils or to the University of Wales according to the following rule. Out of the property not transferred to the Representative Body, the Welsh Commissioners were to transfer "any tithe rentcharge which was formerly appropriated to the use of any parochial benefice" to the council of the county in which the land out of which such tithe rentcharge issued was situate. But tithe rentcharge which was not formerly appropriated to the use of any parochial benefice, but none the less vested in the Welsh Commissioners as from the date of disestablishment as being Welsh ecclesiastical property (such as was tithe rentcharge in Wales formerly owned by the Ecclesiastical Commissioners) was to be transferred by the Commissioners to the University of Wales.

It is convenient at this stage to point out that, in addition to the two varieties of tithe rentcharge mentioned above, there was also a third kind of tithe rentcharge the title to and devolution of which was not affected by the Welsh Church Acts at all. This was tithe rentcharge which had long ceased to belong to the Church and which at the time of the dissolution of the monasteries or later had by royal grant or otherwise come into the possession of lay owners.

Generally speaking, down to the time of the disestablishment of the Church, an owner of any kind of tithe rentcharge in Wales was, in virtue of that ownership, under a personal obligation to maintain or to contribute to maintaining the chancel of the church from whose parish the tithe rentcharge was derived.

The Tithe Act of 1936 extinguished all tithe rentcharges, whether in England or Wales, from Oct. 2, 1936, and authorised the issue of tithe redemption stock for the compensation of the persons interested in a tithe rentcharge in respect of its extinguishment. The Act created a body called the Tithe Redemption Commission to carry out the purposes of the Act, and by sect. 31 it was provided that, in respect of the liability to repair arising from the ownership of a tithe rentcharge extinguished by this Act in respect of which redemption stock was to be issued, the diocesan authority (which in the case of Wales means the Representative Body) should be entitled to receive a part of the stock to be issued in respect of the rentcharge equal to such a sum as may be reasonably sufficient, having regard to the condition of the chancel or building at the appointed day, to provide for the cost of future repairs thereof, and to provide a capital sum the income of which will be sufficient to ensure it against destruction by fire. Where two or more owners of rentcharges were involved in the liability to repair the same building, the Act provided for the apportionment of the stock issuable to the Representative Body from the two or more sources.

The practical importance of the question raised by the originating summons thus becomes clear. The tithe rentcharge which was vested in the Welsh Commissioners with a view to its being transferred to the University of Wales has been extinguished. When the Tithe Redemption Commission determines the amount of stock to be issued for compensation in respect of the extinguishment of any such tithe rentcharge, are the Welsh Commissioners entitled to receive the whole of such stock with a view to transferring it to the University of Wales, or does there attach to the ownership of the tithe rentcharge which has been extinguished a liability to chancel repair, with the result that the Representative Body will be entitled to receive so much of the stock as is needed to provide for this repair hereafter, while only the residue of the stock goes to the Welsh Commissioners for transfer to the University? To determine this issue, it is necessary to look at the situation as it existed just before the extinguishment of the tithe rentcharge.

In order to illustrate the nature of the question to be determined, the secretary of the Tithe Redemption Committee swore an affidavit bringing to the notice of the court the facts relating to the parish of Llantwit Major in the County of Glamorgan as follows:

> The rectory of that parish had before the dissolution of the monasteries been appropriated and belonged to the Abbey of Tewkesbury. One part of the rectorial tithe afterwards became vested in the Earl of Lincoln and the other part in the Dean and Chapter of Gloucester. On commutation in 1842 under the Tithe Acts, tithe rentcharges amounting to £70 were awarded to the trustees of Robert Henry Clive and his wife, presumably the successors in title to the Earl of Lincoln, and tithe rentcharges amounting to £481 7*s.* 11*d.* were awarded to the Dean and Chapter of Gloucester and their lessees. These capitular tithe rentcharges amounting to £481 7*s.* 11*d.* became vested in the Ecclesiastical Commissioners for England and, by virtue of the orders hereinbefore mentioned, were Welsh ecclesiastical property. The said tithe rent-

charges amounting to £70 had prior to Oct. 2, 1936, been reduced by redemption to tithe rentcharges amounting to £64 4*s.* 2*d.* which were then vested in the third-named defendants, the Plymouth Estates, Ltd., as lay impropriators.

Since the rentcharges belonging to the Dean and Chapter of Gloucester were not appropriated to the use of any ecclesiastical benefice, they were rentcharges of the kind which the Welsh Commissioners under the Act of 1914 were required to transfer to the University of Wales, and in this particular illustration the question is whether these tithe rentcharges, valued at £481 7*s.* 11*d.*, are, after the date of Welsh disestablishment, accompanied by a liability for chancel repair. The Plymouth Estates, Ltd., on the other hand, plainly and admittedly remain liable for chancel repair, for their tithe rentcharges, amounting to £64 4*s.* 2*d.*, are not Welsh ecclesiastical property and their situation is not altered by disendowment. The Plymouth Estates, Ltd., are, therefore, interested in this litigation because, if the decision of the courts below stands, they will have lost a previous contributor towards chancel repairs, and will be left as the only party against which a claim in respect of chancel repairs could be made. It is not necessary for the purposes of the present appeal to discuss the difficult question as to the extent of their possible responsibility, or as to whether *Wickhambrook Parochial Church Council* v. *Croxford* (1) was rightly decided.

The section of the Welsh Church Act, 1914, upon which, in my opinion, the matter chiefly turns, is sect. 28, which provides as follows :

> (1) Nothing in this Act shall affect any liability to pay tithe rentcharge, or the liability of any lay impropriator of any tithe rentcharge to repair any ecclesiastical building, but a county council shall not, by reason of being entitled to or receiving any tithe rentcharge under this Act, be liable for the repair of any ecclesiastical building.
>
> (2) Such liability as aforesaid of a lay impropriator may be enforced in the temporal courts at the instance of the representative body in like manner as if such liability arose under a covenant made with the representative body and running with the tithe rentcharge.

The Court of Appeal have reached their decision on the view that " any lay impropriator " in this section does not include either a county council or the University to whom tithe rentcharge is transferred. Equally, in their view, the Welsh Commissioners themselves who were vested with tithe rentcharges are not lay impropriators. The argument is that since ecclesiastical courts and ecclesiastical law ceased to exist as law as from the date of disestablishment, and since the Welsh Commissioners, as well as the county councils and the University, would not be affected by the covenant imposed on members of the Church in Wales under sect. 3 (2), all liability for chancel repairs ceased in connection with tithe rentcharge vested by the Act in the Welsh Commissioners. According to this view, owners of tithe rentcharge in the position of the Plymouth Estates, Ltd., are the only class of owners to be regarded as lay impropriators, and their liability is preserved by sect. 28 (2).

I question the correctness of the view that liability for repair of a church in this country depended solely on ecclesiastical law, such as was ended in Wales by sect. 3 of the Act. TINDAL, C.J., points out in the elaborate judgment of the Exchequer Chamber in *Veley* v. *Burder* (2), at p. 300, with numerous citations of ancient authority, that it was by the common custom of England (that is, by the common law), that, in contrast with most of Christendom, the liability was divided : it anciently rested on the parishioners to repair the body of the church, but on the parson to repair the chancel. There is abundant ancient authority that the obligation of a rector to repair a chancel was an obligation imposed by common law, *e.g.*, COMYNS (DIGEST, *Esglise* G.2); COKE 2 Inst. 489 ; AYLIFFE, PARERGON 455. The enforcement of the obligation was usually in the spiritual courts, by process of monition, but *Nicholson* v. *Masters* (3) seems to support the view that, if the churchwardens were put to the expense of doing the repairs, in case of default they could recover the amount as money paid in the temporal courts.

It is not, however, necessary to pronounce finally on these niceties in order to reach a conclusion on this appeal. Even if sect. 3, standing alone, had so wide an effect as the Court of Appeal assume, it still remains to construe and apply sect. 28, which, on that view, operates as a restricting or saving clause.

Counsel for the Welsh Commissioners contends that in this section the phrase " any lay impropriator " does not include either the Welsh Commissioners themselves, in whom the tithe rentcharges are vested for purposes of redistribution, or either of the lay recipients to one or other of whom these rentcharges were to be transferred by the Commissioners, *viz.*, the county councils and the University. On this view the only persons covered by the phrase would be persons in the position of the Plymouth Estates, Ltd., *i.e.*, owners of rentcharges, the title to which has not been affected or altered by the Act at all because such rentcharges before the passing of the Act were no part of Welsh ecclesiastical property.

There is no definition of "lay impropriator" in the Act of 1914, and the only other place where the words are found in the Act is in sect. 38 (4), where for removing doubts it is declared that the Principal or other member of Jesus College, Oxford, who may from time to time be rector of Llandyssil, shall as such be treated as a lay impropriator and not as the holder of an ecclesiastical office. We have, therefore, to ask ourselves two questions: (*a*) What does "lay impropriator" in its ordinary sense mean? and (*b*) Is there anything in sect. 28 which throws light on its meaning in that section?

As to (*a*), a lay impropriator in its ordinary sense is a lay person or corporation who is in possession of the revenues of a living. (Ayliffe, Parergon, pp. 86, 90; Phillimore, Ecclesiastical Law, 2nd Edn., Vol. 1, p. 220). There existed at one time some confusion between "appropriation" and "impropriation"; but "appropriation," when that word is properly used, refers to the attachment of an ecclesiastical benefice to the perpetual use of some religious house, or Dean and Chapter, or other spiritual person. "Impropriation," on the other hand, is correctly used to refer to the transfer of the property of an ecclesiastical benefice into the hands of a layman, and to the possession by a layman of the property so transferred. Such was the nature of the ownership by a layman of a benefice transferred to him by royal grant or the like at the time of the Reformation. When the property in the incorporeal hereditament was acquired by the lay owner, he still remained, generally speaking, personally liable to maintain, or help to maintain, the chancel of the church of the parish from which the benefice was drawn. I cannot see by what right the phrase "lay impropriator" in sect. 28 should be given so limited a meaning as is suggested.

The county councils and the University of Wales alike acquire this species of property by force of the statute. The nature of the thing transferred and the obligations attached to its ownership do not alter because the mode of transfer is statutory; indeed, in earlier times, I should suppose that there were a good many cases of Acts of Parliament which transferred such property from spiritual to lay hands. Confining myself, therefore, to the ordinary meaning of "lay impropriators," I should be led to the view that such a phrase would cover the county councils and the Welsh University in respect of their acquisition by statute of tithe rentcharge which formerly formed part of Welsh ecclesiastical property. The position of the Welsh Commissioners I will consider later.

As to (*b*), the language of sect. 28 itself goes to indicate that the lay impropriator referred to is not limited to the kind of owner of which Plymouth Estates, Ltd., is an example, for, considered grammatically, the phrase beginning "but a county council, etc.", plainly involves the assertion that a county council to whom tithe rentcharge is to be transferred under the Act is a lay impropriator. The section says that any lay impropriator is to be under the liability of chancel-repair, and then goes on immediately to state the exception "but a county council shall not by reason of being entitled to or receiving any tithe rentcharge under this Act be liable for the repair of any ecclesiastical building." I do not myself quite appreciate the force of the explanation offered in the Court of Appeal that this reference to the county council was inserted "*ex abundanti cautela*." The insertion of the exception enjoyed by county councils, which obviously limits the generality of what has gone before, is also of importance in helping to determine whether the University, in respect of the tithe rentcharge which it is entitled to receive, is not to be regarded as a lay impropriator. The section first asserts that any lay impropriator remains under the liability of chancel-repair; it then goes on to state by way of exception that the county council, though "entitled to" or "receiving" tithe rentcharge under the Act, is not to be so liable, and, according to all ordinary principles of construction, it thus implies that the University of Wales, which is the other recipient of tithe rentcharge at the hands of the Welsh Commissioners, is a lay impropriator to whom the liability of chancel-repair attaches.

I, therefore, reach the conclusion that both the county council and the University of Wales are lay impropriators. The duty of the House is to interpret the section as it stands, and I must respectfully refuse to adopt an interpretation which seems to me not to follow the language which the legislature has chosen to employ.

I now come to the more difficult question whether the Welsh Commissioners should be regarded as "lay impropriators." In *Commissioners of Church Temporalities in Wales* v. *Representative Body of the Church in Wales and Tithe Redemption Commission* (4), the Court of Appeal, reversing MORTON, J., decided that the Welsh Church Commissioners, while there was vested in them tithe rentcharge which was transferable to county councils, were not on that account liable for chancel repair. The actual conclusion in that case as above defined appears to be correct, and it is supported by observing that the exemption of county councils applies whether they are "entitled to" or are actually "receiving" tithe rentcharge under the Act. But I am not able to accept the width of reasoning adopted in the Court of Appeal's judgment in that case, according to which the same conclusion would be reached if the tithe rentcharge vested in the Welsh Commissioners was transferable to the University of Wales. It has to be remembered that the Welsh Church Commissioners are a statutory body with a limited life specially created for the purpose of carrying through the transfer of Welsh ecclesiastical property to its various recipients. The Commission was originally intended to continue for three years and then to be dissolved. While they doubtless had the duty of managing the property vested in them until it was transferred, their duties as managers must be discharged with due regard to the rights interests and obligations of those who were going to benefit by the transferred property. While, therefore, in the case of tithe rentcharge to which the county councils were "entitled," the Commission were not required to meet chancel repairs out of tithe rentcharge for the time being in their hands (and, indeed, would have been liable to the county councils for misapplication of the receipts if they had done so), the position is different as regards tithe rentcharge which is transferable to the University of Wales. As I have already said, the University of Wales when it should own the tithe rentcharge which was coming to it would be a "lay impropriator," and, in view of the language of sect. 28, would be under the obligation of chancel repair. The Welsh Commissioners, while they have vested in them tithe rentcharge which is coming to the University, would be under a similar obligation. Whether in these circumstances the Welsh Commissioners (who, of course, enjoy no benefit from holding tithe rentcharge) should be regarded as lay impropriators or only as a statutory body with a duty to act in this matter as the University would properly act is largely a matter of words. If they neglected this duty, it might well be that the chancel would fall into ruin and there would ultimately be imposed on the University of Wales a far more onerous liability than would arise if the repair was effected promptly.

For these reasons I have reached the view that the question raised by the originating summons should be answered by saying that tithe rentcharges, which but for the Tithe Act, 1936, would have been transferable to the University of Wales and which were immediately before Oct. 2, 1936, vested in the Welsh Commissioners, were liable in the hands of the Welsh Commissioners for the repair of chancels of churches in the parishes where they arise.

I move that the appeal be allowed.

LORD MACMILLAN: My Lords, I am so entirely in accord with the views which have been expressed by VISCOUNT SIMON, L.C., on the matters raised in this appeal that I need do no more than state my concurrence.

LORD WRIGHT: My Lords, I have read in print the opinion which has been delivered by VISCOUNT SIMON, L.C. I agree with it. I merely add a few observations to indicate the reasons which induce me to differ from the courts below.

The arguments on the appeal have ranged over a wide field and no doubt much discussion has been necessary in order to throw into relief the decisive question, which is whether the University of Wales is to be held to be subject to liability for chancel repairs in respect of the rentcharges transferable to it under the Welsh Church Acts, 1914 and 1919. As under the Tithe Act, 1936, all tithe rentcharges were extinguished and Tithe Redemption Stock has been substituted for the rentcharges as on Oct. 2, 1936, the practical problem is whether the Redemption Stock to be issued under the Act of 1936 to the Welsh Commissioners (as I shall describe the respondents, the Commissioners of Church Temporalities in Wales), so far as it represents tithe rentcharge transferable to the University of Wales should suffer a deduction in favour of the appellants, the Representative Body of the Church in Wales, of such an amount of the stock A as would represent the commuted or capitalised value of the estimated future cost of chancel repairs. The Court of Appeal has held that the University of Wales not being liable for the cost of chancel repairs is not subject to have their amount of stock so reduced. The appellants, whose functions correspond to those of the diocesan board in England and who represent the parishioners, appeal on the ground that the cost of repairing the chancel ought not to fall on them.

When the complications inevitable in a topic of this character have been B examined and cleared away, the central problem presents itself in a comparatively simple form. That problem is whether the Welsh Church Act, 1914, has changed the law in the respect that the owner of the tithes in question is relieved from the liability to repair the chancel which the custom of England, that is, the common law, has attached to the ownership of the tithe and in the respect that the ordinary meaning of "lay impropriator" does not apply to the owner of the tithes in question. The answer to these problems is to be C found in sect. 28 of the Act of 1914, read with the rest of the Act and in the light of established principles of law.

The Court of Appeal has fully appreciated that the acid test is whether the Act of 1914 has in sect. 28 given a special limited connotation to the words "lay impropriator." The Court of Appeal have given their reasons for thinking that it has. I am unable, with all respect, to accept the correctness of those D reasons.

After the dissolution of the monasteries and the extensive distribution among lay rectors of the tithe formerly held by the monasteries, which were spiritual persons, a sharp distinction grew up between two words, "impropriations," which was the term properly applied where temporalities of the benefice were held in lay hands, and "appropriations," which was the term used in cases where the benefice was annexed to a spiritual corporation, sole or aggregate. E In the former case the owners were generally called "lay impropriators," though the word "lay" was strictly otiose. The authorities cited by VISCOUNT SIMON, L.C., which might be multiplied, sufficiently show that the repair of the chancel was imposed on the rector, and was so imposed by law. I venture to cite for both propositions an additional case, that of *Hawkins* v. *Rous* (5), where HOLT, C.J., laid it down that:

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> By the Civil and Canon law, the parson is obliged to repair the whole church; and 'tis so in all Christian Kingdoms but in England; for 'tis by the peculiar law of this nation, that the parishioners are charged with the repairs of the body of the church [that is, excluding the chancel].

Now under the Act of 1914, the particular tithes in question, which were then vested in the Ecclesiastical Commissioners or Queen Anne's Bounty as lay impropriators, because they are lay bodies, were to vest in the Welsh Commissioners G until their final transfer to the University. All these bodies in turn would in the ordinary use of language be correctly described as lay impropriators and would, *prima facie*, be subject to the established liability to repair the chancel. Sect. 28 of the Act provides:

> Nothing in this Act shall affect any liability to pay tithe rentcharge, or the liability of any lay impropriator of any tithe rentcharge to repair any ecclesiastical building, H but a county council shall not, by reason of being entitled to or receiving any tithe rentcharge under the Act, be liable for the repair of any ecclesiastical building.

These words would cover the repair of the chancel. Unless the words "lay impropriator" in sect. 28 can be twisted from its normal meaning so as not to cover the Welsh Commissioners if tithe owners or the University of Wales as ultimate owners, the language of sect. 28 (1) would seem conclusive to establish the liability of these bodies. But assurance is made doubly sure when the rest of the subsection is considered, I mean the words introduced by "but."

" But " would naturally be construed as introducing an exception from what would otherwise have been covered. The necessary implication of these words, as it seems to me, is that the county councils would, but for the exception, have been lay impropriators within the meaning of the section and as such would have been subject to the liability to repair the chancel, but are to be entitled to a special exemption which does not extend to the University. Its position is left to be governed by the general law which I have explained. The words introduced by " but " do, however, make it clear that the general provisions of subsect. (1) of the section would, but for the exemption, have had the effect of imposing the liability on the councils in their character of lay impropriators. Apart from the express saving in favour of the councils, both the University and the councils would equally have been liable for the repairs. As the exception, which is limited to the councils, does not extend to the University, the latter is left with the unqualified liability.

The form of question proposed in the summons is framed so that it can be answered without considering the changes effected by the Act of 1936, which extinguished rentcharges and substituted for them the appropriate amounts of redemption stock. In my opinion, the answer to be made on the summons should be in the form proposed by VISCOUNT SIMON, L.C., which is in effect that the University is subject to the liability and the appeal succeeds.

The Court of Appeal arrived at the conclusion that the University was not so liable. In their earlier decision in *Welsh Church Comrs.* v. *Representative Body of the Church in Wales* (4), they had held that the councils were not liable. I agree with their decision in that case, but not with their reasons. In any case, they failed to notice the difference under sect. 28 between the position of the councils and of the University. Though the court admitted that, according to the ordinary use of the words, "lay impropriator" in sect. 28 would include both the Ecclesiastical Commissioners, and, therefore, presumably, the Welsh Commissioners, the University and the County Councils, the opinion of the court was that the special context of the Act of 1914 necessitated a different conclusion. The reference to county councils in sect. 28 was explained as inserted *ex abundanti cautela.* It was further said that so important a provision would not appear in a part of the Act headed " Supplemental." The court particularly relied on its view that sect. 3 of the Act had abolished the whole of the ecclesiastical law of the Church in Wales as law and also had abolished ecclesiastical courts in Wales. In effect the Court of Appeal limit the term " lay impropriator " to the class of lay persons like the appellants Plymouth Estates, Ltd., who, by purchase or inheritance or otherwise, have become possessed of rentcharges which are outside the scope of the Act, because sect. 4 does not apply to them as not being Church property.

There is no definition in the Act of " lay impropriator." The words must, I think, *prima facie,* receive their ordinary connotation. They are only used in one other place in the Act, that is in sect. 38 (4), but there, I think, they are used in their ordinary sense. I am not clear as to the precise effect of the very general words of sect. 3, if it applies at all to an incorporeal hereditament like tithes, a well-known type of real property. But I am clear for the reasons given earlier in this opinion that the rules relating to tithes as an incorporeal hereditament are not part of ecclesiastical law, but part of the common law, though it is true that proceedings for their enforcement were left in the first instance at least to the ecclesiastical courts. The King's Bench, however, would always intervene on grounds of law to control by writ of prohibition or the like the proceedings of the ecclesiastical courts, as the authorities show. It is not, I think, and cannot be, suggested that the existence of tithe rentcharges was abolished by the Act of 1914, and there is no provision in the Act, except in the particular case of county councils, to vary the established rules as to the liability to repair the chancel. On the other hand, what has happened in this case shows the wisdom of the legislature in putting in plain words the rights and liabilities which are expressly saved in sect. 28 and in providing in subsect. (2) a convenient procedure for their enforcement. The section was also necessary to introduce the special exception applying to county councils, which deals both with the intervening period between the vesting of the tithe rentcharge in the Welsh Commissioners and their eventual transfer to the county councils. That point was expressly dealt with in the case of county councils by the words in sect. 28, " being entitled to or receiving any rentcharge," which seem to distinguish between the temporary period of transition and the final transfer to the councils. There is no similar mention in reference to the University, but its liability is left to the general law. The Welsh Commissioners were indeed a statutory body of temporary existence created for the special defined purpose, but though it is not necessary to decide finally, I think they were owners *pro tempore* of the rentcharges during that period which was more prolonged than was anticipated. I find it difficult to think that an incorporeal hereditament like tithe could be left without an owner even for a time; the language of sect. 4 expressly speaks of the property " vesting " and sect. 8 uses similar language. My own inclination is to say that during the period before final transfer under sect. 8 the Welsh Commissioners were legal owners of the property, the councils and the University respectively being beneficial owners. The duty of the Commissioners would thus be in the meanwhile to manage the property in the interest of the beneficial owners, with due regard to the latters' liabilities or immunities, distinguishing for instance between the position of the councils which were freed from liability for repairs and the University which was not exempted.

But, without further discussing these and other interesting contentions, I am content to rest my conclusion on what I think is the true construction of sect. 28.

I would allow the appeal.

LORD PORTER: My Lords, if it were not that this House has formed an opinion different from that entertained by the Court of Appeal, I should not think it necessary to express a view of my own, but should be content to adopt that of your Lordships. As it is I think I can express my opinion shortly.

The decision depends, as I think, primarily upon the construction of the Welsh Church Act, 1914, ss. 3 and 4 (as modified by the Welsh Church Temporalities Act, 1919) and of sect. 28 of the earlier Act. The matter in dispute concerns the liability or non-liability of the University of Wales to shoulder the burden of repairing the chancels of certain churches in Wales, a burden formerly imposed upon the holders of tithe rentcharges destined to the University. The question is to some extent complicated by the passing of the Tithe Act, 1936, but that problem is best dealt with at a later stage.

The change of ownership of the tithe rentcharge in question is the result of the passing of the Welsh Church Act, 1914, which, by sect. 1, disestablished the Church of Wales, and by sect. 3 abolished the jurisdiction of all ecclesiastical courts and persons in Wales and Monmouthshire, and enacted that the ecclesiastical law of that Church should cease to exist as law. Sect. 28 dealt with the obligation of continuing to pay tithe rentcharge and of lay impropriators to repair ecclesiastical buildings. Your Lordships have already had placed before you the various sections of all three Acts which are germane to the determination of the matters which require your decision.

Like VISCOUNT SIMON, L.C., I do not desire to dogmatise as to the effect of sect. 3, but for the purposes of the present dispute I am willing to assume that its provisions would, if they stood alone, abolish any remedy previously existing in a case where the holder of a tithe rentcharge failed to discharge the duty imposed upon him as holder of repairing the chancel of a church. But that section does not stand alone. It is qualified by the terms of sect. 28, which keep alive the liability of the lay impropriator of any tithe rentcharge to repair and provide means for enforcing that liability in the temporal courts as if the liability arose under a covenant running with the tithe rentcharge. *Prima facie*, therefore, if the tithe rentcharge gets into the hands of a lay impropriator at any time it is held subject to the liability to repair.

Necessarily, in these circumstances, much of the discussion before your Lordships turned upon the meaning of the words " lay impropriator." The phrase is nowhere defined. It was urged that in their inception the words referred to a known body of persons to whom the tithe had been granted and who held it for their own benefit or as trustee for some private holder, and that they had no reference to such bodies as the Ecclesiastical Commissioners, the Welsh Commissioners, the University of Wales or any county council. In support of this argument reliance was placed upon the words of AYLIFFE'S PARERGON, at p. 90:

> An impropriation, of which there are in England three thousand eight hundred and forty-five, is properly so called, when it is in the hands of a layman: and an appropriation is, when it is in the hands of a Bishop, College, Religious House, and the like, as aforesaid . . .

These words were said to show that only the three thousand eight hundred and forty-five lay persons and, of course, their successors in title, were properly so described, and were those intended to be referred to in sect. 28 of the Welsh Church Act. This seems to be too narrow a view.

The statement as to the number of lay impropriators is, I think, merely an enumeration of the members of that class in John Ayliffe's time, not a description of their quality. They are defined, as I conceive, in the statement that impropriation exists where the property is in lay hands, and this meaning is borne out by Ayliffe's statement on p. 89, when he says:

> An appropriation can only be made to a body politic, or corporate spiritual, that has succession: and thereby that ecclesiastical body is made perpetual incumbent of the benefice appropriated, and for ever shall enjoy all the glebe, tithes, and other profits belonging thereunto, and has therewith the charge of the souls belonging to the parish where the church appropriated is: upon which account it is, that an appropriation regularly ought only to belong to a spiritual person, or (at most) to aggregate bodies spiritual that consist of priests . . .

Therefore, in deciding whether tithes are in the hands of a lay impropriator or not, I do not think the question to be answered is, Is the holder a successor of a known and limited number of persons? but rather, Is the person, or is the body, an ecclesiastical person or body, or is it not?

It was suggested that, if this be so, there was no reason for providing in sect. 38 (4) of the Act that the Principal or other member of Jesus College, Oxford, who might from time to time be Rector of Llandyssil, should as such be treated as a lay impropriator. This provision, however, as I see it, is only inserted in order to deal with the difficulty that the Principal or other member might at one time be a layman and at another an ecclesiastic, and, therefore, the Act provided that he should preserve the character of a layman in his capacity of Rector, whatever his actual status might be.

I think BENNETT, J., and all the members of the Court of Appeal agreed that in its ordinary sense the term "lay impropriator" would include at any rate a county council and the University of Wales, and I do not think they dissented from the view that in such a case the Ecclesiastical Commissioners and Welsh Church Commissioners would come within the same category.

I have given reasons for supposing that this view is correct, and contrary to the decision of the Court of Appeal, I see nothing in the Act to controvert it: rather the contrary, but as I agree with the reasoning and opinion of VISCOUNT SIMON, L.C., I need not elaborate this point. However, even if I thought that the meaning of "lay impropriator" was a matter of doubt or in other cases did not include such bodies as the Ecclesiastical Commissioners or the Welsh Church Commissioners, I should, like VISCOUNT SIMON, L.C., and LORD SIMONDS, take the view that in this Act the Welsh Church Commissioners come within the class of lay impropriators as holding the property at any rate solely for the benefit of two lay bodies and as being under an obligation to transfer it to them at the appropriate time. Upon this point, I have had an opportunity of reading and would desire to adopt the reasoning of LORD SIMONDS.

The result of this view is that when the Tithe Act of 1936 came into force the Welsh Church Commissioners were and now are lay impropriators of and then held the tithe rentcharges transferred to them under the Welsh Church Act, 1914, which would have been transferable to the University of Wales subject to the liability for the repair of chancels of churches to which they were subject or gave rise immediately before the vesting thereof in such Commissioners.

I would allow the appeal and declare accordingly.

LORD SIMONDS: My Lords, I concur in the motion that this appeal should be allowed and, but for the fact that we are differing from the decision of the Court of Appeal, I should not think it necessary to add anything to what has already been said. There are, however, two aspects of this case to which I wish to call attention. In the first place, I find it impossible to limit, as the

Court of Appeal has limited, the effect of the Welsh Church Act, 1914, s. 28. I do not think it necessary to determine the exact scope of that "ecclesiastical law of the Church in Wales" which by sect. 3 of the Act is to cease to exist as law. The Court of Appeal has assumed that it includes the liability of the owner of the rectorial tithe to repair the chancel of the church of the parish out of which the tithe issues, and this assumption has, I think, largely influenced the interpretation which they have placed upon sect. 28. I share the doubts which have been expressed by your Lordships upon the validity of this assumption in the light of the further researches that have been made into the history and nature of the liability. But, however this may be, I find myself constrained by the language of sect. 28 to hold that for the purpose of this section the county council is regarded as a lay impropriator, who would but for the express exemption be subject to the liability to repair. If the county council is to be so regarded, I cannot escape the conclusion that the University of Wales must be similarly regarded.

In the second place I would add some brief observations on the position of the Welsh Commissioners. The passing of the Tithe Act, 1936, and the consequent necessity for the Tithe Redemption Commission to ascertain at a particular moment of time the existence and *quantum* of liability to repair arising from the ownership of a tithe rentcharge extinguished by the Act have brought into a somewhat artificial prominence the ownership of the Welsh Commissioners who are themselves a statutory body of an impermanent character. I cannot help thinking that, if no question of the issue of tithe redemption stock had ever arisen but during the period of transition, in which the ownership of tithe was vested in the Welsh Commissioners, the question of repair to a particular chancel arose, the obvious solution would be found in the liability or freedom from liability of the beneficiaries to whom after that period of transition the tithe rentcharge would come. If that beneficiary were the county council, which takes free from liability, it would surely be a strange provision if the Welsh Commissioners during their period of management, long or short, were bound, or even at liberty, to embark on a work of repair which might in certain circumstances be of a substantial character. Equally, if the beneficiary were the University of Wales, which takes subject to the liability, it would be a strange thing, if during their period of management they were not at liberty, and, indeed, as a matter of proper management, were not bound, to take the necessary measures of repair. In the repair of chancels as of other buildings the homely proverb that a stitch in time saves nine is effectively true. The Welsh Commissioners would, in my opinion, fall short of their duty of management if by the neglect of proper repairs they left a heavier burden to be borne by their ultimate beneficiary, the University of Wales. These considerations make it unnecessary to determine whether the Welsh Commissioners ought to be regarded as lay impropriators within sect. 28, while the tithe rentcharges are vested in them. In my opinion, those rentcharges which would after their period of vesting in the Welsh Commissioners have been transferable to the University of Wales carried with them the burden of chancel repair throughout their journey to that destination and the question raised by the summons out of which this appeal arises should be answered accordingly.

Appeals dismissed.

Solicitors: *Milles, Day & Co.* (for the first appellants); *Nicholl, Manisty, Few & Co.* (for the second appellants); *A. D. Stocks, C.B., O.B.E.* (for the respondents, the Tithe Redemption Commission); *R. Primrose* (for the other respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

R. v. THE RECORDER OF DERBY (*Ex parte* SPALTON).

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J., Humphreys and Croom-Johnson, JJ.), **May 8, 1944.**]

Appeals—Appeal to quarter sessions—Summons against retailer under Food and Drugs Act, 1938—*Information laid by retailer against manufacturer under s.* 83—*First summons dismissed—Conviction on second summons—Appeal against conviction—Whether notice of appeal required to be given to prosecutor of first summons—Summary Jurisdiction* (*Appeals*) *Act*, 1933 (*c.* 38), *s.* 1 —*Food and Drugs Act*, 1938 (*c.* 56), *ss.* 3, 83.

The medical officer of health of a certain district served an information upon S. in respect of the Food and Drugs Act, 1938, s. 3 (1). S. availed himself of the procedure contained in s. 83 of the Act and served an information in respect of the same subject-matter on the Derbyshire Farmers' Dairy. At the hearing the summons against S. was dismissed and in the summons against the Derbyshire Farmers' Dairy a conviction was recorded. The latter wished to appeal and gave due notice to S. and sent a copy of the notice to the clerk of the court of summary jurisdiction with a further copy to be sent, if thought necessary, to the original prosecutor and to be sent as a matter of courtesy. The question for the determination of the court was whether the Summary Jurisdiction (Appeals) Act, 1933, s. 1, required due notice to be given to the medical officer of health. On behalf of the applicant it was contended that the only proceedings to which the medical officer of health was a party had been dismissed and that, therefore, it was unnecessary to give him notice of the appeal :—

HELD : (i) the proceedings against S. and against the Derbyshire Farmers' Dairy constituted one set of proceedings and upon the true construction of the Summary Jurisdiction (Appeals) Act, 1933, s. 1, due notice of appeal should have been given to the prosecutor under the Food and Drugs Act, 1938, s. 3, namely, the medical officer of health.

(ii) the informal notice given to the medical officer of health was not such a notice as was required by the Summary Jurisdiction (Appeals) Act, 1933, s. 1.

[EDITORIAL NOTE.] In third-party proceedings, it may turn out upon the facts that one party is exonerated and upon an appeal the only question may be the remaining parties. Here the only evidence that improper food had been supplied was given under the first information and, since an appeal to quarter sessions is a rehearing of the case, the latter court would be without any evidence that the food did not fulfil the statutory requirements if the original prosecutor was not there. It is necessary, therefore, that he should be served with a substantive notice of appeal and not a mere copy of a notice to some other party with an intimation that he may appear if he so desires.

AS TO NOTICE OF APPEAL TO QUARTER SESSIONS, see HALSBURY, Hailsham Edn., Vol. 21, p. 707, para. 1230 ; and FOR CASES, see DIGEST, Vol. 33, pp. 393-396, Nos. 1040-1063.]

Case referred to :

(1) *British Fermentation Products, Ltd.* v. *British Italian Trading Co., Ltd.*, [1942] 2 K.B. 145 ; [1942] 2 All E.R. 256.

APPLICATION for an order of *mandamus* directed to the Recorder of Derby to hear an appeal. The Summary Jurisdiction Act, 1879, s. 31 (1) (ii), as amended by the Summary Jurisdiction (Appeals) Act, 1933, s. 1, is as follows :

> The appellant shall, within fourteen days after the day on which the decision of the court of summary jurisdiction was given, give to the clerk to that court and to the other party notice in writing of his appeal, stating the general grounds of his appeal, and signed by him or by his agent on his behalf.

R. T. Paget for the applicant, Doris Ruth Spalton (trading as Derbyshire Farmers' Dairy).

Vernon Gattie for the Recorder of Derby.

VISCOUNT CALDECOTE, L.C.J. : The question which arises in this application, which is brought by leave of the court for an order of *mandamus* directed to the Recorder of Derby, is not at first sight easy, but on consideration and after a full argument I feel no doubt as to the right conclusion.

An offence was said to be committed against the Food and Drugs Act, 1938, s. 3, which makes it an offence for a seller to sell to the prejudice of the purchaser food which is not of the nature or substance or quality of the food demanded.

Dr. Lilico, who in this case represented the health department of the local authority, served an information upon Spalton which alleged that there had been a contravention of the provisions of this section, whereupon Spalton, taking advantage of the provisions of sect. 83 (1) and (2) of the same Act, served an information against a firm called the Derbyshire Farmers' Dairy. That is merely the trading name of Mrs. Doris Ruth Spalton who, we were informed, was some connection or relation of the defendant to the first information. The Derbyshire Farmers' Dairy, in their turn, served an information against the Minister of Food, and sought to take advantage of the provisions of sect. 83 which, to use a phrase which I used in *British Fermentation Products, Ltd.* v. *British Italian Trading Co., Ltd.* (1), contained provisions for putting the consequences of committing an offence on the right shoulders.

The scheme of the section is by this time well-known and it provides that, if a person brings proceedings under the Act against another person, that person may in his turn, upon complying with certain conditions, bring the person to whose act or default he alleges that contravention of the provisions is due, before the court in the same proceeding. The procedure contemplated by the section is, first of all, that the question shall be decided whether contravention has taken place, for it provides that :

> . . . if, after the contravention has been proved, the original defendant proves that the contravention was due to the act or default of that other person, that other person may be convicted . . .

Then the position of the original defendant is dealt with, and it provides that :

> . . . if the original defendant further proves that he has used all due diligence to secure that the provisions in question were complied with, he shall be acquitted of the offence.

The first of those two informations was dismissed, but it is clear from the facts in this case that it was not dismissed on any ground other than that the second person, namely the Derbyshire Farmers' Dairy, was the person to whose act or default the contravention was due. As I have pointed out, there were two steps : first of all, to find the contravention has taken place and, secondly, to find whether it is the original defendant or somebody else who was really responsible. On the information against the Derbyshire Farmers' Dairy a conviction was recorded. The Derbyshire Farmers' Dairy desired to appeal against that conviction, and the sole question in this case is whether the provisions of the Summary Jurisdiction Act, 1879, as re-enacted by the Summary Jurisdiction (Appeals) Act, 1933, s. 1, which requires notice in writing of appeal to be given to all parties, has been complied with. Put in terms of the facts of this case, the question is whether Dr. Lilico was a party to these proceedings who ought to have been served with notice of appeal.

A subsidiary question arises whether or not a notice of appeal was served on Dr. Lilico, but I will first deal with the question whether he ought to have been served with notice of appeal. It is plain, and it is illustrated by what took place in this case, that when the original defendant brings his proceeding against the party really responsible and that party is convicted, if that party then wishes to appeal, it is quite possible that the original defendant may give up any further interest in the case and may, as he did in this case, actually refrain from putting any evidence before the court as to the liability of the party to whose act or default the contravention was due. That shows it is important that the party who set these proceedings going should be informed of the fact that the alleged guilty party is appealing, in order that, if the party originally charged, the original defendant, refrains from laying any evidence before the court, he may be in a position not merely to cross-examine any defendant who gives evidence, but any witness called by him in support of his plea. It is important that he should also call rebutting evidence.

When I look at the provisions of sect. 83 I find that that is in fact provided for. I pointed out that it may be of great importance that the party who launched the proceedings should be aware of the appeal of what I may call the third party, and Parliament seems to have expressly provided for that situation, for in subsect. (2) the Act has said :

> . . . (*a*) the prosecution, as well as the person whom the defendant charges with the offence, [that is, the third party] shall have the right to cross-examine him, if he gives evidence, and any witness called by him in support of his pleas, and to call rebutting evidence.

In other words, the party who launched the proceedings seems to me to be a party to the proceedings which would take place upon an appeal to quarter sessions by the defendant who has been convicted in what I have called the third-party proceedings.

One argument addressed to the court requires our consideration. It has been argued that Dr. Lilico is not a party because the only proceedings to which he was a party have resulted in a dismissal of the information which he served upon Spalton and, therefore, he is out of the matter altogether. That argument seems to me to overlook the fact that the section provides that there should be two steps in the original proceeding, the first of which is to prove that there has been a contravention and, if there has been a contravention, the scheme of the Act clearly is then to have such inquiry made as is necessary to put the responsibility upon the right shoulders. In this case there has been a contravention, as found by the magistrates, and, therefore, it is not accurate to say that Dr. Lilico is no longer interested in the proceedings for the purposes of an appeal to quarter sessions. He is vitally interested, because it must be assumed that there has been a contravention and his interest is to see that that contravention is laid at the door of the party responsible for it.

I think, therefore, upon the plain provisions of the Act of Parliament, Dr. Lilico remains a party for the purposes of the provisions of the Summary Jurisdiction Acts who should have been served with notice of appeal. I think that this conclusion is fortified by an observation made by CASSELS, J., in *British Fermentation Products, Ltd.* v. *British Italian Trading Co., Ltd.* (1), who pointed out that the terms of the section further make it plain that Parliament contemplated that many parties might be before the court and that subsect. 2 (*b*) provided that the court may make such order as it thinks fit for the payment of costs by any party to the proceedings to any other party thereto. CASSELS, J., adds this observation, at p. 149 ([1942] 2 All E.R., at p. 258) :

> . . . so ample provision is thus made . . . for having all the parties before the court in the same proceedings and at the same hearing.

The subsidiary question to which I have referred is whether or not, in these proceedings, notice of appeal was given, and I have had some hesitation in arriving at a firm conclusion upon this point. The Recorder, in his affidavit which has been read to us, says :

> No notice of the said appeal had been served on the said Gordon Lilico. I was, however, informed that, as a matter of courtesy, intimation of the appeal had been given to the said Gordon Lilico.

We have nothing upon affidavit as to the service of that notice except Mrs. Spalton's statement, Mrs. Spalton being the Derbyshire Farmers' Dairy, that she served notice of appeal to the next court of quarter sessions upon Wilfred Greaves Spalton and sent a copy of the same notice to the said Gordon Lilico stating that the said copy of the notice was sent as a matter of courtesy.

That seems to me not to be such a notice as to satisfy the requirements of the material section of the Summary Jurisdiction Acts assuming, as I have decided, that notice was necessary. It was, at most, an informal intimation which was given, we are told here—it is not in the affidavit—to the assistant solicitor who was assistant to the clerk to the magistrates ; but the material section provides that notice shall be given with grounds of appeal, and given, I think, in such a form as to leave no doubt that the person upon whom the notice is served is to be in the position of a party who will have a right to appear and to be heard with the usual consequences.

On both grounds I feel, therefore, the appellant fails. I think notice should have been served upon Dr. Lilico as a party to the proceedings as a whole, and I think in this case that notice was not served and, therefore, I think this application should be dismissed.

HUMPHREYS, J. : I am of the same opinion. My Lord has covered almost the whole of the ground necessary to be covered in this case, but I want to say just a word upon two aspects of the matter. In the first place, I myself feel clear that we could not hold, upon the evidence before us, that the requirements of the section which provides that, in an appeal to quarter sessions, the appellant shall give to the clerk of the court (that is, the court of summary jurisdiction) and to the other party notice in writing of his appeal, has been complied with in this case. The facts were partly stated to us by counsel with complete accuracy and partly are derived from looking at the documents. I have no doubt that what happened was this. The appellant at quarter sessions came quite deliberately to the conclusion that the only party necessary to be served was the person who had laid the information against her, because she is a lady trading under a trade name. Accordingly, one finds that the notice of appeal, of which we have a copy, is specifically addressed to the clerk of the court of summary jurisdiction and Wilfred Greaves Spalton as the other party, and there is no notice addressed to the original prosecutor. What is said by that lady in her affidavit is :

> Upon Aug. 3, 1943, I served a notice of appeal to the next Court of Quarter Sessions upon the said Wilfred Greaves Spalton . . . and sent a copy of the notice [be it observed that is quite a different thing from serving a notice] to the said Gordon Lilico, stating that the copy of the notice was sent as a matter of courtesy.

It now appears that what she did was that she or her advisers made a second copy of the notice and left it with the clerk to the justices who had to be served and who was properly served, and left it to him to do what he liked with it, as a matter of courtesy ; but, if he thought Dr. Lilico would be interested in it, he might give it to him. I think there is no doubt that is what happened. I think that that could not be reasonably construed as serving a notice of appeal upon Dr. Lilico, and I observe that the Recorder, who has made an affidavit in this matter which the court is in the habit of accepting as conclusive upon any question to which it relates, says this :

> No notice of the said appeal had been served on the said Gordon Lilico. I was, however, informed that as a matter of courtesy intimation of the appeal had been given to the said Gordon Lilico.

For these reasons I think the matter is plain, that there was no service of the notice upon Dr. Lilico, the original prosecutor. Therefore, we have a clean-cut issue here upon which the court has to express its opinion as to whether it was necessary in law or not that that gentleman should be served. Upon that I entirely agree with the judgment of my Lord. I ask myself this question : Who were the parties concerned in the case when there was a conviction ? Originally who were they ? It seems to me that the only possible answer to that question is that there were three of them ; there was the original prosecutor who started the proceedings and who is given by the section itself the right to cross-examine and to call evidence in rebuttal if necessary ; not only the right to attend, but to take part in the proceedings. Then the second party was the person who was summoned under sect. 83, the present applicant ; and the third party was the person who, having originally been summoned and being still summoned and being there as a defendant in half of the proceedings, they all being heard together, was very much a party to the proceedings ; he was a double party, because he was defendant in one aspect of the matter and the prosecutor in the other aspect of the matter.

It seems to me that that is precisely what the statute has provided, for the words are that " A person against whom proceedings are brought "—that is, in this case, Spalton—" upon information duly laid by him," and so forth, " shall be entitled to have any person to whose act or default he alleges that the contravention of the provisions in question was due, brought before the court " —how, and in what way ?—" brought before the court in the proceedings." In point of fact, in this case there was only one set of proceedings ; that was the hearing of two informations by the same court against the persons who were there.

I also think that the following words in sect. 83 (2) (*b*) are material to be noticed :

> . . . the court may make such order as it thinks fit for the payment of costs by any party to the proceedings . . .

If there were only two possible parties to the proceedings and the other proceedings were different proceedings, one would have expected the word " either," not " any "—" by any party to the proceedings to any other party thereto." Those words make it, to my mind, tolerably clear that what was contemplated was one set of proceedings in which one or two, or it might be half-a-dozen, different persons acting as and being in fact prosecutor and defendant at the same time might take part, I think in such a case they were all parties to the proceedings.

Then there was an appeal, and the question is: Upon that appeal who were the persons who had to have notice given to them? I do not at all agree with the suggestion made by counsel for the applicant here that, if we hold that Dr. Lilico was entitled to have notice given to him, we must necessarily hold that, if there had been a dozen people—there were not in fact in this case, but there might have been—intermediary between the original person who made the default (that is, Spalton) and the final one who might be the manufacturer of the goods (in this case it happens to be the present applicant) notice would have been required to be given to all of them. I do not take that view at all myself. It seems to me that all the statute has required is that there shall be notice of appeal to all persons who were parties to that part of the proceedings in which there was a conviction. I have never yet heard it suggested that, if A and B are prosecuted jointly and A is acquitted while B is convicted, and B then appeals, it is necessary for B to give notice of appeal to A, the person who has been acquitted, the reason being that the appeal is an appeal against conviction.

All that I, for my part, am holding in this case is that Dr. Lilico, who was the original prosecutor, was a party to the proceedings, a party who ought to have been given notice of appeal. I am not suggesting, indeed, I do not think it is the fact, that those intermediate persons who had been originally parties to the proceedings, but had been dismissed as the result of the finding of the court, had any right to the notice at all.

I only want to add this, to emphasise what my Lord has said, that it is of great importance in an appeal to quarter sessions that the other party should be served with the notice of appeal, and that this case illustrates the great difficulties that might otherwise arise, inasmuch as here we know what took place was this. The medical officer of health having prosecuted A, A was saying: It is not myself, but my sister-in-law who really is responsible for this, and I want you to summon her as well. A having been acquitted and B convicted, B appeals. A takes no more interest in it, and according to the argument for the applicant in this case, A in most cases, it may be assumed, but without any suggestion of collusion or anything of that sort, from the very necessity of the case will no longer take the least interest in the case, having been himself acquitted and having passed on the responsibility to the person who really ought to shoulder it. What will probably happen in most cases—certainly it may happen in many—is that that person will not appear at quarter sessions to support the conviction, and by law the result of that must be that the conviction must be quashed, for an appeal to quarter sessions is a rehearing of the case; the prosecutors have to begin, they have to prove all over again the commission of the offence by the party who is the appellant, and unless they are there to do it with their witnesses, the appeal fails. One can imagine many cases in which it might be extremely convenient to the person who had been convicted of a real criminal offence and sent to prison for a substantial time, to take such steps as would result in the other party to the appeal being some person who would take great care not to turn up and support the conviction. Therefore, in the public interest, I think this is a case of a little more importance than at first sight appears.

I agree that the application here for *mandamus* should fail.

Croom-Johnson, J.: As this is a matter of some importance, I propose to add a few words of my own. When, under the Food and Drugs Act, 1938, s. 83, a person finds himself in the position of being a person against whom proceedings are brought under that Act, he is entitled, upon taking certain steps, to raise at the hearing of those proceedings a defence which otherwise may not be open to him. That defence consists of his being able to say that, if a contravention of the Act has been proved, that contravention was due to the act or default of another person; and I have brought him to court. When the justices hear that, having determined that there is a contravention of the Act, they may then proceed to hear and determine whether the contravention is the contravention of the original defendant, and, if the original defendant satisfies the justices that it is not his contravention, but is really the contravention of the other person that he has brought there, then the original defendant has to go on and prove something else. The words of the statute are perhaps worth looking at:

> . . . if the original defendant further proves that he has used all due diligence to secure that the provisions in question were complied with, he shall be acquitted of the offence.

Upon that state of affairs, counsel for the applicant has argued attractively enough that this is not one set of proceedings ; it is not one summons, so to speak, which the justices are hearing and determining, but a whole series of separate sales limited only by the number of people who, under authority which has been cited before us, have been brought in, following down the trail, so to speak, as the people who are really responsible for what has occurred. I think, upon the language of the section that that is a misunderstanding, because not only are the words " in the proceedings," as HUMPHREYS, J., pointed out, repeated in the section, but the section is careful to distinguish between the original defendant and somebody else. If the defendant was the person and somebody else was a third party, it is a little difficult to understand why the legislature should have used the words " original defendant." To my mind, that is one explanation, at all events, that the proceedings are the same proceedings, with some other substituted or possibly substituted defendant brought in under the provisions of subsect. (1).

Then in subsect. (2) come the provisions giving the prosecutor the right to cross-examine the defendant as well as the person whom the defendant charged with the offence, and also any witnesses he may call in support of his plea. Then most positively of all comes subsect. 2 (*b*), under which :

> . . . the court may make such order as it thinks fit for the payment of costs by any party to the proceedings . . .

Not "by the parties to the various proceedings hereinbefore indicated " but " the proceedings " ; they are the same proceedings. I think it follows that the prosecutor remains the prosecutor all through the proceedings, and when the whole thing is over the justices have the right to find that, if the contravention was due to the act or default of that other person, that that other person should be the person convicted.

In those circumstances, it seems to me that the proceedings are one set of proceedings with one prosecutor who has set the ball in motion, with the right to the original defendant to substitute, if he can, somebody else who should be punished instead of himself, if he satisfies the statutory requirements.

I was a little attracted at one time by the argument which was suggested based on the third-party proceedings in a common law action under rules of court, but upon reflection I do not think that that is a distinction which assists, because third-party proceedings in the High Court are themselves the subject of a definite code with definite provisions, definite rules, while this form of proceeding, I think, falls to be governed by the language of this section and by nothing else.

That being the position, what is to follow when a person brought in in these circumstances has been convicted, when the original defendant has been acquitted and the person brought in desires to appeal ? It must be remembered that appeals to quarter sessions are the creature of statute and that certain things have to be proved by the person who desires to bring on an appeal. It is true the appeal is by way of a rehearing, but because the rules which provide for the appeal must be observed, the very first question which always arises, if it is an appeal to quarter sessions, is : Are the notices in order ? One of those rules, as has been pointed out by both the other members of the court, is that there shall be a notice of appeal served upon the other party, and the other party, as a rule, in matters of that sort, is the prosecutor. I cannot think who else it can be.

Accordingly, what has to be shown when the appeal comes on, and I apprehend what had to be shown here when it is suggested that the Recorder refused jurisdiction, is to show that everything was in order to enable the Recorder to embark upon his duties. The very first question was : Have the notices been served ? Similarly, as it seems to me, when somebody comes to this court to say : " The Recorder has not heard my appeal," they should at least show that they have set things so far in motion that the point has arisen when the Recorder was obliged to hear the appeal. On their own showing here, they start with the admission that there is something unusual with regard to the notice. A little investigation shows quite plainly that the form of notice provided for in such matters has never been served, and what the prosecutors of this application now seek to do is to show that, in some way or another, they have done something just as good, that they have brought this appeal to the attention of the other party, who, according to what I have said already, was in fact the prosecutor here, which enabled him to turn up. I do not desire to say anything more about that matter than that, upon the material supplied to us, I am quite unable to come to the conclusion that there has been any notice of appeal or anything served upon the prosecutor which this court either ought or is obliged to treat as a valid notice of appeal.

In those circumstances, it seems to me that the Recorder was right in the view that he took and that this application should be refused.

Application refused with costs.

Solicitors: *Gibson & Weldon*, agents for *Flint, Bishop & Barnett*, Derby (for the applicant); *Sharpe, Pritchard & Co.*, agents for *C. Ashton* (for the Recorder of Derby).

[*Reported by* R. Boswell, Esq., *Barrister-at-Law.*]

PORT OF LONDON AUTHORITY *v.* ESSEX RIVERS CATCHMENT BOARD.

[King's Bench Division (Humphreys, Oliver and Stable, JJ.), **April 18, 1944.**]

Sewers and Drains—Land drainage—Drainage rates—Annual value of premises for purposes of drainage rates determined by drainage board—Whether board required to make fresh valuation in each year—Land Drainage Act, 1930 (*c.* 44), *ss.* 24 (4), 26 (2), 29.

By virtue of the Land Drainage Act, 1930, drainage rates were payable by the appellants to the respondents in respect of certain properties, the annual value of which, since there was no Schedule A assessment of them, was to be determined, for the purposes of the drainage rates, by the respondents. It was contended on behalf of the appellants that the respondents were under a duty, by virtue of sect. 24 (4) of the Act to make a fresh determination for the purposes of drainage rates of the value of the premises in question in each year. The respondents contended that the Act did not require them to make any valuation other than the first valuation made after the setting up of the board:—

Held: upon the true construction of the section, the respondent board was required to make a valuation of the premises in question in each year.

[**EDITORIAL NOTE.** The valuation for drainage rates was primarily based on the Sched. A. valuation. Certain properties, however, have been taken out of Sched. A and in such cases the drainage board had to value them. The question here is substantially whether, when the value of properties varies from time to time, the board is required to make a fresh valuation.

As to Drainage Rates, see HALSBURY, Hailsham Edn., Vol. 30, pp. 90-92, para. 170; and for Cases, see DIGEST, Supp., Vol. 41, p. 6, Nos. 423-469c.]

Appeal by way of case stated by agreement of the parties from a decision of the quarter sessions on a point of construction of the Land Drainage Act, 1930. The facts are fully set out in the judgment of Humphreys, J.

F. Wishart for the appellants.

Harold B. Williams for the respondents.

Humphreys, J.: The appellants, the Port of London Authority, own property within the jurisdiction of the respondents, the Essex Rivers Catchment Board. By virtue of the Land Drainage Act, 1930, drainage rates are payable by the appellants to the respondents in respect of those properties. The hereditaments are of a very considerable extent, the value being £50,000. The Act provides that the drainage board shall raise money by means of drainage rates, and those rates are to be collected from owners and occupiers.

By sect. 24 (4) of the Act it is provided:

> Every rate made by a drainage board shall be an annual value rate, that is to say, a rate assessed on the basis of annual value as regards all hereditaments. . . .

By sect. 26 of the Act provision is made for the making of the rate, and by subsect. (2) of that section it is provided :

> . . . every drainage rate shall be made in respect either of a period of 12 months or a period of 6 months, as the drainage board may determine . . . .

Those are, I think, the material sections up to sect. 29, which is the interpretation section, and defines annual value. It says :

> The expression "annual value" in relation to any land means the gross annual value of that land as determined for the purposes of income tax under the Income Tax Act, 1918, Sched. A . . .

So far no difficulty can arise of the nature of that which has arisen in this case, but a number of properties, which formerly were assessed for the purposes of income tax under the Income Tax Act, 1918, Sched. A, have been taken out of that Act, and, therefore, it was necessary to, and Parliament did, provide for those cases where the land is not assessed to income tax under Sched. A. In sect. 29 (2), this provision appears :

> . . . where any land is not assessed for the purposes of income tax under the Income Tax Act, 1918, Sched. A, as amended by any subsequent enactment, the annual value thereof for the purposes of drainage rates shall be such value as may be determined by the drainage board.

The drainage boards came into existence in 1931, and the contention which is made on behalf of the respondents here is that all that is required to be done is that a drainage board in the year 1931, if it came into existence at that time, or no doubt if it comes into existence later, at its birth, if I may use that expression, should once and once only determine the annual value for the purpose of drainage rates of the hereditaments which come under its jurisdiction. It is argued on the other side that the annual value of any particular hereditament must be decided annually because it is the annual value and not the value once and for all ; it is the yearly value which has got to be assessed, and that, quite obviously, may alter from time to time, and certainly in the course of such a long period as from 1930 to 1943 when this matter arose.

To return to the Act itself, where under sect. 29 (2) a drainage board have determined any value, they must serve notice of their decision upon the owner and the occupier of the hereditament to which the decision relates. That, on the face of it, appears to me to be an indication that in regard to every hereditament the duty of the drainage board is to determine either yearly or half-yearly, and normally it would be yearly, the annual value of that hereditament and to give notice to the owner and occupier of the hereditament of their decision. The object of giving notice is to be found in the following words of sect. 29 (3) :

> . . . the owner and the occupier, or either of them, may within 28 days after the service of the notice, appeal against the apportionment or determination to a court of summary jurisdiction, whose decision shall be final.

It seems to me that unless there is an annual determination and that determination is followed each year by a notice served on the persons who are affected by the determination, there is no opportunity given by the Act to the person who is liable to pay the drainage rate to appeal, as he is entitled to under that Act and as any person who is affected by a rate of any sort has a right to do by way of appeal to some court or other. Sect. 30 gives a right of appeal to quarter sessions.

The facts are quite simple. The hereditaments in question here are hereditaments, as I have already stated, of some £50,000 odd in value, and the determination by the respondents as to the annual value of those was originally made in February, 1937, when the value was determined by them to be £51, 541. Later in the same year a certain slight alteration took place, a physical alteration, as the result of which the respondents in 1939 revalued the property but only in the sense that a small ticket office having been valued under another Act as part of the property of a railway company, it had to come out of the total, of which it formed part, of £51,541, with the result that the determination of the respondents in 1939 was that the value was reduced to £51,504. There was no general revaluation of the properties. It seems that all that was done was that the value of this particular ticket office was taken out of this valuation inasmuch as it appeared in some other place and other rates were paid in respect of it as the result of other Acts of Parliament.

It appears that since 1940 every year the drainage rate has been made and has been paid by the appellants so far as their share of it is concerned. On Mar. 26, 1943, the respondents made a drainage rate and demanded it from the appellants. The appellants, according to the facts stated in this case, were of opinion that the rate was too high because they said the annual value of part of their premises had for some reason or other been reduced and that they were entitled to be assessed at a smaller annual value. The case states that the appellants requested the respondents to make a fresh determination of the annual value for the purpose of the drainage rates for the year commencing Apr. 1, 1943, before making the actual rate, and asked them to serve notice of their decision upon the appellants, the object, no doubt, being that, unless they made the reduction which the appellants desired, the appellants would desire to appeal to a court of summary jurisdiction on the matter, and exercise their right of appeal under sect. 29 (3) of the Act. The case continues by saying that the respondents refused to do so. We are not informed of the reason, if any, given by the respondents for refusing to do so or whether they made any counter proposal of any description. They refused to do so, taking up the ground, which they were perfectly entitled to do, that in law they could not be made to do it. They were not contending, I think I am right in saying, for a moment that they had not power to make a determination of the annual value (indeed, it is quite clear that they had), but they said that they did not propose to do it and they could not be made to do it. That is the question which we have to decide.

The appellants then appealed against the rate and later to quarter sessions, and the parties agreed to state the facts in the form of a special case for the opinion of this court. The parties have asked this court the following questions :

> (i) Whether the respondent was bound in law to make a fresh determination of the annual value of the said premises and to serve notice of their decision upon the appellant before making the said drainage rates for the year commencing Apr. 1, 1943, and (ii) whether the said rates are bad in law.

It does not seem to me that there is any half-way house here. Either the respondents are right in saying that they had a discretion in the matter and cannot be compelled to make a determination, or they are wrong. If they are wrong it seems to me that the rate is bad and there is nothing more to be said about it so far as this court is concerned. Is it bad ? A great many conundrums have been propounded by counsel in regard to this legislation, but I think it is tolerably clear that the scheme of this Act was a scheme for the annual valuation of such hereditaments as were not already the subject of a valuation under the Income Tax Act, 1918, Sched. A. In my opinion, one has only to read the language of these various sections to see that that is beyond any question at all. Sect. 24 (4) says :

> Every rate made by a drainage board shall be an annual value rate, that is to say, a rate assessed on the basis of annual value . . .

The drainage rate is to be made not for 5 years or 10 years or for a longer period but in respect of a period of 12 months at the longest and it may be shorter. I do not desire myself to express any opinion upon any of the questions which have been argued which in my opinion are unnecessary for the decision of this case. I base my judgment upon this. It seems to me to be clear that the argument for the respondents involves this proposition. Every person whose property is *prima facie* liable to a drainage rate either has his property assessed under Sched. A or he does not. If he comes under Sched. A, then the assessment is a quinquennial one. The Sched. A assessment once made lasts for 5 years, but there is an annual right of appeal by the person assessed. Whether or not he can prove a reduction in value is a matter for each individual ratepayer, but, if he thinks he can show that the annual value last year of his property has decreased this year, so that the present annual value of his property is less than it was last year, he is perfectly entitled to appeal and ask to have that matter set right. That is the position of half the people, those who come under Sched. A. The position of the other persons, including the appellants in this case, is said to be this. As the result of the language of the various sections of this Act only one determination must be made by the drainage board of the value of the whole of the hereditaments under their jurisdiction; they are not required, although they are given power, to make any further valuation at all at any future time, and the result is that they can, by declining to accede to a request that they should exercise their jurisdiction by determining the value for a particular year when asked, deprive the person who is to be rated and pay the drainage rate of his right to appeal to a court of law. To my mind that proposition only requires stating to make it plain to any lawyer that it must be wrong. No public authority can have vested in it a discretion to do or not to do something which it may exercise in that way. It is on that ground, and it is a sufficient ground in my opinion, that I hold in this case that the language of the section can only be made consistent by reading it as not only giving jurisdiction to the drainage board to assess an annual value, but to be read as requiring them to assess an annual value, and where they have once determined a value, which I think they must do annually, then it follows from sect. 29 (3) that they are equally bound to give notice to the various owners and occupiers of hereditaments who will be called upon to pay drainage rates, and it follows from that that each of those rated persons has the right of appeal which the statute gives them under that subsection. It seems to me that any other decision must work real and substantial injustice. Courts of law are always reluctant, at least, to hold that the true meaning of any Act of Parliament is that which must work injustice. I am not saying for a moment that I think it is necessary (indeed, I do not think it is necessary) for skilled valuers to be appointed every year to value the whole of the properties within the area of this catchment board. It may be it is quite sufficient for the board, assuming there is nothing else brought to their attention, to say in any particular year there has been no alteration in value. But they must determine the value every year in order that the rights of appeal which are given to the parties come into force. They must determine what is the annual value of properties within their jurisdiction in such cases in which they are called upon to value them inasmuch as the normal method of valuation which is under Sched. A does not apply to those properties.

For these reasons I think this rate was bad on the ground that the respondents failed to comply with the requirements of the statute.

Oliver, J.: I agree with every word my Lord has said and I cannot usefully add a single one of my own.

Stable, J.: I agree.

Appeal allowed with costs.

Solicitors: *Solicitor to the Port of London Authority* (for the appellants); *Kennedy, Ponsonby & Co.*, agents for *W. Hilliard & Ward*, Chelmsford (for the respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

McGOVERN *v.* THE LONDON, MIDLAND & SCOTTISH RY. CO. AND OTHERS.

[Liverpool Spring Assizes (Hilbery, J.), **April 28, 1944.**]

Master and Servant—Liability in case of accident—Defences—Common employment—Employees engaged in different departments of duty—Plaintiff not in course of employment at time of accident.

The plaintiff, an engine cleaner in one of the railway company's running sheds, was in the habit of crossing some railway sidings belonging to the company as a short cut to and from her work. On the day of the accident here in question, a lorry had been backed to the sidings and stood overlapping the rails. While crossing the sidings in front of this lorry on her way home for her lunch, the plaintiff was knocked down by the lorry which had suddenly received a violent impact from a train that was being shunted on that line without any warning being given. The plaintiff claimed damages for negligence. It was contended by the railway company that the plaintiff's remedy was barred since the negligence was that of fellow servants in common employment with her :—

HELD : the doctrine of common employment did not apply because the plaintiff's work as a cleaner in the running shed was quite distinct from that of the shunters and did not expose her to risk of injury through their negligence.

[**EDITORIAL NOTE.** The doctrine of common employment is only applicable to employees in the same department of duty. In the case of large undertakings involving A many departments of duty this general statement is a little difficult to apply and the position can be elucidated only by the consideration of particular cases.

AS TO COMMON EMPLOYMENT, see HALSBURY, Hailsham Edn., Vol. 22, pp. 191-194, paras. 322-328 ; and FOR CASES, see DIGEST, Vol. 34, pp. 211-215, Nos. 1744-1781.]

Cases referred to :

*(1) *Radcliffe* v. *Ribble Motor Services, Ltd.*, [1939] A.C. 215 ; [1939] 1 All E.R. 637 ; Digest Supp. ; 108 L.J.K.B. 320 ; 160 L.T. 420.

B *(2) *Pollock* v. *Burt (Charles), Ltd.*, [1941] 1 K.B. 121 ; [1940] 4 All E.R. 264 ; Digest Supp. ; 110 L.J.K.B. 93 ; 164 L.T. 244.

(3) *Morgan* v. *Vale of Neath Ry. Co.* (1864), 5 B. & S. 570 ; *on appeal* (1865), L.R. 1 Q.B. 149 ; 34 Digest 212, *1750* ; 5 B. & S. 736 ; 35 L.J.Q.B. 23 ; 13 L.T. 564.

(4) *Alexander* v. *Tredegar Iron & Coal Co., Ltd.*, [1944] 1 All E.R. 451.

(5) *St. Helens Colliery Co., Ltd.* v. *Hewitson*, [1924] A.C. 59 ; 34 Digest 280, *2364* ; 93 L.J.K.B. 177 ; 130 L.T. 291 ; *sub nom. Hewitson* v. *St. Helens Colliery Co., Ltd.*, 16 B.W.C.C. 230.

C (6) *Lancashire & Yorkshire Ry. Co.* v. *Highley*, [1917] A.C. 352 ; 34 Digest 290, *2425* ; 86 L.J.K.B. 715 ; 116 L.T. 767.

ACTION for damages for negligence. About 2 years before the accident, the subject of this action, the plaintiff had been employed by the defendant railway company as a shop worker at Kirkdale Station, but later volunteered for work in the locomotive running shed where she was engaged in locomotive cleaning. D This work, on which she was employed at the time of the accident, was all done in the running shed, which was situated at the corner of a siding. Her home was near to the other side of this siding and she had been in the habit of going to and from her home by crossing the lines. There was a track across the lines which was used by servants of the railway company engaged in shunting operations. No one had ever given her permission or ordered her to go by this route but at no time had she been interfered with when doing so. She went E entirely for her own convenience. On the day of the accident she was going home by this route shortly after 11.30 a.m., and in doing so passed in front of a lorry. The back of the lorry was overhanging one of the railway lines and the train coming along at that particular moment hit the back of the lorry and the plaintiff was knocked down and injured. The evidence showed that the accident was due to the negligence of the shunters and a plea of contributory F negligence on the part of the plaintiff was abandoned by counsel for the railway company. The only remaining plea was the contention that the doctrine of common employment barred the plaintiff's remedy in the circumstances of this case.

Edward Wooll, K.C., and *Rose Heilbron* for the plaintiff.

G. J. Lynskey, K.C., and *H. I. Nelson* for the first defendants.

Wilfrid Clothier, K.C., *C. M. W. Elliott* and *R. R. Smylie* for the second G defendants.

HILBERY, J. : The limits of the doctrine of common employment were considered by the House of Lords in *Radcliffe* v. *Ribble Motor Services, Ltd.* (1), where all the previous cases were reviewed. In that case LORD WRIGHT held, at p. 238, ([1939] 1 All E.R. p. 650) that the relevant limitation was that the rule does not apply where the injured man and the negligent employee are not H engaged in the same common work or are not common workers in the same work, or are engaged in different departments of duty. At p. 249 ([1939] 1 All E.R. p. 658) he said :

> They [that is the servant who is negligent and the servant who suffers through that negligence] must be employed in common work, that is work which necessarily and naturally or in the usual course involves juxtaposition . . . and exposure to the risk of the negligence of one affecting the other.

In the present case, at the time of her accident, the plaintiff was not at her work at all ; she was upon an excursion of her own. She had left her work and was on her way home to fetch her dinner. Her work had not taken her to the spot where she met with her accident. She was there in her own time for her own ends.

She was in no sense employed in, or taking any part in the shunting, the negligent conduct of which caused her accident. Her work with the company was work in a department quite distinct from the shunting; as a fire-box cleaner in the running shed she was employed in a department of work quite distinct from that of the shunters. Her work in the running shed did not "necessarily," "naturally" or "in the usual course" involve her in "juxtaposition . . . and exposure to the risk" of their negligence.

By the tests enunciated by LORD WRIGHT it is, therefore, quite clear that the plaintiff's case would not be barred by the doctrine of common employment and, in my opinion, it is not barred. This topic of common employment was again considered in the Court of Appeal, in *Pollock* v. *Burt* (2). There the Court of Appeal was considering whether the manager of a branch shop of the defendants' business, who met with an accident and injury while being driven on the defendants' mail order business, by a driver also employed by the defendants, who usually drove one of the directors in that particular car, was barred from his remedy against the defendants' for the negligence of this driver, by the doctrine of common employment. DU PARCQ, L.J., in his judgment, concurred in the decision of the court that the doctrine did not apply. He stated what were the precise limits of the contractual obligations to the defendants undertaken by the plaintiff, and then gave his reasons for deciding that, having due regard to the exact limits of those contractual obligations, the doctrine did not bar the plaintiff's remedy. At p. 130 ([1940] 4 All E.R. p. 267) he says:

> There was not a word to suggest that it would be likely at any time that he would be sent out in a car by the defendant company. It is quite true that after entering the company's service he was told on occasions to go out on this mail order business, and that this necessitated his going in a vehicle, but it involved in ordinary circumstances his going with a fellow-employee in a car provided by that fellow-employee himself and driven by him. It is not necessary to consider whether if an accident had happened in these circumstances the doctrine of common employment would have applied. However that may be, I see no reason to think that on the day on which this accident happened there was anything at all in the contract of employment between the plaintiff and the defendants which obliged him to go in the director's car. I think he could have said: "I must do this mail-order business, but I will do it in some other way. I will take a cab, if I cannot do it by walking." I do not think that he could have been ordered to go in this car. If he had been technically minded he could have said: "It is not part of my contract that I should be driven in the director's car by Spencer," just as he could have said, if a director had made an offer with regard to a car which was his own private car—one cannot imagine an employee saying it, but it would be open to him to say it—"I never agreed to being driven in your private car."

In the present case there was nothing in the plaintiff's contract of service with the railway company which obliged her to go across the shunting yards, the way she was in fact going when she met with her accident. I do not think—to borrow the language of DU PARCQ, L.J.,—that she could have been ordered to go by the road which she was in fact following when she met with her accident. There was nothing in her contract of service which obliged her to expose herself to the risk of negligent shunting. There is no evidence before me that it was her only way to and from the running shed where she worked. The evidence is quite the contrary. She chose to go that way as a short cut. She was there solely for her own convenience.

It is quite clear, whatever else may be in doubt about this doctrine of common employment, that, the principle is as stated by BLACKBURN, J., in *Morgan* v. *Vale of Neath Ry. Co.* (3), in language cited by LORD ATKIN with approval in *Radcliffe* v. *Ribble Motor Services, Ltd.* (1). At p. 578, BLACKBURN, J., said that the principle upon which the doctrine depends is this:

> . . . that a servant who engages for the performance of services for compensation does, as an implied part of the contract, take upon himself, as between himself and his master, the natural risks and perils incidental to the performance of such services . . . and . . . where the nature of the service is such that as a natural incident to that service, the person undertaking it must be exposed to risk of injury from the negligence of other servants of the same employer, this risk is one of the natural perils which the

servant, by his contract, takes upon himself, as between him and his master.

This undertaking by the servant is, therefore, an implied term of his contract, a term which the law implies in the contract of service. That is confirmed and made abundantly clear by the judgment of the Court of Appeal in *Alexander* v. *Tredegar Iron & Coal Co., Ltd.* (4). Tested by the principle underlying the doctrine, how would the plaintiff's case seem to stand ? When she undertook to perform the work of cleaning the fire-boxes in the locomotives brought into the running shed while they were in the running shed, could she be said impliedly to undertake as between herself and the railway company, as a natural risk and peril incident to the employment of herself and her services, and as a risk to which she must be exposed, the risk of negligence on the part of shunters on the siding and, amongst other places, on the siding where she met her accident? The answer, I think, must be: No. There was nothing in the work which she had to do in the running shed which must expose her to the risk of injury through the negligence of the shunters on the lines which lay adjacent to the running shed, for there was nothing in her work necessarily to take her to the lines where the shunting was going on. The shunting on the lines and on the Kirkdale Local siding, and negligence in the shunting that as a mattter which might affect her performing her duties in the running shed, could not have been in the contemplation either of herself or the railway company when she undertook the work of cleaning the fire-boxes, etc., in the running shed.

I see no reason in principle to imply as a term in her contract that she must necessarily have undertaken any such risks. The risk from which she suffered was not a natural incident of her service and, although it is not necessary, in the view which I have expressed, definitely to determine the matter, nevertheless, when one is considering whether this risk from which she in fact suffered —i.e., the risk of the negligent shunting along the Kirkdale Local lines—was a natural risk or peril incident to the risk or peril of her services, it is, I think, illuminating to observe (without, as I say, deciding it), that apparently, when she was going in the way she was going when she met with her accident and when she was in such a situation that she was exposed to the risk of negligent shunting up to the Kirkdale Local line, she can scarcely be said, on the authorities, to have actually been where she was in the course of her employment. She had left off work, as I have said. She was going from her work home, with the purpose of getting herself some food. She was going by an unorthodox way, along which, to put it at the highest, all that can be said was that she had been permitted to go by the railway company. The situation is very much like that which arose in *St. Helens Colliery Co.* v. *Hewitson* (5). In that case I would only mention in this action LORD WRENBURY's speech, at p. 92, where he says :

> A first step is to ascertain what is the employment. If the workman is doing anything that his employer could and did, expressly or by implication, employ him to do . . . and the accident occurs when he is doing it, the case is within the Act. If, for instance, the employer says " Go by the 9.45 train to Manchester and there do such and such a job " the employer is on the risk directly the man goes, as he is ordered. This was the case in *Lancashire & Yorkshire Ry. Co.* v. *Highley* (6). If the man is paid by time his time begins from the moment of his going. If, again, the employer (being entitled so to do) says, "Come to your work by a particular route," the employer is on the risk when the man is coming by that route. This is so, because in each of these cases there is an obligation. The man . . . goes by the assigned route [or train] because he . . . is obeying an order to do so . . . But the mere fact that the man is going to or coming from his work, although it is a necessary incident of his employment, is not enough.

The plaintiff in this case was not going by an assigned route at the time when she met with her accident. There was nothing in the terms of her employment or in the situation of her work which obliged her to go by that route, nor had she been ordered to go by it, and in all the circumstances I am, therefore, of the opinion that her remedy is not barred in this case by the doctrine of common employment.

Judgment for the plaintiff for £300 *and costs against the first defendants.*

Solicitors : *Silverman & Livermore* (for the plaintiff) ; *Alexander Eddy* (for the first defendants) ; *Platt & Co.*, Manchester (for the second defendants).

[*Reported by* M. D. CHORLTON, *Barrister-at-Law.*]

Re PETITION OF RIGHT OF CANADIAN EAGLE OIL CO., LTD.

[Court of Appeal (Scott, Goddard and du Parcq, L.JJ.), **May 24, 1944.**]

Income Tax—Double taxation—Relief—Shares in British companies held by Canadian company—Dividends of British companies suffering tax—Relief claimed by Canadian company in respect of tax deducted from dividends paid to British shareholders—Income Tax Act, 1918 (*c.* 40), *Sched., D. case V.*

The suppliant, a Canadian company, held shares in certain British companies and suffered a deduction of income tax from the dividends received from those companies and from the interest on money lent to them. The suppliant was also directly assessed to income tax in respect of interest on money deposited with British bankers. On the payment of dividends to shareholders resident in the United Kingdom, the suppliant, by its agent, deducted tax at the rate then in force. Until 1932, the Special Commissioners exempted from assessment to income tax such part of such dividends as arose from dividends received from the British companies, but since that date no repayment was allowed in respect of fixed preferential dividends payable by the Canadian company, and, since 1940, the only repayment made was in respect of income directly assessed. The suppliant claimed, under the rule in *Gilbertson* v. *Fergusson* (1), the repayment of all tax from 1932 onward assessed on dividends arising from dividends received by the company from British companies :—

Held : (i) [Scott, L.J., giving no decision on this point] assuming there was tax to be repaid, the proper person to sue for its repayment was either the shareholder or the paying agent and not the company. The petition must, therefore, be dismissed.

(ii) [Goddard, L.J., giving no decision on this point] the rule in *Gilbertson* v. *Fergusson* (1) does not apply to profits of a foreign company which consists of dividends upon shares in English companies received by the foreign company.

Decision of Macnaghten, J. ([1943] 2 All E.R., at p. 702) *affirmed.*

[**EDITORIAL NOTE.** In this case there was a question whether the suppliant was the right party to sue for the repayment of the tax, and it would seem that this objection by way of demurrer is really a preliminary issue. In this appeal, therefore, it would seem that the substantive question arising upon the rule in *Gilbertson* v. *Fergusson* (1) is not really in issue, but as that had to be decided in the following appeal, *Selection Trust, Ltd.* v. *Devitt*, p. 742, *post*, Scott and du Parcq, L.JJ., have found it convenient to deal with that question in their judgments herein. It is essential, therefore, that the two cases should be read together.

As to *Gilbertson* v. *Fergusson* Relief, see HALSBURY, Hailsham Edn., Vol. 17, p. 195, para. 399 ; and for Cases, see DIGEST, Vol. 27, p. 79, No. 431, DIGEST, Supp., Income Tax 431a.].

Cases referred to :

*(1) *Gilbertson* v. *Fergusson* (1881), 7 Q.B.D. 562 ; 28 Digest 79, *431* ; 46 L.T. 10 ; 1 Tax Cas. 701 ; *affg.* 5 Ex.D. 57.

*(2) *Barnes* v. *Hely-Hutchinson*, [1940] A.C. 81 ; [1939] 3 All E.R. 803 ; Digest Supp. ; 108 L.J.K.B. 893 ; 161 L.T. 181 ; *revsg.*, [1939] 1 K.B. 93.

(3) *Cesena Sulphur Co.* v. *Nicholson, Calcutta Jute Mills Co.* v. *Nicholson* (1876), 1 Ex.D. 428 ; 28 Digest 25, *136* ; 45 L.J.Q.B. 821 ; 35 L.T. 275 ; 1 Tax Cas. 83.

(4) *Selection Trust, Ltd.* v. *Devitt*, p. 742, *post* ; *affg.* S.C. [1943] 2 All E.R. 727.

Appeal by the suppliant from a decision of Macnaghten, J. ([1943] 2 All E.R. 702), where the facts are fully set out.

J. Millard Tucker, K.C., and *Heyworth Talbot* for the suppliant.

The Solicitor-General (*Sir David Maxwell Fyfe, K.C.*), and *Reginald P. Hills* for the Crown.

Scott, L.J. : This is an income tax case and in this judgment I use the epithet " foreign " as meaning resident outside the United Kingdom ; and the epithet " British " as meaning resident within the United Kingdom. In this sense the suppliant company is foreign ; a Canadian company carrying on business in Canada and not in the United Kingdom. In the present case it is claiming by petition of right, repayment from the Inland Revenue of income tax on dividends from which the tax had been deducted by the company's " paying agents " in the United Kingdom, to whom it had entrusted moneys for the payment in London of dividends on its shares. Of these there were three classes: (A) cumulative preference, entitled to a fixed rate of dividend; (B) participating preference; (C) ordinary. Class (B) were entitled to a fixed non-cumulative dividend (upon declaration) payable out of net profits. Then followed a similar dividend for class (C) (*i.e.*, after payment to (B) of its fixed dividend), but at the same fixed rate as (B). Then, if there still remained a surplus of distributable profits, the company could declare a further distribution, but this had to be rateable between all the shares of (B) and (C). There is no information before the court about Canadian law, but classes (B) and (C) appear to be somewhat similar to what in England are often called ordinary and deferred ordinary, (A) alone seem to be true preference shares. The paying agent was the Midland Bank, who duly carried out all the directions of r. 7 of the Miscellaneous Rules under Sched. D and the third set of rules under Sched. C—"the Paying Agents' Rules" (as they are now to be called; see Finance Act, 1938, s. 23), which are applied by r. 7 of Sched. D. The bank, as such paying agent, was duly assessed to tax, which, in respect of all the dividends it distributed it duly deducted, and it paid the tax over to the Inland Revenue as required by those rules. The suppliant now claims a return of the tax so paid over to the extent to which the dividends, so distributed by the bank under deduction of tax, came out of a balance of profits and gains which had consisted in part of dividends received by it from various companies resident in the United Kingdom, all of whom had deducted British income tax before payment to the suppliant company, and in part of certain bank interest received by it on which British tax had been paid by it. In the proportion that the suppliant's own income had been so taxed by deduction in the United Kingdom the suppliant claims that on the income tax principles of English law its own dividends should be similarly apportioned, and that tax was only properly deductible in the hands of its appointed "paying agent" on that part of the dividends which could be regarded as earned by it wholly abroad; the other part having indirectly, through its original British sources, already suffered tax.

The suppliant has proceeded by petition of right because it contends that there is no procedure under the Income Tax Acts by which it can enforce its rights. The Crown has demurred, and the only issues before us, as before MACNAGHTEN, J., are those raised by the demurrer. For more reasons than one, it is a difficult case. The claim purports to be based upon a rule of law enunciated in 1879, when the Divisional Court held that there was behind the express terms of income tax legislation, as it then was, a principle forbidding "double taxation," and making it illegal for "the same income" to be taxed twice over; the phrase "the same income" predicating identity, not only of source, but of the person entitled to receive it. That was *Gilbertson* v. *Fergusson* (1), decided in favour of the taxpayer by the majority of the Divisional Court. Their decision was affirmed two years later in the Court of Appeal. The "principle" of *Gilbertson* v. *Fergusson* (1) was followed by the Inland Revenue for half a century; and, indeed, it was so applied by the Inland Revenue to the suppliant company completely till 1932, when H.M. Inspector of Foreign Dividends raised the objection that the principle of *Gilbertson* v. *Fergusson* (1) was inapplicable to "preference dividends paid at a fixed rate," although at that time he still conceded the operation of the principle in regard to the suppliant's ordinary dividends. During the years 1933-4, 1934-5, and 1935-6, the suppliant paid no dividends: but in each of the three following years it paid dividends on all three classes of its shares, including arrears on its cumulative preference shares. In each of those years, however, the suppliant's claims for relief were allowed in respect of its ordinary dividends paid through the Midland Bank, its paying agent in London. In the year 1939-40, the suppliant again paid dividends on all its shares, through the same paying agent as before, but the Inland Revenue then contended that, by reason of the decision of the House of Lords in July, 1939, in *Barnes* v. *Hely Hutchinson* (2), the suppliant's relief must be restricted to that part of its ordinary dividends distributed by the bank, which could "be regarded as paid out of the profits of the company directly assessed to United Kingdom income tax under Sched. D" (*i.e.*, the bank interest received by it in London after deduction of tax). The suppliants did not accept the suggestion that it should be content with that small concession, and, therefore, declined the offer. Presumably that item remains conceded by the Inland Revenue; but the claims of the suppliant to relief in respect of tax deduction at the source from the dividends it received from the various British companies are all now resisted by the Inland Revenue: and this claim the suppliant now puts forward in regard to all the relevant past years. The Crown also contends (i) that, if anyone is entitled to claim, it is the shareholders on whose behalf, under the Paying Agent Rules, the tax was paid over by the bank to the Inland Revenue, and not the suppliants; and (ii) that petition of right does not lie because the company could have proceeded by a certain procedure under the Income Tax Acts.

I postpone discussion of these questions of parties and procedure till after I have dealt with the important matters of principle in issue.

On the latter I have come to the conclusion that the Crown is right. On the one hand the problem is in most ways made easier of solution for this court by the help the reasoning of their Lordships in the *Hely Hutchinson* case (2) gives to us; but, on the other hand, in some ways, it is made more difficult by the deliberate abstention of the House from overruling *Gilbertson* v. *Fergusson* (1). Indeed, it is not easy to say how far, if at all, that case can still stand, in view of the fundamental character of the reasoning of their Lordships in *Hely Hutchinson* (2), especially in certain passages in the speech of Lord Wright.

In view of the above considerations, it is incumbent on this court on the one hand to treat whatever was really decided in *Gilbertson* v. *Fergusson* (1) as binding on us; but on the other hand to consider very carefully how far the reasoning by which either court reached its conclusion in that case is now modified by the decision of the House of Lords in *Hely Hutchinson* (2). We have further to consider how far we are free to criticise the reasoning in *Gilbertson* v. *Fergusson* (1) on principle and to form our own views on the basic questions of law involved.

The facts there, so far as material to the present issues, can be stated shortly. The Ottoman Bank were, at the time in question, a foreign corporation, but carried on business in the United Kingdom through an agency in London, and on the profits so made were liable to tax under Sched. D, case 1. In addition they made profits abroad. Out of those two sources they paid dividends. For distribution of the dividends payable to persons in the United Kingdom they employed their London agents also as paying agents under the Income Tax (Foreign Dividends) Act, 1842, s. 2 (roughly equivalent to our Sched. D, Miscellaneous Rules, r. 7, and Sched. C, "Paying Agents' Rules"). To the agency they "entrusted" payment of the dividends, and those agents, before payment, deducted the tax on the whole dividend, in each case without regard to whether the profits out of which it was being paid, had been made abroad or in Great Britain (now the United Kingdom: see the Income Tax Act, 1853, s. 5). The shares were all bearer shares, dividends whereon were payable at Constantinople, Paris or London at the option of the holders. So far as relevant to the present problems, the question there was whether the London agency (a member whereof, Gilbertson, was treated as representing it) was entitled to recover from the Inland Revenue an amount of tax bearing the same proportion to the whole tax paid to the Revenue by the agency in its twofold capacity, as the profits made in the United Kingdom bore to the total profits of the Ottoman Bank, on the ground that in the name of the London agency the Ottoman Bank had already been directly taxed on the totality of their United Kingdom profits under case 1 of Sched. D.: see para. 32 of the special case, at p. 62. The court held that the Inland Revenue must return that proportion, on the ground that the whole of the British profits having already been taxed, if the Inland Revenue were to retain the whole tax on the dividends payable out of the mass of profits, partly foreign and partly British, it would, to the partial extent to which the mass was British income, necessarily involve double taxation of the same income: see *per* Huddleston, B., at pp. 71-72; *per* Pollock, B., at pp. 75-76. Kelly, C.B., differed on an issue, to which it is unnecessary to refer in the present case. It may be noted in passing that there was some confusion in the Divisional Court between the two capacities in which the London agency were acting, *viz.* (*a*) earning profits in the United Kingdom for the Ottoman Bank abroad; and (*b*) distributing dividends entrusted to it as a "paying agent" who has nothing to do but to perform the duties imposed on him: see now Miscellaneous Rules, r. 7 of Sched. D and the "Paying Agents Rules" of Sched. C, which, in effect, repeat the earlier statutory provisions. The Court of Appeal affirmed the decision, holding, in effect, that the part—*i.e.*, the dividend—partook of the nature of the whole, being partly foreign-earned, and partly British-earned income, and, consequently, that, if the British-earned part of the dividend was again taxed, it would offend against the rule forbidding double taxation of the same income.

The House of Lords, having expressly abstained from overruling that case, the decision remains binding upon us.

But it is necessary to see how far it goes and where it stops short. As I see it, the essential factor there was that the court treated the shareholder's dividend out of the corporation's profits as, in essence, a part of those very profits; and, if half the corporation's profits had been earned in the United Kingdom, half the shareholder's dividend had been equally earned there: if the whole had been charged to British tax, it would have been just as wrong in principle again to charge any fraction, as again to charge the whole.

If the above be the principle there affirmed, it has no necessary relevance to the present appeal. The suppliants here did not carry on any business in the United Kingdom and did not earn a penny here and suffered no direct taxation here. It had money invested in English companies and they paid tax on their own incomes and on paying dividends deducted tax, as they were entitled to do under All Schedules Rules, r. 20. But the *ratio decidendi* of *Gilbertson* v. *Fergusson* (1) is absent. On what ground, then, should we hold that there has been any "double taxation" in the *Gilbertson* v. *Fergusson* (1) sense? I can see none. And on consideration I have come to the conclusion that the whole idea of any such principle applying to such a case as the present is impossible. The suppliant is a foreign company, which has carried on no "trade" (in the sense of the Income Tax Act, 1918, s. 237) in the United Kingdom, so as to attract direct tax under Sched. D to its own income, but has only had money invested in British companies. Why should not its dividends when distributed here be taxed as income coming from foreign possessions to British residents, whether sent direct, so as to come under case V of Sched. D, or entrusted to a paying agent under Miscellaneous Rules, r. 7? The rules applicable to case V of Sched. D in terms apply to such a dividend and exact tax "on the full amount of the actual sum received." What was received was the gross untaxed amount. Unless there is some clear legal ground for cutting down the ambit of those plain words, it is, in my view, impossible to apply any such principle as that of indirect double taxation, even if *Gilbertson* v. *Fergusson* (1) be upheld, where the profits out of which the dividend is paid have been earned in part in the United Kingdom.

Fiscal legislation must, of necessity, be restricted, broadly speaking, within the limits of jurisdiction of British sovereignty; Parliament cannot legislate so as to bind foreign corporations or foreign persons—in the sense in which, in this judgment, I have used the word "foreign." Conversely, I can see no ground for assuming that when Parliament purports to tax income coming into this country from abroad, it does not intend to treat it simply as so much income, without dissecting it in order to consider its original nature or composition. To do the latter would mean embarking on all sorts of questions, often complicated, of foreign law. Parliament cannot control a foreign corporation, nor can our executive enforce any rules against it; why, then, should Parliament be supposed to be making legislative concessions in its favour, if it does not use plain words to say so? I must not be understood as expressing an opinion that such concessions might not be thought desirable by Parliament in connection with our export trade; but there is no indication, that I can find, in our income tax legislation at present to suggest that income from "foreign possessions" coming to British recipients is to be relieved of tax because of any particular characteristic in the source from which that income has originated. I, therefore, arrive at the conclusion that no such inquiries are permissible, except in the one case in which this court held over 60 years ago that, in regard to income earned by a foreign corporation within the United Kingdom, the principle of not taxing the same income twice may impose on the Inland Revenue a duty to return the tax on dividends so far as they are attributable to those British earnings when directly charged against the foreign corporation.

In *Barnes* v. *Hely Hutchinson* (2), at p. 101, I pointed out this difference and ventured to express an opinion that our income tax legislation treated corporation and corporators as to some extent identified. That passage was not expressly disapproved in the House of Lords; but the application I gave it in that case to a foreign company's dividend was held to be wrong, and I think that the speech of LORD WRIGHT, in particular, does involve the corollary that in the present case we must firmly refuse to inquire into the actual sources of the Canadian company's income, except in the single item of bank interest, where the income was gained in the United Kingdom and became subject to direct taxation by the Inland Revenue. Unless this general conclusion be A accepted and applied, I humbly agree with the observations of LORD ATKIN and LORD WRIGHT in *Hely Hutchinson* (2) that it is impossible logically to draw a line at any particular stage of remoteness.

This conclusion makes the discussion of a possible difference between "ordinary" dividends and fixed "preference" dividends superfluous. It also saves the necessity of inquiring into the question of whether, assuming there to be a right of recovery, that right belongs to the company, or to the shareholder whose B dividend has been taxed. I merely observe that All Schedules Rules, r. 20, can have no application to a foreign company; for such an application would be no concern of British sovereignty. I, therefore, express no opinion on the point, although I recognise the force of the judgment of GODDARD, L.J., which I have had the advantage of reading, since I wrote the preceding part of this judgment.

On the questions of procedure, if, contrary to my view, there be a right vested C in the company, I am not disposed to concur in the demurrer to the petition of right on the ground that it cannot lie because the Income Tax Acts afford another remedy; for I am not satisfied that there is another remedy; but, again, I do not think it necessary to decide the point.

In deciding against the contentions of counsel for the taxpayer, I should like to add that I am greatly indebted to him for his clear and very interesting argument; and I hope I learnt much from it, although I reject it. The appeal D must be dismissed with costs.

GODDARD, L.J.: This is an appeal by the suppliants against a judgment of MACNAGHTEN, J., allowing a demurrer by the Attorney-General against a petition of right claiming the repayment of part of the income tax assessed and charged under case V of Sched. D on dividends paid by the company, which neither resides nor carries on business in the United Kingdom, to shareholders who are resident within the Kingdom. Put shortly, the circumstances are E that the company remit a sum of money derived from its profits to a bank in London for distribution as dividend among its British shareholders. Part of the profits of the company have already borne British tax; and by r. 7 of the Miscellaneous Rules applicable to Sched. D, the sums remitted to the paying agent, are assessed and charged to tax. So, say the suppliants, this is a case of double taxation, and they are entitled to reclaim a proportion of the tax, F because it is always assumed that Parliament does not intend that profits are to be subject to double taxation. The first answer raised by the Crown on the demurrer is that, whether or not the company's profits have suffered tax, either by deduction or by direct assessment, the company have no right to reclaim; if there is a right in any one, it is either in the shareholders or in the paying agent, but in any case not in the company. MACNAGHTEN, J., has held that this contention is correct, and, if it is, it follows that the petition must fail. G The case for the appellants was supported by counsel in an elaborate argument involving a very wide survey of the relevant provisions of the Schedules, and a close examination of *Gilbertson* v. *Fergusson* (1) and of *Barnes* v. *Hely Hutchinson* (2), and certain other authorities. But, with all respect to his interesting argument, and in spite of the fact that this case relates to income tax, I am bold enough to believe that the solution is comparatively simple.

I start by accepting that *Gilbertson's* case (1) has not yet been overruled and H has stood for some sixty years, though it can no longer be taken as applicable to dividends paid on preference shares since the decision of the House of Lords in *Hely Hutchinson* (2). But, in my opinion, it is not conclusive of the point that we have to decide. Assuming it to be an authority that a claim for repayment can be made, it does not decide, in my opinion, that the company can make the claim. Turning to the relevant provisions of the Schedules, case V of Sched. D provides for the charging of tax in respect of income arising from possessions out of the United Kingdom, usually called foreign possessions. It is plain that, if a foreign company sends dividends direct to a shareholder, he must show those dividends in his income tax return and he is then assessed and must pay upon them. In such a case counsel for the taxpayer agrees that, if any claim for repayment is to be made, it is the shareholder who must make it. But, he says, it makes all the difference if a paying agent is employed by the company. It would be strange, indeed, if the benefit of a repayment accrues to a shareholder who receives the dividend direct from the company, but that, if an agent is employed, the benefit should go to the company. No doubt, if the repayment goes to the company its financial position is strengthened to that extent, and so an indirect benefit is conferred on the shareholders, but this would be cold comfort for one who was minded to dispose of his shares after receiving his dividend from the agent. Now, by r. 7 of the Miscellaneous Rules, where dividends are entrusted to a paying agent in the United Kingdom for payment to persons in the United Kingdom, they are to be assessed and charged to tax by the Special Commissioners, and the provisions of Sched. C, relating to tax on dividends payable out of public revenue other than that of the United Kingdom, and entrusted to any person other than the National Debt Commissioners or the Bank of England, are applied. R. 1 of the relevant part of Sched. C provides for the delivery by the agent of accounts, describing the dividends intrusted to him for payment ; r. 2 provides for the assessment of the dividends, and then r. 3 provides that the person intrusted with payment shall, out of the moneys in his hands, pay the tax on the dividends on behalf of the persons entitled thereto. How, then, if the Crown remits any part of the tax charged, can any one, other than the person on whose behalf it has been paid, be entitled to it ? Placing the obligation on the agent to pay the tax is in accordance with the well-known policy of the Acts relating to income tax of making the tax payable at the source. If he pays on behalf of the shareholder, it must be the latter who is entitled to any repayment. Who, then, can claim ? In my opinion, either the shareholder or the paying agent ; the latter is the person responsible to the Revenue for making the payment. Notice of assessment is given to him, and, if he does not pay, it is he who is liable to the prescribed penalties. But, if he claims and receives a repayment, for whose use does he receive the money ? I venture to think it is clear beyond question that he must receive it for the use of the person for whom he paid the tax. In *Gilbertson's* case (1), no question arose as to who was the proper claimant. The claimant was a member of the London committee of the bank, and that committee acted, as I understand the case, as paying agents in London for the Turkish bank. Although the matter was not specifically dealt with, I read all the judgments in the Court of Appeal, and particularly that of COTTON, L.J., as recognising that it was the shareholders who could be said to have suffered double taxation, and to be entitled to benefit by the return of the tax, and this, I think, is supported by the variation the court made in the order of the Exchequer Division by substituting the word " dividends " for " profits."

As, in the view that I have formed, the suppliants have no title to sue, the other questions raised by the demurrer do not arise. Whatever relief can be given, except in respect of that part of the company's profits which have been the subject of direct assessment, arises in the next case in which we are giving judgment, and I need say no more about it here. Nor is it necessary here to discuss whether a petition of right would in any case lie, or whether appeal was not the proper remedy ; if the company is not the proper party to claim relief, the nature of the remedy is immaterial, for it has none. I think the appeal should be dismissed.

DU PARCQ, L.J. : In this case we are invited by the appellant company, as was MACNAGHTEN, J., to apply what is called the rule in *Gilbertson* v. *Fergusson* (1). The Crown, while reserving to itself the right to question the propriety, or even the very existence, of that rule in some later case, is prepared for the purposes of the present appeal to admit the existence of the rule and to join in the invitation that we should apply it. The question remains : What is the rule in *Gilbertson* v. *Fergusson* (1) ?

In these circumstances I will assume, without deciding, that the so-called " rule in *Gilbertson* v. *Fergusson* (1) " is binding on this court. I have done my best to ascertain what the rule is. In my opinion, it may be stated in the form of four propositions : (i) It would be unjust that the same profits should be taxed twice over, and the taxing Acts must, if possible, be so construed as to avoid such a result. (ii) A company paying tax on its profits must be regarded as paying the tax on behalf of its shareholders: see *per* LORD ATKIN, *Barnes* v. *Hely Hutchinson* (2), at p. 89, where he says of the rule:

> . . . it seems to me plain that the reasoning proceeded on the theory then prevailing that the company paid tax on its profits on behalf of its shareholders . . .

(iii) When a foreign company has been taxed on the profits of a trade or business which it carries on in England, a shareholder whose dividends are subject to tax is entitled to say that so much of the dividend as is attributable to the profits of the company's English trade or business has already been taxed. (iv) It follows that when a paying agent has paid tax (in pursuance of the Income Tax Act, 1918, Sched. C, Rules as to interest (3)) on behalf of a shareholder entitled to a dividend, the paying agent is entitled to say, on behalf of the shareholder, that he (the shareholder) has been doubly taxed *quoad* that part of the dividend which is attributable to English trading profits, and to obtain relief for and on behalf of the shareholder.

If the learned judges of the Exchequer Division and the Court of Appeal in *Gilbertson's* case (1) had had their minds directed to the possible conflict between the claims of a company on the one hand, and its shareholders on the other, to a refund of the tax which a paying agent had paid on dividends "on behalf of the persons entitled thereto," the precise point which MACNAGHTEN, J., decided in this case might have been the subject of a definite and clear-cut decision in 1876. As matters then stood, however, the courts were not considering that aspect of the matter at all. Indeed, they were not consciously formulating any precise rule, but rather approving the construction which the Crown was prepared to put on the relevant provisions. I think, however, that the four propositions which I have stated may be taken as summarising the rule, which can be deduced from the decision. If I am right, it follows that the reasoning of MACNAGHTEN, J., in the present case was correct. It is not the suppliant or its agents, but the individual shareholders, who are entitled to the return of the excess.

My understanding of the judgments in *Gilbertson* v. *Fergusson* (1) accords with that of MACNAGHTEN, J. When those judgments are read, it must not be forgotten that, however indefensible the *ratio* of the decision may have been according to principles more recently established, the courts, even in 1879, were not blind to the distinction between a corporate body and a partnership, or between the right of the company to its profits, and the separate and different right of the shareholder to his dividend. Thus, in *Calcutta Jute Mills Co.* v. *Nicholson* (3) (which was decided three years earlier), HUDDLESTON, B., had said, at p. 456, that the argument for the appellants in that case would have been very forcible:

> . . . if you could make out this artificial being, a corporation, to be a partnership, and say that every shareholder was a partner . . .

And KELLY, C.B. (at p. 451), stated the position in terms which, so far as they go, are consistent with the view which has now been authoritatively established:

> The whole of the gains come into the hands of the company, and have to be divided among the whole of the shareholders. But until they are divided they are the property of the company, and only pass into the hands of the shareholders when the dividends have been declared under the authority of the company, and according to the articles of their constitution.

The judgments delivered in the Exchequer Division in *Gilbertson* v. *Fergusson* (1) must be read in the light of that earlier pronouncement. In particular, I would refer to the judgment of POLLOCK, B. When (at p. 75), he said that the London agents were "assessable under the provisions of sect. 10," he clearly meant assessable, not in respect of the profits earned by the company, but in respect of the dividends which the shareholders were entitled to receive. This is plain from the words of sect. 10, to which reference had just been made in the judgment. When it is remembered that it is on the dividends that the paying agents are assessed (for to this extent at least there is no difference between the provisions of the code which are now applicable and the section which was then in force), that the dividends are the shareholders' money, that any deduction from them by way of tax is at the shareholders' expense, and that the paying agent pays the tax on the dividend on behalf of the shareholder, the apparent obscurity of the immediately succeeding words in the judgment disappears. "If they can show that they have already paid income tax upon the amount in whole or in part, they are entitled to do so" must, I think, mean: "If the shareholders, through the paying agents who, for this purpose, are the shareholders' agents, can show that they (the shareholders) have already paid income tax," etc. Then the argument ran thus: The shareholders are able to show that they have already paid tax, because, although, juristically speaking, the dividend is income received by the shareholder, and the company's profits are income received by the company, in substance the dividends are, so to say, a part of the profits which have already been taxed. In the words of Brett, L.J., at p. 570, "they are not two profits but one indivisible profit."

The same reasoning is to be found in the judgment of Cotton, L.J., at p. 573:

> The dividends are payable in respect of all profits . . . the shareholders would be entitled to say as against the Crown, part of this is attributable to English profits, and we have already paid duty in respect of that . . .

The fact is, I think, that in *Gilbertson* v. *Fergusson* (1), the court was dealing with the position as between the Crown, the company and the shareholders at a stage at which the paying agents, who had paid the tax on behalf of the shareholders, were to be regarded as demanding its repayment in the capacity in which they had paid it, *viz.*, as agents for and on behalf of the shareholders. The rule in *Gilbertson* v. *Fergusson* (1) must, therefore, operate not in favour of the company, but in favour of the shareholders. It may now be said without disrespect that the reasoning in *Gilbertson* v. *Fergusson* (1) must be adjudged faulty in the light of later decisions, but, even if it be assumed that the rule itself has survived the partial collapse of its foundations, I agree with Macnaghten, J., that it gives no assistance to the suppliant here.

I was impressed by the argument that the main reason for respecting a rule which, though questionable, has long been established, is that it has governed the practice for many years, and that the practice generally adopted, and certainly the practice formerly adopted in the case of the suppliant company itself, had been to treat the company rather than its shareholders as being entitled to relief. If, however, I am right in the construction which I place on the judgments in *Gilbertson* v. *Fergusson* (1), there is really nothing in this argument. The courts may think it wrong to disturb a rule which is based on a precedent of doubtful validity if it has long been observed in practice. It can never be right to approve a wrong practice, of however long standing, which is based on an erroneous construction of a rule which the court has laid down.

I would add that, in my opinion, no assistance can be derived in this case from the provisions of the code with regard to English companies. There is nothing in any of the judgments in *Gilbertson* v. *Fergusson* (1) which suggests that the courts were founding their decision on an analogy drawn from those provisions.

Agreeing, as I do, with Macnaghten, J., on a point which is conclusive of the whole case, I should not have thought it desirable to express an opinion on any of the other points which were argued before us, had I not found it necessary to decide one of them in the case of *Selection Trust, Ltd.* v. *Devitt* (4), in which judgment is shortly to be delivered. As matters stand it is convenient that I should now express my opinion that there is no double taxation where the receipts of the foreign company which are in question are dividends paid by English companies. The rule in *Gilbertson* v. *Fergusson* (1) may be wide enough to cover that part of a foreign company's income which consists of interest on moneys deposited with an English bank, but cannot, in my judgment, be stretched, so as to cover English dividends. I base this opinion on those passages in the speeches of Lord Atkin and Lord Wright in *Barnes* v. *Hely Hutchinson* (2) on which Macnaghten, J., relied in the *Selection Trust* case (4). In my opinion, this appeal should be dismissed.

Appeal dismissed. Leave to appeal to the House of Lords.

Solicitors: *Horace Davey* (for the suppliant); *Solicitor of Inland Revenue* (for the Crown).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

SELECTION TRUST, LTD. *v.* DEVITT (H.M. INSPECTOR OF TAXES).

[COURT OF APPEAL (Scott, Goddard and du Parcq, L.JJ.), **May 24, 1944.**]

Income Tax—Double taxation—Relief—British company held shares in American company which held shares in 5 British companies—Dividends received by American company from British companies and by British company from American company suffering tax—Relief claimed by British company—Income Tax Act, 1918 (*c.* 40), *Sched. D, case* 1.

The appellant, a British investment company, held shares in the common stock of an American company which itself held shares in 5 British companies. The American company suffered a deduction of income tax from the dividends paid to it by the British companies and the appellant was assessed to income tax in respect of the dividends received from the American company. The appellant contended that so much of the dividends paid to it by the American company as were attributable to that part of the profits of the American company which consisted of dividends received by it from the 5 British companies ought to be excluded from assessment to income tax in accordance with the principle laid down in *Gilbertson* v. *Fergusson* (2) :—

HELD : the rule laid down in *Gilbertson's* case (2) had no application here since the American company did not carry on business or make profits in the United Kingdom. The appellant was, therefore, rightly assessed to income tax in respect of the dividends received from that company.

Decision of MACNAGHTEN, J., ([1943] 2 All E.R., at p. 727) *affirmed.*

[**EDITORIAL NOTE.** Dividends of a foreign company payable either abroad or in the United Kingdom are charged with tax in the United Kingdom if the shareholder exercises his option to have them paid there, but, if the company carries on business in the United Kingdom, an allowance has been made in respect of the portion of the dividends arising from profits in the United Kingdom. It was contended that the profits included income from investments, but it is held that the rule applies only to profits from a business. It will be noted that GODDARD, L.J., does not dissent from the decision in the appeal, but expresses the view that a finance company might be able to invoke the rule in *Gilbertson's* case (2) even in respect of dividends.

AS TO *Gilbertson* v. *Fergusson* RELIEF, see HALSBURY, Hailsham Edn., Vol. 17, p. 195, para. 399 ; and FOR CASES, see DIGEST, Vol. 28, p. 79, No. 431.

AS TO NATIONAL DEFENCE CONTRIBUTION, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 30, pp. 356-358.]

Cases referred to :

*(1) *Re Canadian Eagle Oil Co., Ltd.*, p. 734, *ante* ; *affg.* S.C. [1943] 2 All E.R. 702.

*(2) *Gilbertson* v. *Fergusson* (1881), 7 Q.B.D. 562 ; 28 Digest 79, *431* ; 46 L.T. 10 ; 1 Tax Cas. 501.

*(3) *Barnes* v. *Hely Hutchinson*, [1940] A.C. 81 ; [1939] 3 All E.R. 803 ; Digest Supp. ; 108 L.J.K.B. 893 ; 161 L.T. 181.

APPEAL by the taxpayer from the decision of MACNAGHTEN, J., ([1943] 2 All E.R., at p. 727), where the facts are fully set out.

J. Millard Tucker, K.C., F. Grant, K.C., and *John Clements* for the appellants.

The Solicitor-General (*Sir David Maxwell Fyfe, K.C.*), *J. H. Stamp* and *Reginald P. Hills* for the respondent.

SCOTT, L.J. : The question of principle in this special case and the Crown's demurrer is the same as that upon which this court decided in favour of the Crown on the *Petition of Right of the Canadian Eagle Oil Co., Ltd.* (1), in which we have just given judgment. The only difference is that here the facts are even stronger against the taxpayer than there. I, therefore, content myself with a reference to the main part of my judgment in that case. I would add, however, that I entirely agree with the judgment of MACNAGHTEN, J., in the present case.

The appeal is dismissed with costs.

GODDARD, L.J. : I agree that this appeal should be dismissed, but as I base my judgment on a narrower ground than do my Lords, and unfortunately differ from them on one point, I will briefly state my reasons. As the House of Lords expressly refrained from overruling *Gilbertson's* case (2), this court must regard it as a binding authority as regards ordinary, though not preference, shareholders. So far, then, as profits have been earned and directly taxed before they come into the hands of the foreign company, relief can be claimed by British shareholders when they receive their dividends from that company. This the Crown was ready to concede in the *Canadian Eagle Oil* case (1). Then one must consider profits in the shape of dividends received from British companies in which the foreign company is a shareholder. These will have been received under deduction of a sum representing the shareholder's proportion of the tax borne by the British companies on its profits. There were such dividends in the *Canadian Eagle Oil* case (1). In regard to these I feel there is great difficulty in holding that no relief can be claimed. My difficulty is that *Gilbertson's* case (2) has not yet been overruled. I cannot see that the court, in that case, either expressly or impliedly differentiated between the two classes of profits that I have mentioned, nor, on the reasoning applied by the court, do I think it is possible to do so. It is, of course, true that the company in that case was trading in England, but it is easy to visualise a foreign company, whose business is of a financial character, carrying on a business here which consists solely of dealing in stocks and shares of English companies. Their profits then would consist in part of dividends on the shares which they possessed when dividends were declared, and partly of the profits they made on sales. They would, no doubt, be directly assessed here on the latter profits, but, in my opinion, as *Gilbertson's* case (2) must still be regarded as law, there would be no ground for distinguishing between the two classes of profits. While I am conscious of the force of the criticisms on that case which my brethren have made in the light of the decision in the *Hely Hutchinson* case (3), I think we are still bound by it, and, for that reason alone, I do not feel able to agree that, in the case I have put, relief could not be claimed. But in the present appeal the appellants are not shareholders in a British company. They hold shares in another foreign company, which is a holder of shares in British companies. I think we are well justified in holding that, in such a case, no relief can be claimed; the chain is broken, if I may so express it. The reasoning of both LORD ATKIN and LORD WRIGHT in the *Hely Hutchinson* case (3) is, I think, quite destructive of any claim to relief in these circumstances, and, therefore, I agree that the appeal fails.

DU PARCQ, L.J.: In the *Canadian Eagle Oil Co.* case (1), I stated the opinion which I have formed as to the true intent and scope of the rule in *Gilbertson* v. *Fergusson* (2), which we were asked to apply in this case also. It follows from what I then said that, in my judgment, MACNAGHTEN, J., came to the right conclusion in the present case also, and for the right reasons, and that this appeal should be dismissed.

Appeal dismissed with costs. Leave to appeal to the House of Lords.

Solicitors: *Freshfields, Leese & Munns* (for the appellants); *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

MONTREAL COKE AND MANUFACTURING CO. *v.* MINISTER OF NATIONAL REVENUE. MONTREAL LIGHT HEAT AND POWER CONSOLIDATED *v.* MINISTER OF NATIONAL REVENUE.

[PRIVY COUNCIL (Viscount Simon, L.C., Lord Russell of Killowen, Lord Macmillan, Lord Wright and Lord Porter), **March 27, 28, 29, May 3, 1944.**]

Privy Council—Canada—Income Tax—Company—Redemption of Bonds—Principal and interest payable at bond-holders option in currency other than Canadian dollars—Conversion expenses—Not deductible under Income War Tax Act (*Canada*), 1927—*Income War Tax Act* (*Canada*), 1927, *s.* 6 (*a*)

The appellants carried on undertakings in Canada which were financed by money borrowed from the public on interest-bearing bonds which were redeemable prior to maturity at a premium. The principal and interest were payable at the bond-holders option in currency other than Canadian dollars. Owing to the state of the exchange the options as to the mode of payment occasioned considerable expense to both companies. Market conditions being favourable, both companies decided in 1935, with a view to reducing their interest charges, to redeem their existing bonds before maturity and to reborrow at lower rates on less onerous conditions as to payment. The carrying through of these financial operations necessarily involved substantial outlays on the part of both companies. A The question is whether or not under the Income War Tax Act, 1927, s. 6 (*a*), the appellants were entitled in computing their respective incomes for the purposes of assessment to income tax for the year 1935-1936 to deduct certain expenses incurred by them respectively in effecting changes in their bonded indebtedness for the purpose of reducing their annual interest payments :—

HELD : the expenditure in question incurred by the appellants was in B relation to the financing of their businesses and was not incurred in the "earning of the income" within the meaning of s. 6 (*a*) of the Act ; and, therefore, was not deductible in computing their taxable income.

[**EDITORIAL NOTE.** The operation here considered is familiar to persons in the United Kingdom and is often referred to as a conversion loan. In short, it consists of paying off high-interest securities and replacing them by borrowing on more favourable terms. C The process necessarily involves considerable incidental expense. It is not, however, a part of the ordinary trading of a corporation, but an isolated episode and the expense is chargeable to capital account and is not deductible as money spent to earn income.

As TO TRADE EXPENSES, see HALSBURY, Hailsham Edn., Vol. 17, pp. 149-156, paras. 309-319 ; and FOR CASES, see DIGEST, Vol. 28, pp. 42-56, Nos. 215-283.]

CONSOLIDATED APPEALS by the taxpayers from a decision of the Supreme D Court of Canada on the Income War Tax Act, 1927, s. 6 (*a*). The facts are fully set out in the judgment of their Lordships delivered by LORD MACMILLAN.

J. M. Tucker, K.C., and *Frank Gahan* for the appellants.

Cyril King, K.C., and *Heyworth Talbot* for the respondents.

LORD MACMILLAN : The appellants in these consolidated appeals, hereinafter for brevity called "The Coke Company" and "The Light Company," E carry on important undertakings in Canada which are financed in part by money borrowed from the public on interest-bearing bonds. At Jan. 1, 1935, the Coke Company had outstanding a series of 5½ per cent. bonds maturing in 1947 but redeemable prior to maturity at a premium. Principal and interest were payable at the bondholder's option in United States dollars. The Light Company, at Jan. 1, 1936, had outstanding a series of 5 per cent. bonds maturing in 1951. F Principal and interest were payable at the bondholder's option in gold at Montreal, Toronto, New York or London. Owing to the state of the exchange the options as to the mode of payment occasioned considerable expense to both companies. Market conditions being favourable, both companies decided, with a view to reducing their interest charges, to redeem their existing bonds before maturity and to reborrow at lower rates on less onerous conditions as to payment. The carrying through of these financial operations necessarily G involved substantial outlays on the part of both companies. The question for decision by their Lordships is whether these outlays are permissible deductions under the Income War Tax Act, 1927, in the assessment of the appellants' taxable income.

In order to appreciate the nature of the expenditure incurred by the companies in the conversion of their bonds it is necessary to set out the items in some detail. In the case of the Coke Company the amount of their 5½ per H cent. bonds outstanding was $3,457,000. Notice was given that the bonds would be redeemed at Dec. 1, 1935, the next date for the payment of interest. As this date anticipated the maturity of the bonds a premium of 2 per cent. was payable, amounting to $69,140. The bondholders being entitled at their option to payment in United States dollars this involved the disbursement of $36,744.81 on account of exchange premium. Under the scheme the company paid off $57,000 of the bonds out of earnings and replaced the balance of $3,400,000 by the issue of two new series of bonds, one of $1,200,000

3½ per cent. bonds, the other of $2,200,000 4 per cent. bonds, principal and interest being payable in Canada. A commission or discount of ½ per cent. on the 3½ per cent. issue and of 1 per cent. on the 4 per cent. issue was paid to underwriters who took up the whole of both issues. This commission or discount amounted to $28,000. These three sums of $69,140, $36,744.81 and $28,000 amounting together to $133,884.81, the company decided to amortise by spreading them over twelve years, involving a charge of $10,535.16 A annually against income.

Then as the old bonds were not repaid till Dec. 1, 1935, and the new bonds dated from Sept. 16, 1935, the company had to pay interest on both the old bonds and the new bonds for the overlapping period. This cost the company $23,207.54. Legal, printing and other incidental expenses were incurred to the amount of $12,484.92 in connection with the retiring of the old bonds and the issue of the new bonds. These two items the company charged wholly B against the income of the year 1935 but was willing to amortise them on the same footing as the other items above mentioned.

The result of this "refinancing"—the word is the appellants'—was a reduction of the company's interest charges by $4,750 in 1935 and $55,716.66 in 1936. In contrast with the system obtaining in the United Kingdom the legislation of Canada permits in the computation of taxable income, the deduction of "such reasonable rate of interest on borrowed capital used in the C business to earn the income as the Minister in his discretion may allow" (Income War Tax Act, 1927, s. 5 (*b*)). Consequently, a diminution in deducted interest charges reflects itself, other things being equal, in increased taxable income.

The details in the case of the Light Company are on the same lines. The company had outstanding 5 per cent. bonds to the amount of $27,615,000. The premium paid on their retirement was 4 per cent., amounting to $1,104,600. D The exchange premium cost $676,726. The old bonds were repaid out of the proceeds of the sale of investments to the extent of $12,615,000. The balance of $15,000,000 was reborrowed on two series of bonds with different periods of redemption, one of $5,000,000 at 2½ per cent. and one of $10,000,000 at 3½ per cent. principal and interest being payable in Canada. Discount at the rate of 1½ per cent. was paid on the 2½ per cent. issue and at the rate of 4 per cent. on the 3½ per cent. issue, amounting in all to $475,000. Expenses E in connection with the operation accounted for $25,753.42. These four items, totalling $2,282,079.42, the company amortised by spreading them over twenty years, the amount debited to 1936 (for eleven months) being $104,596.04. In this case also there was overlapping interest to the amount of $79,166.64 and the whole of this, as well as an item of $29,134.75 representing excise tax and expenses paid on the transfer of certain securities, the company charged against 1936 without amortisation. The result of the whole operation was a F large saving in interest charges and exchange.

The Coke Company in making its return of income for the year 1935 deducted a sum of $46,227.62 made up of the amortisation instalment of $10,535.16, the overlapping interest $23,207.54 and expenses $12,484.92, as above detailed. In its return for 1936 the company deducted the amortisation instalment of $10,535.16.

G The Light Company in making its return for the year 1936 deducted a sum of $212,897.43 made up of the amortisation instalment of $104,596.04, the overlapping interest $79,166.64 and the excise tax $29,134.75.

The respondent the Minister of National Defence disallowed *in toto* the deductions claimed by the Coke Company. The company served a notice of appeal on the Minister. The Minister affirmed his assessment. Thereupon the company sent to the Minister a notice of dissatisfaction to which the Minister H replied adhering to his decision. Finally the Minister caused the relevant documents to be transmitted to the Registrar of the Exchequer Court of Canada and the matter was then deemed to be an action in that court ready for trial or hearing. The procedure in the case of the Light Company followed the same lines. It may be noted that the claim to deduct the item of $29,134.75 for excise tax was not pursued and disappears from the case.

The appeals of both parties were heard in the first instance by McLEAN, J., who affirmed the Minister's decision disallowing the deductions. Appeals to the Supreme Court were dismissed by a majority consisting of SIR LYMAN

Duff, C.J., and Davis and Kerwin, JJ.; Rinfret and Taschereau, JJ., dissenting. The reasoned judgments of the court are given in the Light Company's appeal. Special leave to appeal to His Majesty in Council was granted on the advice of their Lordships.

The question at issue turns entirely upon the terms of the Income War Tax Act, 1927. Part II of the Act, which is headed "Exemptions and Deductions," contains sect. 6 which has a sub-heading "Deductions from income not allowed." So far as relevant to the present purpose sect. 6 reads as follows:

> 6. In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of (*a*) disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income; (*b*) any outlay, loss or replacement of capital or any payment on account of capital or any depreciation depletion or obsolescence, except as otherwise provided in this Act.

By sect. 9 of the Act the tax is charged upon income and by sect. 3 income is defined to mean annual net profit or gain.

It is important to attend precisely to the language of sect. 6. If the expenditure sought to be deducted is not for the purpose of earning the income, and wholly, exclusively and necessarily for that purpose, then it is disallowed as a deduction. If the expenditure is a payment on account of capital it is also disallowed. The appellants say that the outlays in question were made wholly exclusively and necessarily for the purpose of earning income and were not payments on account of capital. The respondent maintains the contrary.

The justification for upholding the deductions claimed could not be more attractively presented than it is in the judgment of Rinfret, J. (now Chief Justice of Canada), with which Taschereau, J., concurred. The judge says:

> There are two ways of increasing the profits from a trade or commercial or other calling; either by increasing the earnings while the expenses remain the same or by decreasing the expenses while the earnings remain the same. Of course, if the expenses diminish at the same time as the gross earnings are increased the profits will be correspondingly larger and the proposition just mentioned is only made more evident . . . In order to pay a lower interest and to get rid of the exchange rates it was necessary to redeem the original bonds; and therefore the expenses required to achieve that result were wholly, exclusively and necessarily laid out or expended for the purpose of decreasing the fixed interest and exchange charges and accordingly "for the purpose of earning the income."

Down to the last nine words quoted the statement of Rinfret, J., is unexceptionable, but their Lordships are unable to accompany him in leaping the last fence. If the statute permitted the deduction of expenditure incurred for the purpose of increasing income the appellants might well have prevailed. But such a criterion would have opened a very wide door. It is obvious that there can be many forms of expenditure designed to increase income which would not be appropriate deductions in ascertaining annual net profit or gain. The statutory criterion is a much narrower one. Expenditure to be deductible must be directly related to the earning of income. The earnings of a trader are the product of the trading operations which he conducts. These operations involve outgoings as well as receipts and the net profit or gain which the trader earns is the balance of his trade receipts over his trade outgoings. It is not the business of the appellants to engage in financial operations. The nature of their business is sufficiently indicated by their titles. It is to these businesses that they look for their earnings. Of course, like other business people, they must have capital to enable them to conduct their enterprises, but their financial arrangements are quite distinct from the activities by which they earn their income. No doubt the way in which they finance their businesses will or may reflect itself favourably or unfavourably in their annual accounts but expenditure incurred in relation to the financing of their businesses is not in their Lordship's opinion, expenditure incurred in the earning of their income within the statutory meaning. The statute in sect. 5 (*b*) above quoted significantly employs the expression "capital used in the business to earn the income," differentiating between the provision of capital and the process of earning profits.

A faint suggestion was made that the item for overlapping interest might be differentiated from the other items of expenditure in view of the fact that interest on borrowed money is a permissible deduction at such rate as the

Minister may allow. But the overlapping interest was paid as part of the cost of the refunding operations and on money borrowed temporarily in excess of what was required for the purposes of the businesses during the overlapping period and was thus properly disallowed by the Minister.

It was conceded in the courts in Canada, and in any event it is clear, that the expenses incurred by the appellants in originally borrowing the money represented by the bonds subsequently redeemed were properly chargeable to capital and so were not incurred in earning income. If the bonds had subsisted to maturity the premiums and expenses then payable on redemption would plainly also have been on capital account. Why then should the outlays in connection with the present transactions, compendiously described as "refunding operations," not also fall within the same category? Their Lordships are unable to discern any tenable distinction. In the history of both companies the financial re-adjustment of their borrowed capital was an isolated episode, unconnected with the day to day conduct of their businesses, and the benefit which they derived was not "earned" by them in their businesses.

In the courts in Canada the deductions claimed were held to be struck at both by sect. 6 (*a*) as not being expenditure for the purpose of earning the income and by para. (*b*) as being payments on account of capital. It may well be that items of expenditure may be open to both objections. The first objection, which their Lordships uphold, is sufficient for the disposal of the cases but their Lordships in no way dissent from the view that the second objection also applies.

Reference was made in the course of the argument for the appellants to a number of reported cases, chiefly on the analogous provisions of English, Dominion and Indian Revenue statutes. In some of these cases attempts were made to formulate principles of discrimination among different kinds of expenditure, permissible or prohibited as deductions. They illustrate the diversity of the problems which may arise. Their Lordships do not on the present occasion find it necessary to discuss these authorities as in their opinion the particular expenditure with which they have to deal falls clearly within the statutory prohibition against deduction.

Their Lordships will accordingly humbly advise His Majesty that the consolidated appeals be dismissed, and the judgments of the Supreme Court of Canada be affirmed. The appellants will pay the respondent's costs of the present appeal.

Appeals dismissed with costs.

Solicitors: *Lawrence Jones & Co.* (for the appellants); *Charles Russell & Co.* (for the respondent).

[*Reported by* HUBERT B. FIGG, ESQ., *Barrister-at-Law.*]

R. *v.* JUSTICES OF THE PEACE FOR WESTON-SUPER-MARE, *Ex parte* BARKERS (CONTRACTORS), LTD.

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J., Atkinson and Oliver, JJ.), **April 26, 1944.**]

Crown Practice—Certiorari—Defect of jurisdiction—Persons "having control or management"—Company convicted after conviction of employees on identical charges—Whether persons "having control or management" collateral to main issue—Rationing (General Provisions) Order, 1942 (*S.R. & O.*, 1942, *No.* 1472), *art.* 13.

The applicant company were industrial caterers with a number of canteens throughout the country. Two of the company's employees in two of the canteens were convicted by the respondents of offences under the Rationing (General Provisions) Order, 1942, art. 13, as the persons "having control or management" within the meaning of the Order. The company was also convicted on separate informations based on precisely the same facts as being the person "having control or management" of the two canteens. The company applied for an order of *certiorari* to have the convictions against the company brought into the High Court and quashed.

It was contended on behalf of the company that the justices had no jurisdiction to hear the charges against the company inasmuch as they had already adjudicated upon charges preferred against the two employees, whom the justices had found to be the persons "having control or management" of the canteens in question :—

Held : (i) there was jurisdiction because (*a*) magistrates cannot deprive themselves of jurisdiction to adjudicate upon charges by reason of having already convicted other persons of those charges, for the first decision may be in error ; and (*b*) where magistrates have jurisdiction to determine charges made against certain persons or persons in a certain capacity, they have jurisdiction to decide whether the person is such a person or has the capacity or office named in the provisions creating the offence.

(ii) there being jurisdiction to hear these charges, the application for an order of *certiorari* was improper.

[**EDITORIAL NOTE.** Unless the jurisdiction given to a court is specifically limited, it involves the deciding of all questions necessary to decide the issue, whether they be questions of law or fact. This no doubt sometimes places a heavy burden on justices and arbitrators, but in case of error there is machinery for putting the matter right. An application for an order of *certiorari* can, however, be made only where there is lack of jurisdiction and in the present case that was not the right machinery to put in operation to set right the decision of the magistrates which the court seems to have thought was in error.

As to Certiorari to Quash on grounds of Defect of Jurisdiction, see HALSBURY, Hailsham Edn., Vol. 9, pp. 880-883, paras. 1484-1486 ; and for Cases, see DIGEST, Vol. 16, pp. 420-427, Nos. 2801-2861.]

Cases referred to :

(1) *R.* v. *Bradford*, [1908] 1 K.B. 365 ; 16 Digest 423, *2834* ; 77 L.J.K.B. 475 ; 98 L.T. 620.

(2) *R.* v. *Income Tax Special Purposes Comrs.* (1888), 21 Q.B.D. 313 ; 16 Digest 318, *1306* ; *sub nom. R.* v. *Income Tax Special Comrs., Ex p. Cape Copper Mining Co., Ltd.*, 57 L.J.Q.B. 513 ; 59 L.T. 455.

(3) *R.* v. *Woodhouse*, [1906] 2 K.B. 501 ; 16 Digest 398, *2421* ; 75 L.J.K.B. 745 ; 95 L.T. 367.

Motion for an order of *certiorari* to have certain convictions, made by the justices of the peace for Weston-super-Mare against the applicants, brought into the High Court and quashed on the ground that the justices had no jurisdiction to adjudicate upon the charges in question. The facts are fully set out in the judgment of Viscount Caldecote, L.C.J.

Douglas Lowe for the applicants.

Valentine Holmes for the respondents.

Viscount Caldecote, L.C.J. : The applicants, Barkers (Contractors), Ltd., have a large connection as industrial caterers and, according to the affidavit, they carry on industrial canteens at a number of factories and premises throughout the country. The Rationing (General Provisions) Order, 1942, is the latest of three Orders which have been made in relation to this matter and Art. 13 is to this effect :

> The person having the control or management of an establishment shall (*a*) be responsible for securing that the total quantities of rationed foods permitted to be used in or by the establishment in any prescribed period are not exceeded.

There was a case which arose on each of a number of informations against persons who were said to be persons having the control or management of an establishment so that they were responsible for securing that the rationed foods were not exceeded. The rationed foods, it is stated in an affidavit, were exceeded. In those circumstances, informations were laid not only against the two persons in relation to the canteens of which they were said to have the control or management, one at Old Mixon and the other at Ellborough, but a corresponding number of informations were laid against the applicants in this case on precisely the same facts, upon the footing that they also were persons who, to use the words of the Order, had the control or management of the establishments at those two places. I may perhaps here refer to the definition or the interpretation clause of the Order, which provides that " 'Establishment' means a catering establishment or institution."

Upon the six informations laid against two individuals, each of whom bore the name of Parsons, there was a plea of guilty, and the magistrates inflicted a fine. Also there were six informations against the applicants, and when the case came to be heard against them the magistrates convicted them and fined them substantial sums, £15 on each of the six informations, with 2 guineas as an advocate's fee. Thereupon the applicants obtained the leave of this court to move for an order of *certiorari* and, pursuant to that leave, this motion has been made to the court.

The question whether the magistrates arrived at a right decision is one which seems to me capable of a very plain answer. Art. 13 of the Order of 1942 which for all material purposes is in precisely the same form as the earlier Orders of 1939 and 1941, lays the responsibility for seeing that the total quantities of rationed foods permitted to be used are not exceeded upon the person having the control or management of an establishment. This paragraph or article in the Order is not the only place in the Order in which those words are used, " the person having the control or management." For instance, under art. 11 (6), it is the duty of the person having the control or management of the establishment to invalidate monthly coupons relating to the current ration period in respect of each rationed food. There are a number of similar references imposing duties upon the person having the control or managemnt of the establishment, and, if it were not for an objection to this motion raised by counsel on behalf of the respondents, I should have no difficulty in arriving at the view that the person upon whom the responsibility is placed under art. 13 is the person who is *de facto* the person having the control or management of the establishment in the sense that he is the person who is in charge of the establishment.

The applicants have their registered office in London. It happens to be at the moment evacuated to Reading, but the fact that the applicants are the owners of these canteen establishments, or the fact, as perhaps is a more accurate way of putting it, that they are the persons who conduct these establishments all over the Kingdom is not, I think, sufficient to constitute them the persons who have the control or management of these two particular catering establishments. I say so much upon this point and no more because of the objection which has been raised to these proceedings by counsel for the respondents, and which I think must prevail. I have a little reluctantly, but at the same time, quite clearly in my own mind come to the conclusion that the objection is right.

This is a motion for *certiorari*. It is not disputed, I think, that if the applicants had in this case proceeded by way of a special case, taking the opinion of the court on a question of law, or had taken such other steps as were open to them by way of appeal, they would have had a remedy, but instead of pursuing the course which we were informed this morning was that which was first considered the right course, namely, to apply for the statement of a special case, this application for an order of *certiorari* has been made.

The most attractive way in which the case for the applicants on this point can be put in answer to the contention by counsel for the respondents that the application for the order of *certiorari* is misconceived, is that the magistrates had no jurisdiction to hear the charge and try the case raised by the information as against the applicants because they had already had before them and had adjudicated upon the charges preferred against the persons who, to use the words which I have employed, were the persons having the *de facto* charge of these particular catering establishments. It is said that, having exercised their functions in connection with the charges against the persons having the *de facto* control of the catering establishments, they have no jurisdiction to adjudicate again against other persons, namely, the persons who are the proprietors of the business which is carried on at these catering establishments.

Counsel for the respondents, in taking his objection to the form of these proceedings, pointed out and, I think, rightly pointed out, that to grant this application would open a very wide door to motions for an order of *certiorari*, because it would be open to every person who was charged with an offence committed by him in a particular capacity to say that the court had arrived at a wrong decision upon the question of his capacity or status, and had given themselves jurisdiction by an erroneous decision on that point and that, therefore, an order of *certiorari* was the proper method of having the question reviewed.

Cases frequently come before this court in which persons in a particular position or holding a particular office or discharging certain duties, are required to do or not to do certain things. An illustration which I ventured to put in the course of the argument may be seen in the class of case which arises when a person in charge of a vehicle is required to do certain things, such as to see that the load is made secure upon the vehicle. If the applicants are right in this case, in a matter in which a person was wrongly held to be responsible for not securing the load, on the ground that he was not the person in charge of the vehicle, it would be possible for him to move for an order of *certiorari* to remove the conviction into this court in order that it might be quashed, and innumerable instances might be given of the same position.

I think that the objection taken by counsel for the respondents may be put in two ways, and both ways seem to me to be right. First, it might be said that the decision of the magistrates convicting the two persons named Parsons, who pleaded guilty, might be a wrong decision. They might have pleaded guilty under a misapprehension, and the real persons who had the control or management of the establishment might be the applicants ; and it can be said that the magistrates could not possibly deprive themselves of their jurisdiction to adjudicate upon charges against the persons who really had the control or management by reason of having given a wrong decision in the case of persons who, according to the true interpretation of the law, had not the control or management.

But perhaps a better and a slightly wider ground may be found upon such considerations as I now mention. Magistrates have jurisdiction to hear and decide such matters, and only such matters, as are entrusted to their decision by statute or by statutory authority and, if that authority gives them jurisdiction to determine charges made against certain persons, or persons in a certain capacity, it seems to me a necessary issue in those proceedings first of all to decide whether the person was such a person or had such a capacity or office as was named in the provision creating the offence. Of course, there is a large class of case in which jurisdiction is given to magistrates or to the court or to other bodies of persons only upon condition that some particular state of facts exists. An illustration of that was referred to in the course of the argument, *R.* v. *Bradford* (1), where surveyors of highways were licensed to take materials for the repair of highways from land, such land not being a park. In that case it was held that the question whether land was not a park was preliminary to the exercise of the jurisdiction given to the magistrates, and an order of *certiorari* was granted in that case to quash the decision of the magistrates. It may seem rather a fine distinction, but I think there is a distinction between a jurisdiction which is in fact limited as in that case by certain requirements, and a case in which a person of a particular description or having a particular capacity or status is fixed with responsibility for doing or not doing a particular thing. In such a case it is part of the issues which the magistrates have to decide when the information is brought against a person said to be acting in that capacity or having that status.

In this particular case I think, notwithstanding the conviction of the two individuals under the same provision in the Food Rationing Orders, it was for the magistrates to determine whether or not the company, the applicants, were persons having the control or management of the establishment. I have already expressed my opinion that, in this case, the applicants were not such persons, but that does not affect the question as to whether it was not part of the very issue, or one of the very issues, which the magistrates had to decide in seeing whether the offence had been committed. It was not what has been called a collateral issue which had to be decided before it could be seen whether the magistrates had jurisdiction. I think, therefore, that the contention raised on behalf of the magistrates to the form of these proceedings, to the form of the relief asked for, must succeed, and I think on those grounds, though, as I have said, I say so reluctantly, this application for an order of *certiorari* must fail.

ATKINSON, J. : I agree. I am satisfied that the person referred to in these articles, of which the Rationing (General Provisions) Order, 1942, art. 13, seems to be the last edition, as having the control or management of an establishment means the person having the *de facto* control or management, the man on the spot. When one considers the obligations imposed on this person by arts. 11 and 12, it seems plain that that must be so. But, with reluctance equal to that of my Lord, I think that this procedure is wrong. I think the convictions were wrong, but I am satisfied that the complaint on which this application is based does not go to jurisdiction. If the question whether the applicants were in control or management of an establishment were collateral to the main issue which the justices had to try, it might very well be that it would be a matter of jurisdiction, and that they could not give themselves jurisdiction by a wrong decision on that question. But here I think that the question whether the applicants were in control or management was not collateral, but was part of the very issue into which the justices had to inquire, and the mere fact that one may think they arrived at an erroneous conclusion does not make this the proper remedy. It seems to me that the formula stated by LORD ESHER, M.R., in *R.* v. *Commissioners for Special Purposes of the Income Tax* (2), and the judgments of the majority of the court in *R.* v. *Woodhouse* (3), looking particularly at pp. 515 and 516, make it impossible for us to treat this complaint as going to jurisdiction. The proper remedy was to appeal or get a case stated.

OLIVER, J.: I agree with the judgments of my Lord and ATKINSON, J. I think these convictions were wrong, but that the proper way of setting them right was not by taking proceedings by way of *certiorari*, but by appealing to quarter sessions or applying to the magistrates, as I understand was actually done direct, to state a case for the opinion of this court. I think my Lord summed the whole matter up during the argument when he said that just as a court cannot give itself jurisdiction by a wrong decision of fact, so a court cannot deprive itself of jurisdiction which has been entrusted to it by Parliament by a decision of fact which may quite possibly be wrong. In these circumstances, as *certiorari* never goes except where action has been taken without jurisdiction, I think this application must fail.

Application dismissed. No order as to costs.

Solicitors: *Bentleys, Stokes & Lowless* (for the applicants); *Treasury Solicitor* (for the respondents).

[*Reported by* R. BOSWELL, ESQ., *Barrister-at-Law.*]

KANSSEN *v.* RIALTO (WEST END), LTD.

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and Luxmoore, L.JJ.), **April 21, 24, May 26, 1944.**]

Companies—Directors—Failure to appoint—Transfer of shares by persons purporting to be directors—Duty of person dealing with company to inquire—Extent of inquiry—Companies Act, 1929 (*c.* 23), *s.* 143, *Sched. I, Table A, art.* 88.

The articles of association of the defendant company, which was incorporated on Dec. 27, 1939, incorporated the Companies Act, 1929, Sched. 1, Table A, with certain modifications. The plaintiff and C. were the first directors of the company and each held one share, these being the only shares allotted. The defendants C. and S. alleged that in Feb., 1940, S. was appointed a director although, in fact, no such appointment was made and the entry in the minute book relating to the appointment was fabricated. In 1941 no annual general meeting was held as required by the articles of association and therefore there were no *de jure* directors from Dec. 31, 1941. On Mar. 30, 1943, C. and S. purporting to act as directors appointed M. a director of the company and received an application from C. for 90 shares which, at his request, were allotted as follows, 34 to M., 32 to S., and 24 to C. On Apr. 13, 1942, S. transferred 17 of his shares to M. In all these transactions M. was aware that the plaintiff contended that S. was not a director but relying on an assurance from C., and the solicitor to the company given in the presence of S. that there was no ground for such allegation,

M. made no inquiries and it was contended that, had he done so, he would not have discovered that they were not directors, by reason of the fabricated minute book. The plaintiff brought an action for, *inter alia*, a declaration that the plaintiff and C. were the only directors; rectification of the register by the removal of the names of all persons as the holders of shares except the plaintiff and C. as the holders of 1 share each; damages on the ground that C. and S. procured a breach of a contract subsisting between the company and the plaintiff by virtue of the Companies Act, 1929, s. 20:—

Held: (i) the person claiming protection under the Companies Act, 1929, s. 143 is entitled to it if he is ignorant of the irregularity although those acting for the company are aware of it. The position is thus the same as under the rule in *Turquand's* case (2).

(ii) M. was put upon inquiry as to the disputed right of S. to act as a director and he failed to put proper inquiries. He ought to have inquired of the plaintiff as to the grounds of his assertions and also to have called for the minute book.

(iii) in respect of the 34 shares allotted to M., either C. was acting as agent for M. or M. was the nominee of C., and in either case M. could not claim to be in a better position than C. In the case of the 17 shares transferred by S. to M., M. had merely a derivative title. In neither case could M. have a better title than C. or S. and was not entitled to the protection of sect. 143 or art. 88.

[**EDITORIAL NOTE.** Where a person is put upon inquiry it is not enough simply to address such inquiry as he makes to persons who are interested solely in reassuring him. He must go further and require some corroboration of the answer given. Moreover this further inquiry cannot be dispensed with on the ground that, if corroboration is asked for, it will be manufactured and the inquiry lead no result. It must not be assumed beforehand that a lying answer will be given to an inquiry or that, if documents are asked for, they will, if satisfactory ones do not exist, be fabricated, or even that false or fabricated documents will be produced without a confession that they are such. The first holding is important as bringing sect. 143 into line with the rule in *Turquand's* case (2), and it is immaterial to the person claiming protection that the officers of the company or some of them are aware of the defect.

As to Contracts of Companies in General, see HALSBURY, Hailsham Edn., Vol. 5, pp. 423-426, paras. 698-701; and for Cases, see DIGEST, Vol. 9, pp. 628-634, Nos. 4160-4193.]

Cases referred to:

(1) *Re Consolidated Nickel Mines, Ltd.*, [1914] 1 Ch. 883; 9 Digest 457, *2968*; 83 L.J.Ch. 760; 111 L.T. 243.

*(2) *Royal British Bank* v. *Turquand* (1856), 6 E. & B. 327; 9 Digest 615, *4094*; 25 L.J.Q.B. 317.

*(3) *Channel Collieries Trust, Ltd.* v. *Dover, St. Margaret's and Martin Mill Light Ry. Co.*, [1914] 2 Ch. 506; 10 Digest 1147, *8118*; 84 L.J.Ch. 28; 111 L.T. 1051.

(4) *Mahony* v. *East Holyford Mining Co.* (1875), L.R. 7 H.L. 869; 9 Digest 642, *4239*; 33 L.T. 303.

(5) *British Asbestos Co., Ltd.* v. *Boyd*, [1903] 2 Ch. 439; 9 Digest 442, *2865*; 73 L.J.Ch. 31; 88 L.T. 763.

(6) *B. Liggett (Liverpool), Ltd.* v. *Barclays Bank, Ltd.*, [1928] 1 K.B.D. 48; Digest Supp.; 97 L.J.K.B. 1; 137 L.T. 443.

(7) *A. L. Underwood, Ltd.* v. *Bank of Liverpool*, [1924] 1 K.B.D. 775; Digest Supp.; 93 L.J.K.B. 690; 131 L.T. 271.

(8) *Jones* v. *Williams* (1857), 24 Beav. 47; 35 Digest 464, *2021*; 30 L.T.O.S. 110.

(9) *Jones* v. *Smith* (1841), 1 Hare 43; 20 Digest 323, *686*; 11 L.J.Ch. 83.

Appeal by the plaintiff and cross-appeal by one of the defendants from a decision of Cohen, J., dated Dec. 20, 1943.

The articles of association of the defendant company, which was incorporated on Dec. 27, 1939, incorporated the Companies Act, 1929, Sched. 1, Table A, with certain modifications. The plaintiff and C. were the first directors of the company and each held one share, these being the only shares allotted. The defendants C. and S. alleged that in Feb., 1940, S. was appointed a director, although in fact no such appointment was made. In 1941 no annual general meeting was held as required by the articles of association and, therefore, there were no *de jure* directors from Dec. 31, 1941. On Mar. 30, 1943, C. and S. purporting to act as directors appointed M. a director of the company and received an application from C. for 90 shares which at his request were allotted as follows, 34 to M., 32 to S., and 24 to C. On Apr. 13, 1942, S. transferred 17 of his shares to M. In all these transactions M. was aware that the plaintiff contended that S. was not a director, but relying on an assurance from C., and the solicitor to the company given in the presence of S. that there was no ground for such allegation, M. made no inquiries and had he done so would not have discovered that they were not directors, by reason of a fabricated minute book. The plaintiff brought an action for, *inter-alia*, a declaration that the plaintiff and C. were the only directors; rectification of the register by the removal of the names of all persons as the holders of shares except the plaintiff and C. as the holders of 1 share each; damages on the ground that C. and S. procured a breach of a contract subsisting between the company and the plaintiff by virtue of the Companies Act, 1929, s. 20. It was held that there were no directors of the company; that M. was entitled to remain on the register as the holder of 51 shares; and that the plaintiff's claim for damages failed. The plaintiff appealed on the question of rectification of the register in respect of the 51 shares standing in the name of M., and, in the event of this failing, on the question of the breach of contract. M. cross-appealed claiming that he was a director.

Raymond Jennings and *Michael Albery* for the appellant.

C. R. C. Richmount for the respondents Cromie and Strelitz.

H. Christie, K.C., and *H. Hillaby* for the respondent Morris.

LORD GREENE, M.R.: I will confine myself to a statement of those matters which are necessary for understanding the questions raised for our decision. Before COHEN, J., Kanssen, who was plaintiff in the consolidated actions, succeeded in part and failed in part. He succeeded in obtaining a declaration that there were no directors of the respondent company and an order rectifying the register by deleting (i) the name of Strelitz as the holder of one share said to have been allotted to him at a board meeting on Apr. 12, 1940, and of 15 shares part of an allotment of 32 shares said to have been made to him at a board meeting on Mar. 30, 1942, (ii) the name of Cromie as the holder of 24 shares said to have been allotted to him at the last-mentioned board meeting. Kanssen, however, failed in his claim to have the register rectified in respect of 51 shares standing in the name of the respondent Morris, 34 of which were said to have been allotted to Morris at the board meeting of Mar. 30, 1942, and the remaining 17 of which formed part of the 32 shares said to have been allotted to Strelitz as already mentioned and to have been subsequently transferred to Morris.

It will be seen at once that Kanssen's failure in this respect destroyed the real advantage of his successes, since Morris as holder of 51 out of 53 issued shares has complete control of the company. Kanssen accordingly appeals to this court and claims to have the register rectified in respect of all the shares which stand in the name of Morris. He also claims, as he claimed below, that in the event of the right of Morris to have his name retained on the register being affirmed, Cromie and Strelitz are liable to pay damages for procuring a breach by the company of the contract subsisting between the company and Kanssen by virtue of the Companies Act, 1929, s. 20, the alleged breach consisting in allotting the shares held by Morris to the detriment of Kanssen. This latter claim does not, of course, arise if it be held that Morris's name must be removed from the register. It was dealt with by COHEN, J., after he had decided that Morris was entitled to his shares, and he dismissed it. We have not heard argument upon it, as it must first be decided whether or not Kanssen is entitled to succeed on his main contention with regard to the title of Morris to the 51 shares. The parties interested in that contention are Morris and the company, which, although made a respondent to the appeal by Kanssen, did not appear before us. Cromie and Strelitz have no direct interest in the main contention; their interest begins only if that contention is rejected, and the claim for damages against them comes up for decision.

The shares which now stand in the name of Morris were, as I have already said, all alleged to have been allotted at a board meeting on Mar. 30, 1942. There were present Cromie and Strelitz and Mackay, the company's solicitor. Neither Cromie nor Strelitz was then a director of the company. Cromie had been a director, but he had vacated office on Dec. 31, 1941, by reason of art. 73 of the company's articles of association (see *Re Consolidated Nickel Mines* (1)), a fact which nobody at the time seems to have appreciated. Strelitz had never been validly appointed a director since, as the judge found, the pretended board meeting of Feb. 1, 1940, at which it was alleged that he had been elected never took place ; while at the general meeting on Apr. 26, 1940, at which this alleged appointment was said to have been confirmed, the vote of Strelitz by which the confirmatory resolution was said to have been carried was improperly given, Strelitz not being entitled to the shares in respect of which he purported to vote. In passing it may be noted that Kanssen ceased to be a director on Dec. 31, 1941, for the same reason as Cromie.

The first business at the meeting of Mar. 30, 1942, was to appoint Morris a director and managing director of the company. This appointment was clearly invalid in itself by reason of the fact that Cromie and Strelitz were not directors. It was held by Cohen, J., that it was not validated either by the Companies Act, 1929, s. 143, or by art. 88 of Table A, of which more will be said later. By a notice of cross-appeal Morris claims that this view was incorrect and that the declarations made by Cohen, J., that there were no directors at the date of his judgment should be amended accordingly.

The next thing that happened was that Morris joined the so-called board, which according to the minute book proceeded to receive an application from Cromie for 90 shares of £1 each in the capital of the company, together with his cheque for £90. At his request the application asked that the shares be allotted 34 to Morris, 32 to Strelitz and 24 to Cromie himself. It was resolved that the shares be allotted accordingly.

Taken by themselves this allotment and the subsequent entries in the register (which are dated the same day) were unquestionably invalid. The sole question which arises on this part of the appeal is whether or not they are (so far as regards the 51 shares now standing in the name of Morris) validated either under sect. 143 or art. 88 (as Cohen, J., held they were) or alternatively under the rule known as the rule in *Royal British Bank* v. *Turquand* (2). So far as regards the shares allotted to Cromie and that part of the allotment to Strelitz which still stood in his name (i.e., the 15 shares), Cohen, J., held that no such validation took place. Cromie and Strelitz who, to use the words of Cohen, J., "recklessly deposed to events which never took place" and endeavoured to support their evidence by reference to a minute which they knew to be fabricated, were perfectly well aware that Strelitz had never been appointed a director and had no shadow of a right to act as such ; they were incompetent to appoint Morris to the board, and owing to the defect in the appointment of Strelitz there was no properly constituted board capable of passing the resolution for the allotment of the shares. So far as regards the remaining 34 shares allotted to Morris at the meeting and the 17 shares part of the allotment made to Strelitz which had been transferred to Morris on Apr. 20, 1940, Cohen, J., held that Morris was, in the case of the 34 shares at the date of allotment, and, in the case of the 17 shares at the date of the transfer, unaware of the defect in the qualification of Cromie and Strelitz to act as directors. It is not suggested that he was aware of the defect in the qualification of Cromie since nobody appears to have realised that Cromie had vacated office on Dec. 31, 1941. The question, therefore, is confined to the knowledge or imputed knowledge of Morris with regard to the qualification of Strelitz.

It is not established that Morris had actual knowledge of the fact that Strelitz was not a director of the company. He did, however, know at the crucial time in March, 1942, that Kanssen was alleging that Strelitz was not a director, but he was assured by Cromie and by Mackay, the company's solicitor, in the presence of Strelitz, that there was no ground for any such allegation. He accepted their statements as correct without making any investigation whether by enquiring from Kanssen or otherwise. He did not ask to see the company's minute book or even the entry containing a resolution appointing Strelitz.

As I have already said the sole question raised by the appeal of Kanssen is as to the validity of the allotment of the 51 shares standing in the name of Morris. This allotment was made by three persons, two of whom, namely, Cromie and Strelitz, knew that Strelitz was not entitled to act as a director, and both of whom in fact were not directors, and one of whom, namely, Morris, had just been appointed by the two former but had no actual knowledge of the defect in their qualification or of any lack of power in any of the three of them to pass the resolutions appointing him a director and allotting shares.

Morris claims that notwithstanding the fact that Strelitz was to the knowledge of Cromie and Strelitz not a director *de jure*, he is entitled to rely on sect. 143 and art. 88, or alternatively on the rule in *British Bank* v. *Turquand* (2) as being the original allottee in respect of the 34 shares, and as a transferee in respect of the 17 shares which he acquired from Strelitz. On the facts as found by COHEN, J., the assurances given to Morris were not true. Mackay was clearly speaking on instructions and no suggestion is made against his good faith in the matter. Cromie knew, as did Strelitz, that the meeting at which Strelitz was ostensibly (according to the minute book) appointed as a director had never taken place and that the entry with regard thereto was a fabrication. It is to be noted that, even if Strelitz had been appointed as the fabricated minute purported to record, he would not have been a director in March, 1942, since he would, like Cromie and Kanssen, have ceased to be a director on Dec. 31, 1941. Similar observations apply to the claim of Kanssen to be a director. Morris knew of Kanssen's claim that Strelitz was not a director, but acted on the assurances given to him that there was no foundation for it. As I have already said, Kanssen had in fact ceased to be a director, so nothing turns on his claim to have been a director at the time.

The Companies Act, 1929, s. 143, is as follows :

> The acts of a director or manager shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification.

Art. 88 of Table A (save that it is confined to the case of directors) is to the same effect, although its language is more elaborate. It was not suggested that for the purposes of this appeal its operation is more extended than that of the section, and accordingly it will be sufficient to deal with the section alone without further reference to the article.

Three main arguments with regard to the effect of the section were put forward on behalf of Kanssen. I will summarise them in what appears to me to be the most convenient order. (i) It was said that the section applies only where at the time when the Act which it validates is performed no discovery of the defect in the appointment or qualification has been made by any party concerned in the act. In the present case it was said that when the act of allotting the 51 shares now standing in the name of Morris was performed two of the actors, viz., Cromie and Strelitz, were aware of the defect in the qualification of Strelitz and also of the defect in the appointment of Morris which could only have been valid *de jure* if both Cromie and Strelitz had been directors at the time when the purported appointment of Morris to the board was made. (ii) Alternatively it was said that Morris was put upon inquiry as to the right of Strelitz to act as a director and so cannot rely on the section as validating the allotments under which he claims. (iii) In the further alternative it was said that the allotment of the 34 shares to Morris on Mar. 30, 1942, was made to him as nominee of Cromie who paid the company for the shares : that Cromie knew of the defect in the qualification of Strelitz and the defect in the appointment of Morris ; that Cromie, being a party to the act of allotment by making the application for the shares could not himself claim that the act was validated by the section ; and that Morris, as the nominee of Cromie, cannot claim that by virtue of the section he is entitled to be put in a better position than Cromie would have been in if the shares had been allotted to Cromie himself. With regard to the 17 shares it was said that the shares were not validly allotted to Strelitz in the first instance and that the section did not enable Strelitz to pass to Morris a better title than he himself possessed.

I will deal with these arguments in order. (i) COHEN, J., rejected the first argument, relying particularly on the language of LORD COZENS HARDY, M.R., in *Channel Collieries Trust, Ltd.* v. *Dover St. Margaret's and Martin Mill Light Railway* (3). I have carefully considered the various cases decided upon this and similar sections. In all of them (including *Mahony* v. *East Holyford Mining Co.* (4) as will appear from a study of that case) there was no knowledge of the existence of a defect on the part of anyone concerned. The point raised by this argument is, so far as direct authority is concerned, a novel one. It is pointed out that the language of the section, read literally, gives an absolute, not a relative, validity to the acts with which it deals, and speaks of the defect being "afterwards discovered," without limiting that phrase to the person claiming the protection of the section. It seems to me, however, that the construction contended for would cut down the beneficial operation of the section to a very serious extent and produce results so surprising that I feel constrained to reject it. It would mean, for instance, that if a *de facto* board, acting in ignorance of any defect, sold goods to a third party who was aware of the defect, the board would be liable to an action for conversion at the instance of the company. Conversely, it would mean that a purchaser in ignorance of the defect could not maintain an action on the contract if the board was aware of the defect. This it seems to me would be quite contrary to the way in which the effect of the section has been regarded, and, although the precise point has not been decided, the observations of Lord Cozens Hardy, M.R., appear to me, as they appeared to Cohen, J., to be good sense and good law.

This conclusion brings the operation of the section into line with that of the rule in *Turquand's* case (2) as regards the area in which they overlap. Under both, the person claiming protection is entitled to it if he is ignorant of the irregularity notwithstanding that those purporting to act for the company are aware of it. This correspondence between the section and the rule is not without importance in considering the next question which arises and makes it unnecessary to give separate consideration to the rule for the purposes of this appeal.

(ii) It is settled that, in cases where the knowledge of the *de facto* board itself is the material consideration, it is sufficient to bring the section into operation if knowledge of the defect is not present to the mind of the board at the relevant time, notwithstanding that the facts are known. In *British Asbestos Co., Ltd.* v. *Boyd* (5), at p. 444, Farwell, J., said:

> It is not, therefore, that the facts are not known, but that the knowledge of the defect is not present to the mind of any person to whom it is material at the time to know it.

a statement of the law which was subsequently approved in this court in the *Channel Collieries* case (3). I read this as meaning that the same principle applies where the knowledge of a third party is the material consideration. On this basis if Morris knew the facts but was not aware that they constituted a defect (assuming that to have been a possible state of mind) he could (subject to the third argument) say that the section operated in his favour in respect of the allotment of his shares. But he did not even know the facts, since he did not know that the statements made to him that Strelitz was a director were untrue or that the minute purporting to record his election was a fabricated document. This by itself would appear to place him in an even stronger position but for one circumstance, the effect of which now falls for consideration. It is said that matters were brought to his notice which were sufficient to put him upon inquiry as to what the actual facts were, and that if he had inquired into the facts he would inevitably have discovered that Strelitz had no right to act as a director.

The first question which arises here is whether a person, notwithstanding that he acts in good faith, is precluded from claiming the protection of the section if he is put upon inquiry. Cohen, J., considered that he is so precluded, and in my opinion he was right. He was of opinion that this principle which was held (and in my respectful opinion rightly held) by Wright, J., to be applicable to the rule in *Turquand's* case (2) (see *B. Liggett* (*Liverpool*) v. *Barclays Bank* (6), at p. 56), is applicable also to cases under the section. I do not know of any branch of the law relating to civil rights and liabilities where a rule designed to protect a person who is ignorant of material facts can be relied on by a person who is put upon inquiry and fails to make such reasonable inquiries as the circumstances demand. It would be a strange result if the strict principle applied to cases falling under the rule in *Turquand's* case (2) and a far less strict principle applied to cases under the section when it is remembered that the rule and the section to a considerable extent overlap one another and (if I am right in what I have said) the section, like the rule, is designed to protect persons who are ignorant of the defect, however fully aware of it the other party or parties to the transaction may be.

That Morris was put upon inquiry as to the right of Strelitz to act as a director the evidence leaves me in no doubt. COHEN, J., thought that Morris was relieved of the consequences of this by the fact that, as he thought, inquiries would have led to no result. He thought that Morris was not in the circumstances bound to inquire of Kanssen as to the reasons for which Kanssen, to the knowledge of Morris, was disputing the right of Strelitz to act as a director;
A that the obvious and reasonable step would have been to ask to see the minute book; that if he had done so the book containing the fabricated minutes would have been produced to him; and that he would reasonably have relied upon it.

I do not agree that there was no obligation on Morris to inquire of Kanssen. What Morris did was to accept the statement of parties who were obviously interested in disputing the correctness of Kanssen's allegations and the statement of their solicitor who could only speak upon their instructions. It would,
B as it seems to me, make a serious inroad in the rule applicable to persons put upon inquiry if it could be said that all that they need do in such a case as this is to make inquiries of the very persons who are interested in giving a reassuring answer, and that they can safely refrain from addressing themselves to the person who is asserting that the answer is untrue.

But if this is too harsh a view I still find myself unable to agree with the
C opinion of COHEN, J., with regard to what would have happened if Morris had asked to see the minute book. If in response to such a request the minute book had been handed to him by Cromie or Strelitz or Hills, the secretary, without comment, the person so handing it would have been making a false representation as to its genuineness. A truthful person in handing the book to Morris would have been bound to tell him that the relevant entries had been fabricated; and that would have been an end of the matter. Ought it to be assumed that
D such a false representation would have been made, however likely, humanly speaking, that may have been? I do not think so. In *A. L. Underwood, Ltd.* v. *Bank of Liverpool* (7), BANKES, L.J., at p. 789, quoted with approval a well-known passage from the judgment of LORD ROMILLY in *Jones* v. *Williams* (8), at p. 62, which has always, so far as I am aware, been accepted as a correct statement of the law. It is as follows:

> E With respect to the argument that it was unnecessary to make any inquiry because it would have led to no result, I think it impossible to admit the validity of this excuse. I concur in the doctrine of *Jones* v. *Smith* (9), that a false answer, or a reasonable answer given to an inquiry made, may dispense with the necessity of further inquiry, but I think it impossible, beforehand, to come to the conclusion that a false answer would have been given, which would have precluded the necessity of further inquiry. A more dangerous doctrine could not be laid down, nor one involving a more unsatisfactory inquiry, namely, a hypothetical inquiry as to what A. would have said if B.
> F had said something other than what he did say.

ATKIN, L.J., expressed the same view. He said:

> It was said that if inquiries had been made Underwood could easily have made a lying explanation, which would have set at rest any doubts. I agree with the judge, ROCHE, J., that even if well founded this would be an insufficient answer.

For these reasons I am of opinion that Morris cannot rely on the section.

G (iii) But there is a further reason why I take this view. COHEN, J., held that Morris could rely on the section as validating his title to the 17 shares transferred to Morris by Strelitz although Strelitz himself could not have relied upon it in respect of the allotment to him of those shares. I venture to take a different view. The section, in my opinion, only protects persons who are parties to the act the validity of which is in question; and I do not see how a person with only a derivative title comes within its scope. Such a person
H cannot, I think, stand in a better position than the person from whom he derives his title. It is upon the title of the transferor that the transferee must rely, not upon the ostensible validity of an act to which the transferee was no party. No question of estoppel arises, no reliance being placed upon any certificate issued to Morris.

The facts with regard to the 34 shares are different. According to the minute of Mar. 30, 1942, the accuracy of which, upon the evidence, is not subject to controversy, the application for the 90 shares was made by Cromie and paid for by his cheque. Morris did state that he paid for his 34 shares, but this can mean no more than that he subsequently paid Cromie. The terms upon which Morris was to become interested in the company are contained in a letter of Mar. 30, 1942, from Cromie to Morris, which was read at the meeting. In this letter Cromie states that he will take steps to have the remaining 90 shares in the existing capital allotted and would see that of the issued shares Morris always held one third, Strelitz one third, and Cromie himself one third. This appears to imply that Morris was eventually to pay for the shares in the existing capital which were to be allotted to him. It appears to me from the minute either that Cromie was, as between himself and the company, acting as principal (in which case Morris was merely a nominee between whom and the company there was no privity) or that he was acting as agent for Morris in applying for the shares allotted to Morris. In neither case, it seems to me, can Morris claim that he can stand in a better position than Cromie himself. If the former view is right, Morris was no party to the act of the *de facto* board save as a mere volunteer accepting shares issued to him at the request of Cromie; this would not be affected by the fact that as between himself and Cromie he was liable to pay Cromie for the shares. If the later view is right, the knowledge of the defect which the agent had must be imputed to the principal. In neither case can Morris claim to be in a better position than Cromie himself would have been in if the shares had been allotted to him.

For the reasons which I have given I am of opinion that the second argument of counsel for the appellant is entitled to succeed; and that, if this view is not correct, his third argument must prevail. The appeal, therefore, succeeds, and the register must be rectified by deleting the name of Morris as holder of the 51 shares standing in his name. The alternative claim for damages does not arise for consideration.

It remains to deal shortly with the cross-appeal of Morris claiming that he is a director. His counsel frankly admitted that this claim was purely defensive, and he did little more than enunciate it. In my opinion it cannot succeed. The board that purported to appoint him as a director was in law incompetent, and it is clear that where such a board in ignorance of the defect in its appointment or qualifications purports to appoint an additional director the section does not operate to make him a director, however much it may validate acts done by him in the belief that he has been validly appointed. If it were otherwise he could claim to be a director and to act validly as such after the discovery of the defect, a result which cannot be extracted from the section. As a matter of fact the point was decided by SARGANT, J., in the *Channel Collieries Trust* case (3) and his decision was affirmed by this court.

The appeal will be allowed in so far as it relates to rectification. There will be an order for rectification accordingly, and the usual direction to the company to notify the registrar of companies. The company must repay £34 to Cromie and £17 to Strelitz, but if Cromie and Strelitz consent the order will be to repay these sums to Morris. Morris must pay the appellant's costs of the appeal except so far as they relate to the alternative claim for damages against Cromie and Strelitz. Cromie and Strelitz must bear their own costs of the appeal. The order of COHEN, J., as to costs will stand. Morris must pay the costs of his cross-appeal.

MACKINNON, L.J.: I agree.

LUXMOORE, L.J.: I have not thought it necessary to write a separate judgment, for I have had the opportunity of considering the judgment which has been delivered by LORD GREENE, M.R. I have found myself in complete agreement with the conclusions at which he has arrived, and the reasons which he has given for arriving at those conclusions. I agree with the order which LORD GREENE, M.R., has stated should be made.

Order accordingly.

Solicitors: *G. F. Wallace & Co.* (for the appellant); *Paisner & Co.* (for the respondents Cromie and Strelitz); *Billinghurst, Wood & Pope* (for the respondent Morris).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Re MERCER, TANNER *v.* BULMER.

[CHANCERY DIVISION (Morton, J.), **June 6, 1944.**]

Executors and Administrators—Commorientes—Statutory presumption—Persons killed by bombs falling outside premises which were set on fire—Presumption applicable—Law of Property Act, 1925 (c. 20), *s.* 184.

On Apr. 29, 1942, a husband and wife, aged respectively 75 and 69, were killed by enemy action. One high explosive bomb fell upon the entrance to the block of flats in which they were living and another in the garden at the back. There were also a number of incendiary bombs in the neighbourhood, but, though part of the destruction of the flat and its contents was caused by fire, there was no evidence that the fire was due to incendiary bombs. It might well have been an indirect result of the high explosive bombs. The bodies were so badly burnt that it was difficult properly to identify them. It was not proved in what room or rooms the deceased were when they met their deaths. The first question was whether the deaths were simultaneous or whether the Law of Property Act, 1925, s. 184, was applicable. Both husband and wife died intestate. A further question arose whether the sum payable under the war damage insurance in respect of certain chattels in the flat, mostly furniture, was payable to the wife's personal representatives. On this point there was no evidence that the furniture was in existence after the husband's death ;—

HELD : (i) the Law of Property Act, 1925, s. 184 applied. There was no evidence that the deaths occurred simultaneously and it must be presumed that the younger, the wife, survived the husband.

(ii) the personal representatives of the wife could only claim the furniture, if it was proved to have been in existence after the death of the husband. There being no such proof, the chattels formed part of the husband's estate and his personal representatives were entitled to the insurance moneys.

Re Grosvenor (1) *distinguished.*

[**EDITORIAL NOTE.** It is clear that, where the deaths are not proved to have been simultaneous, the statutory presumption applies. This case is, therefore, merely an example of what facts amount to proof that the deaths were not simultaneous whereby *Re Grosvenor* (1) can be distinguished on the facts.

AS TO COMMORIENTES, see HALSBURY, Hailsham Edn., Vol. 14, p. 212, para. 354 ; and FOR CASES, see DIGEST, Vol. 23, pp. 88, 89, Nos. 790-801.]

Cases referred to :

*(1) *Re Grosvenor, Peacey* v. *Grosvenor*, [1944] 1 Ch. 138 ; [1944] 1 All E.R. 81.
(2) *Durrant* v. *Friend* (1852), 5 De G. & Sm. 343 ; 44 Digest 404, *2366* ; 21 L.J.Ch. 353 ; 19 L.T.O.S. 152.

ADJOURNED SUMMONS to determine whether the statutory presumption relating to *commorientes* applied in the circumstances of this case and whether the sum payable under the War Damage Acts in respect of furniture destroyed was payable to the husband's estate or to that of the wife. The facts are fully stated in the judgment.

C. D. Myles for the plaintiff.
A. C. Nesbit for the first defendants.
H. E. Salt for the second defendants.

MORTON, J. : The first question for my determination is whether the plaintiffs as administrators of the estate of Henry Mercer deceased ought properly to distribute his residuary estate on the footing that he predeceased his wife Louisa Mercer.

The facts, so far as it is necessary to state them, are that Mr. Mercer resided with his wife in a block of flats in the city of York. In the early morning of Apr. 29, 1942, York was subjected to enemy action, the flat in which the Mercers resided was destroyed, and their bodies were found among the debris. The husband was 75 years of age, and the wife was 69 years of age. They both died intestate. There is evidence that a high explosive bomb fell in Queen Anne's Road immediately opposite the entrance to the block of flats, and that another bomb fell in the garden at the back, and it is estimated that each bomb was of the weight of 500 kilograms, or 1,103 lbs. There was also evidence that a number of incendiary bombs fell on the city that night, and that part of the destruction caused was the result of fire. An architect gave evidence that it was possible that the bomb killed the husband and wife instantaneously, but other evidence established that there were no signs of injury to their bodies except those caused by burning. The bodies were so badly burnt that it was difficult properly to identify them. Whether the burning was caused by incendiary bombs, or by the explosion and firing of the gas supply, or by other means such as the scattering of unextinguished coals from the grates, it is impossible to say. It has not been established by any evidence in what room or rooms these persons were at the time when they met their deaths. Considering this question apart from authority, I should have no hesitation in finding that this was a case to which the Law of Property Act, 1925, s. 184 applied. The section provides as follows :

> In all cases where, after the commencement of this Act, two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such deaths shall (subject to any order of the court), for all purposes affecting the title to property, be presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder.

I have been referred to *Re Grosvenor* (1). In that case the majority of the Court of Appeal thought that the proper inference to draw from the evidence was that all the persons who were killed by a high explosive bomb died simultaneously. The facts were such as to lead to the inference that the five persons in question were in the same shelter in the basement of 5, Upper Cheyne Row, Chelsea. GODDARD, L.J., at p. 153 ([1944] 1 All E.R., at p. 89), pointed out that the basement room was not large, that the bodies were so mutilated as to be unrecognisable, and that the bomb had penetrated to the basement. In these circumstances he thought it " a matter of certainty " that all five were killed at the same time by the explosion of the bomb.

In the course of his judgment LORD GREENE, M.R., said this, at p. 146 ([1944] 1 All E.R., at p. 85) :

> The words " uncertain which of them survived the other or others " appear to me to be applicable only to the case where the proper inference from the facts is that the persons in question died consecutively and this will not be the case if the court comes to the conclusion on the evidence that they died simultaneously . . . If the evidence merely shows that two persons were swept overboard by a wave no court, I venture to think, would draw any inference except that they died one after the other. The possibility of simultaneous death in such a case is obviously so remote that it must be left out of account.

Later he said, at p. 147 ([1944] 1 All E.R. at p. 86) :

> Each case must depend on its own facts, and where, for example, two persons killed by blast were some distance away from one another the court might well decline to draw the inference, [of simultaneous death] particularly if it had before it evidence as to the capricious nature of the effects of blast.

At p. 153 ([1944] 1 All E.R., at p. 89), GODDARD, L.J., said : " I would go so far as to say that the probabilities are so overwhelming that to feel doubt on the matter is really to speculate on improbable possibilities."

Of course I accept the decision of the majority of the Court of Appeal in *Re Grosvenor* (1), but it seems to me that the cases where the court can find as a fact that two or more persons have died simultaneously must occur very rarely. The circumstances of *Re Grosvenor* (1), where five persons were proved to have been in one small room actually penetrated by a high explosive bomb, were very exceptional circumstances, which may or may not occur again. In the present case I do not think that it would be right for me to draw the inference that Mr. Mercer and his wife died simultaneously. *Re Grosvenor* (1) establishes that it is possible for two persons to die simultaneously, but in this case there are many other possibilities ; for instance, it is quite possible that the two persons were stunned by the blast of the bombs, and afterwards were killed by fire. This being so, I can see no good reason for drawing the inference that they died simultaneously as the result of the blast. I hold, therefore, that the Law of Property Act, 1925, s. 184, does apply to this case ; indeed, I think it must apply to the great majority of cases where two or more persons are killed by bombs. I shall make a declaration that the plaintiffs, as administrators of the estate of Mr. Mercer, should distribute that estate on the footing that Mr. Mercer predeceased his wife.

The second question is one of some interest, although I do not think that it is one of much difficulty. According to the evidence, the estate of Mr. Mercer included furniture and other personal chattels in the flat, which were estimated to be of the value of £200. Subject to the exception to which I shall later refer, all the chattels were destroyed in the fire which broke out in the flat, but there
A is no evidence to show whether they were destroyed after or before the death of Mr. Mercer. The exception which I mentioned is described in the affidavit of Mr. J. H. Busby, in para. 4 of which he says that certain damaged articles of jewellery were recovered from the flat and handed to him. A right to recover the value of the destroyed chattels has arisen by reason of the War Damage Acts, and the question I have to decide is this: "Does that right form part of the estate of Mr. Mercer or does it form part of the estate of his wife?"
B The burden of proof is admittedly on the legal personal representatives of the wife to show that the chattels in question continued to exist after the death of the husband, no matter how brief that continued existence may have been. If they had succeeded in showing that, then in view of my decision that Mrs. Mercer must be deemed to have survived her husband, the result would be that Mrs. Mercer would have been entitled to the articles in question under her husband's intestacy. Therefore, the right to claim for their loss would have
C become part of her assets. On the other hand, if there is no evidence establishing that these articles "survived" Mr. Mercer, the right to claim for their loss would form part of the assets of his estate. Counsel for the wife's legal personal representatives did not rely upon the indestructability of matter or put forward the contention that these articles survived as ashes, or some other form of matter. I think that the practical question is—has it been established that
D any of these articles were destroyed after the death of Mr. Mercer? It seems to me that the evidence wholly fails to establish that fact. I do not know whether they were destroyed before or after his death. In these circumstances, the legal personal representatives of Mrs. Mercer have failed to establish what it was necessary for them to prove. In *Durrant* v. *Friend* (2), a testator gave specific chattels to a legatee, and he gave the residue of his estate to his executors, having insured the specific chattels. The testator took the chattels with him
E on a voyage, the ship and the chattels were lost at sea and the testator was drowned. It was held by PARKER, V.-C., that as the testator and the chattels "perished together," the legatee had no interest in the chattels and consequently he had no interest in the insurance money, which vested in the executor as part of the residuary estate. The specific legatee in that case was in the same position as the wife in this case, and as the testator and the chattels in question were both on board the lost ship, PARKER, V.-C. treated the case as one in which the
F testator and the chattels perished together. In the present case it has not been proved that the chattels in question perished after the intestate. Therefore, in my view, the claim of the wife's representatives must fail and any payment which may be made under the War Damage Acts in respect of the destruction of the chattels forms part of the general residuary estate of Mr. Mercer. The jewellery which is still in existence, though damaged, forms part of Mrs. Mercer's
G estate.

Order accordingly.

Solicitors: *Neve Beck & Co.*, agents for *Smithson Teasdale & Hewitt* (for the plaintiff and the first defendants); *Ridsdale & Son*, agents for *Crombie Wilkinson & Robinson* (for the second defendants).

[*Reported by* HUBERT B. FIGG, ESQ., *Barrister-at-Law.*]

H

CHOPPINGTON COLLIERIES, LTD. *v.* JOHNSON AND OTHERS.

[Chancery Division (Uthwatt, J.), **December 21, 1943.**]
[Court of Appeal (Lord Greene, M.R., MacKinnon and Luxmoore, L.JJ.), **April 19, 1944.**]

Companies—Meetings—Notice—Notice to " elect directors "—Proposal to elect three directors as well as re-election of retiring director—Sufficiency of notice—Companies Consolidation Act, 1908 (*c.* 69), *Table A, arts.* 49, 50.

A notice of the annual general meeting of the respondent company was sent to the shareholders containing a notification that the purpose of the meeting was, *inter alia,* " to elect directors." And on a fresh line were the words " In accordance with the articles of association Mr. C. W. Coan retires, and, being eligible offers himself for re-election." The articles of association of the company incorporated the Companies (Consolidation) Act, 1908, Table A, arts. 49 and 50 with regard to the question of notice of matters to be proposed at meetings of the company. At the meeting in question Coan was proposed for election as a director but an amendment was moved that three other persons be elected directors. The amendment was ruled out of order by the chairman. The chairman rejected on similar grounds a substantive motion that the three persons in question be directors. The appellants contended that the notice was such as to confine the business, so far as the election of directors was concerned, to the election of one director :—

Held : the notice in question sufficiently specified, within the meaning of the Companies Consolidation Act, 1908, Table A, arts. 49, 50, the general nature of the business to bring it within the competence of the meeting to elect directors up to the number permitted by the articles.

[**EDITORIAL NOTE.** The point here is merely whether the notice sufficiently specified the business to be done at the meeting. The proposed business amounted to an increase in the number of directors and no doubt to some alteration in the control of the board.

As to Notice Convening Meeting, see HALSBURY, Hailsham Edn., Vol. 5, pp. 353-357, paras. 580-585 ; and for Cases, see DIGEST, Vol. 9, pp. 565, 566, Nos. 3750-3756.]

Motion for, *inter alia,* a declaration that a proposal and an amendment made at the general meeting of the company and ruled out by the chairman were not out of order. The facts are fully set out in the judgment.

H. Wynn Parry, K.C., and *Harold Lightman* for the appellants (defendants).
Harold Christie, K.C., and *Cecil W. Turner* for the respondents (plaintiffs).

Uthwatt, J. : Prior to the annual general meeting of Choppington Collieries, Ltd., there were three directors of the company ; and at that general meeting one of them, Coan, was due to retire by rotation. On Oct. 4, 1943, a notice of the meeting was sent out, which was as follows :

> Notice is hereby given that the 17th ordinary general meeting of Choppington Collieries, Ltd., will be held at the registered office, Guide Post, Choppington . . . for the following purposes (i) To receive the report of the directors and the accounts of the company to Dec. 31, 1943, with the auditors' report thereon. (ii) To elect directors.

Then comes a fresh line :

> In accordance with the Articles of Association Mr. C. W. Coan retires and, being eligible, offers himself for re-election.

Then :

> (iii) To appoint auditors for the ensuing year.

After a full-stop the following appears on a new line :

> Messrs. J. W. Armstrong & Sons retire, and being eligible, offer themselves for re-election.

The notice concludes as follows :

> To transact any other business which under the articles of association may be transacted at an ordinary general meeting.

At the meeting which was held on that day, Coan was proposed as a director; and an amendment was moved to the effect that three gentlemen, Field, Thornton and Capstick be elected directors. Upon that amendment being moved, the chairman ruled it out of order. A substantive motion about Coan was put to the meeting; but he was not elected. Then there was a motion for the appointment of Field, Thornton and Capstick as directors; but the chairman ruled that out of order. At that point I may stop recounting the proceedings of the meeting.

The question which I have to decide is whether the chairman was right in saying that the amendment relating to these three persons, and the subsequent substantive motion, was out of order. He was right if the business to which that amendment related and to which the following motion related, was not business of which either notice need not be given under the articles, or of which improper notice had been given. The whole matter turns on the construction of the notice in the light of the relevant article. The company's articles of association contain nothing special which is relevant on this point. It is sufficient to say that, under the articles of association, the number of directors has not to be more than five nor less than two. The acceptance of the amendment or the motion did not involve an increase in the number of directors beyond the five. The articles dealing with the necessity for notice and the form of notice are arts. 49 and 50 of Table A, as they appear in the schedule to the Companies' Consolidation Act, 1908. They are as follows:

> 49. Seven days' notice at the least . . . specifying the place, the day and the hour of meeting, and in case of special business, the general nature of that business, shall be given . . . 50. All business shall be deemed special that is transacted at an extraordinary meeting, and all that is transacted at an ordinary meeting, with the exception of sanctioning a dividend, the consideration of the accounts, balance sheets and the ordinary report of the directors and auditors, the election of directors and other officers in the places of those retiring by rotation, and the fixing of the remuneration of the auditors.

So the scheme of the Act is that all business that is transacted at an ordinary meeting, with certain exceptions, is special business under art. 50. Under art. 49, if you wish to transact special business at an ordinary meeting, or, indeed, at any other meeting, you must give notice of the general nature of that business. It is that alone of which you have to give notice.

I quite agree with what has been put forward by counsel for the defendants as to the principle upon which one should construe this notice, namely, that you should regard it as a business document and give it a fair business construction. He argues that, if you look at the notice as a whole and disregard for the moment the particular question about "to elect directors" to see whether that means to elect directors, it is just dealing with the ordinary class of current business as transacted at every ordinary general meeting of a company and nothing else at all. He says it gives no indication that anything out of the way is going to happen. Of course, to a certain extent that is true. But counsel for the defendants goes on to say—and this is where I disagree with him—that an ordinary business man reading this notice would take the view, as regards the election of directors, that it was going to be confined to electing a director in place of Coan, who was retiring by rotation. For that there is this to be said. The phrase "to elect directors" is to a certain extent a cant phrase, used frequently without having any particular number of directors in mind—whether it be one or a dozen. That is certainly true. But for myself, reading that notice and trying to read it as an ordinary man—a task which I find exceedingly easy—I should have thought that the one thing brought prominently to my attention was the idea of appointing more directors than one. I should have thought that the ordinary man, reading this notice "to elect directors," followed by the statement: "Mr. C. W. Coan retires and, being eligible, offers himself for re-election," would say: "I wonder who they are putting up for the other directorships." That is a matter which jumps to my mind as an individual, as the first thing which would occur to anybody on reading this notice.

That may or may not be so: but the language of the document is quite clear. It is in the plural. The question, therefore, is whether, reading the document in the way I have read it, you can properly say that notice has been given of the general nature of the business. There is no need to specify that the business is special. There is no need to specify the exact nature of the business. It is not necessary to say: "I propose A or X as a director." All you have to do, to comply with the articles, is to specify the general nature of the business. I think there is in this notice a sufficient specification of the general nature of the business to bring it within the competence of the meeting to elect directors up to the number permitted by the articles.

Upon that footing the chairman was wrong in refusing to allow the amendment to go to the meeting. He was wrong in not putting the substantive motion to the meeting; and I so hold.

The defendants appealed from the decision to the Court of Appeal, where the following judgments were delivered.

Lord Greene, M.R.: On the hearing of a motion which it was agreed should be treated as a motion for judgment, Uthwatt, J., decided the substantial point of controversy between the parties; that was, whether or not the chairman at the ordinary general meeting of the plaintiff company, held on Oct. 15, 1943, was right or wrong in disallowing, first, a motion proposed by a shareholder by way of an amendment to a motion for the re-election of a retiring director and, secondly, the rejection by the chairman of a substantive motion proposing the election of three named persons as directors; and also whether at the adjourned ordinary general meeting he was right in refusing to reconsider his decision. Uthwatt, J., held that the chairman misconstrued his powers, and was wrong in refusing to accept those motions.

The point is a very short one, and turns upon the construction of the notice of the meeting. I have listened attentively to the argument of counsel for the appellants, and it is no disrespect to that argument if I say that the judgment of Uthwatt, J., is, to my mind, so convincing that I should be wasting time if I did more than say that I entirely agree with it, and am content to accept it as my own.

In the result, the appeal must be dismissed with costs.

MacKinnon, L.J.: I agree.

Luxmoore, L.J.: I also agree.

Appeal dismissed with costs.

Solicitors: *Bentleys, Stokes & Lowless*, agents for *Criddle, Orde & Muckle*, Newcastle-upon-Tyne (for the defendants (appellants)); *Emmet & Co.*, agents for *Wragge & Co.*, Birmingham (for the plaintiffs (respondents)).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

END OF VOLUME 1.